Lawyers | McCullough Robertson

Focus

Resources

Emerging issues for the Australian resources sector in 2017

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WHO SHOULD READ THIS

All resource companies and contractors operating or developing projects in Australia.

THINGS YOU NEED TO KNOW

This article highlights the legislative and policy developments over the past 12 months which will significantly affect the Australian resources industry going forward, with a specific focus on the resource rich states in Australia.

WHAT YOU NEED TO DO

Start looking now at the impacts that these emerging issues could have on current or proposed projects.

A range of legislative and policy reforms were introduced over the past 12 months which may significantly impact on Australia's resources sector during 2017. This publication also identifies a number of emerging issues where we expect to see further policy development this year.

COMMONWEALTH

Native title – Federal Court decision challenges validity of ILUAs

In 2010, the Federal Court in *QGC Pty Ltd v Bygrave (No.2)* [2010] FCA 1019 held that an Indigenous land use agreement (**ILUA**) could proceed to registration with the National Native Title Tribunal (**NNTT**) without the signatures of all named applicants.

Since then, it has been common practice of the NNTT to accept ILUAs for registration where some, but not all, of the applicants have executed the agreement (and, of course, the balance of the registration requirements have been met).

On 2 February 2017, the Full Federal Court in *McGlade v Native Title Registrar* [2017] FCAFC 10 (**McGlade**) reversed this position and held that:

- for an agreement to be validly registered as an ILUA, all individuals comprising the 'registered native title claimant' must sign it
- resolutions of the community do not have the effect of overriding that fundamental principle
- if an applicant unreasonably refuses to execute an ILUA against the wishes of the claim group, that applicant can only be removed by application of the claim group under section 66B of the *Native Title Act 1993* (Cth), and
- deceased applicants must also be removed and replaced under section 66B prior to the making of the ILUA.

This decision has potentially far-reaching impacts on parties operating under ILUAs without the signature of all applicants and, critically, on parties seeking the registration of ILUAs that have been executed by some but not all of the named applicants.

In response to the decision, the *Native Title Amendment (Indigenous Land Use Agreement) Bill 2017* (**the Bill**) has been introduced to Parliament. The Bill proposes to:

- retrospectively validate registered ILUAs that do not comply with McGlade
- allow for registration of ILUAs lodged before McGlade which do not comply with the decision
- change the requirements for who must be a party to future ILUAs to reverse the rule in McGlade, and
- confirm that the Commonwealth is liable for any arising compensation.

On 16 February 2017, the Bill passed the House of Representatives. Before debate commences in the Senate, the Legal and Constitutional Affairs Legislation Committee will conduct an inquiry into the Bill and report on 17 March 2017. The Bill will then be debated in the Senate on 20 March 2017.

Timber Creek native title compensation decision

On 24 August 2016, the Federal Court delivered a landmark decision on the first judicial assessment of compensation payable for native title extinguishment. The Northern Territory Government was ordered to pay $3.3 million to the Ngaliwurru and Nungali People as compensation for the extinguishment of their native title over land at Timber Creek.

This was the first time the Federal Court has considered and assessed the value of native title compensation.

The decision relates to approximately 60 acts, including land grants and construction of public works which extinguished native title since the 1980s over an area of approximately 23km^2. There are three aspects to the amount of compensation payable as determined by the Court:

- $512,000 attributable to economic loss suffered and calculated by reference to the freehold value of the land
- $1,300,000 for non-economic loss associated with the loss of traditional attachment to the land or 'solatium', and
- $1,488,261 for interest against the economic loss suffered.

Liability for the payment of compensation for extinguishment and impact on native title, under the *Native Title Act 1993* (Cth), rests with the Commonwealth, State and Territory governments. However, in certain cases, this liability may have been passed on to private parties.

While the decision relates to previous acts giving rise to extinguishment or impairment of native title, it nevertheless may have an impact on the expectations of native title groups as to an appropriate compensation amount for future actions by proponents which impact their native title rights and interests.

Register of foreign ownership of water rights

On 1 December 2016, the Commonwealth Government passed the *Register of Foreign Ownership of Agricultural Land Amendment (Water) Act 2016* (Cth) (**Act**). As a result, foreign persons are now required to register their interests in registrable water entitlements and contractual water rights (**Registrable Water Interests**) on the 'Register of Foreign Ownership of Water Entitlements' (**Water Register**) administered by the Australian Taxation Office (**ATO**).

The purpose of the Act is to enhance transparency of the level of foreign ownership of water entitlements in Australia, inform the Government and the community about emerging investment trends, and improve information for future policy development.

Importantly, a 'foreign person' is:

- an individual that is not ordinarily resident in Australia
- a foreign government or foreign government investor
- a corporation, trustee of a trust or general partner of a limited partnership where an individual not ordinarily resident in Australia, foreign corporation or foreign government holds a substantial interest of at least 20%, or
- a corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40%.

Registrable water entitlements are:

- irrigation rights relating to a water resource in Australia, and
- rights to either hold water or take water from a water resource in Australia, or both (this includes a water access entitlement).

Registrable water entitlements do **not** include stock and domestic rights, riparian rights or water allocations.

A contractual water right is a right under a contract or deed that the foreign person has, either individually or jointly, in relation to another person's registrable water entitlement, with a remaining term (including any extension or renewal) that is reasonably likely to exceed five years by 30 November 2017.

Foreign persons holding a Registrable Water Interest as at 1 July 2017 must register by **30 November 2017**.

Further, from **1 December 2017**, foreign persons must notify certain events to the ATO within 30 days of the end of the financial year in which the notifiable event occurred. 'Notifiable events' include a foreign person becoming the holder of or ceasing to hold a Registrable Water Interest, a person becoming or ceasing to become a foreign person while holding a Registrable Water Interest and changes to the characteristics of the Registrable Water Interest.

Independent Review into the Future Security of the National Energy Market

The Australian electricity market is broadly divided into two key sectors, the National Electricity Market (**NEM**), which services Queensland, New South Wales, Victoria, South Australia and Tasmania and provides 85% of Australia's total electricity consumption, and the Wholesale Electricity Market (**WEM**), which services most of Western Australia and provides 8% of Australia's total electricity consumption. The remaining 7% of the Australian electricity market is made up of a variety of small scale markets that cover the Northern Territory and remote Northern regions of Western Australia.

In late 2016, an Independent Review into the Future Security of the NEM was conducted by a panel led by Australia's Chief Scientist, Dr Alan Finkel AO, with industry and stakeholder consultation to continue throughout early 2017. The Preliminary Report released by the panel identified seven key themes, namely, that:

- technology is transforming the electricity sector
- consumers are driving change
- the transition to a low emissions economy is underway
- variable renewable electricity generators, such as wind and solar PV, can be effectively integrated into the system
- market design can support security and reliability
- prices have risen substantially in the last five years, and
- energy market governance is critical.

A particularly critical issue that will be addressed in the review is the ability of a modernised NEM to manage the intermittency of renewable energy sources. The final report is expected to be delivered in the first half of 2017 and will make recommendations about how the NEM can be reformed and improved.

Commonwealth Climate Change Policy Review

The Commonwealth Department of Environment and Energy will conduct a review of Australia's climate change policies during 2017. At the 2015 Paris Climate Summit, the Australian Coalition Government committed to reducing carbon emissions by 26-28% below 2005 levels by 2030. The review will take stock of Australia's progress in reducing emissions since that commitment was made, and will be targeted at ensuring the Government's climate change policies remain effective in achieving the 2030 target and other Paris Agreement commitments.

A Department of Environment and Energy Discussion Paper will shortly be released and followed by a public submission period, with the review expected to conclude by the end of 2017.

Renewable Energy Targets

The national renewable energy target (**RET**) was set by the Australian Coalition Government in mid-2015 and provides that 23.5% of Australia's electricity will come from renewable energy sources by 2020. In addition to the Federal target, many of the states and territories in Australia have implemented their own RETs, with governments particularly revisiting their policies within the past year.

It has been considered that state-based schemes may create a decentralised approach to renewables and carbon emission reductions and, as such, some opposition parties have given their support to scrapping the state-based targets in preference for the one national RET. However, there appears to be growing support for state-based targets. In January 2017, a carbon consultancy group named RepuTex released a report which suggested that state targets are emerging as a key instrument in meeting emission targets and may possibly push Australia's renewable energy usage to 35% in 2030. The present status of RETs for each Australian state and territory is outlined below.

Australian Capital Territory

The Australian Capital Territory has a legislated RET of 100% by 2020. The most successful initiative to meet this target has been a series of reverse auctions for the allocation of feed-in tariffs which has attracted new, large-scale wind and solar projects. Expanded investment in wind power infrastructure is expected to generate enough electricity to power all Canberra residences by 2020 and the Australian Capital Territory Government is also supporting the roll-out of energy storage to more than 5000 Canberra residences and businesses between 2016 and 2020.

New South Wales

The New South Wales Government has previously based its policies towards meeting the national RET. However, in November 2016, the New South Wales Government released a draft paper outlining a goal of net zero carbon emissions by 2050 with a proposed expenditure of $500 million over five years to stimulate the transition to renewable energy. A draft strategic plan will be released for public comment ahead of the Government formalising its policies by mid-2017.

Australia's three largest solar plants are located in New South Wales at Nyngan, Moree and Broken Hill. The state also hosts the Snowy Mountain Hydropower Scheme, Australia's largest ever engineering project. The successful $10.3 billion acquisition of TransGrid by a consortium of investors has prompted the NSW government to call for expressions of interest in the state-owned Sydney power distributor AusGrid and electricity infrastructure company Endeavour Energy, which may create opportunities to increase renewable energy in the state. In 2015, renewable energy generated approximately 8% of New South Wales' total electricity.

Northern Territory

The Northern Territory Labor Government has committed to a RET of 50% by 2020. On 16 December 2016, an expert panel was established to advise on and inform the development of a 'Roadmap to Renewables Report', which will set out a series of options to pursuing the RET. Community consultation commenced in January 2017 and the draft report will be provided to Government in mid-2017. After considering the report, the Government will develop and implement a Renewable Energy Strategy to formalise its policy on the RET. The Northern Territory is isolated from both of Australia's largest energy markets, the NEM and the WEM. However, there are 5242 domestic solar PV systems in the state, generating 25 megawatts (**MW**) of capacity.

Queensland

Queensland has a RET of 50% by 2030. In October 2016, the Queensland Labor Government released a draft report by the Queensland Renewable Energy Expert Panel outlining three potential avenues that the Government may take to achieving this target. Following consultation and public submission on the draft report, the panel delivered its final report to the Queensland Government on 30 November 2016. The final report will be publically released after the Government has considered the recommendations.

Queensland's uptake of small-scale, rooftop solar PV is the highest in Australia, with over 1,500 MW installed and small-scale solar is expected to continue growing, providing one-third of generation capacity by 2024/25. While the state has no large-scale solar plants, the Queensland Government has committed to support up to 60 MW of large-scale solar power

generation, providing an incentive for renewable energy investment. The state-owned electricity retailer Ergon Energy's recent tender for 150 MW of renewable energy capacity received more than 2000 MW of applications. In February 2017, the Queensland Government also stated its intention to issue certified and independently verified green bonds to investors to help fund projects such as renewable energy generation.

South Australia

South Australia has a RET of 50% by 2025. This target followed on from the state meeting its previous RET of 33% by 2020 well ahead of time in 2013/2014. The South Australian Government has also committed to an investment target of $10 billion in low carbon generation by 2025.

In 2015, more than 40% of South Australia's electricity was generated by renewable energy. Over 25% of households have installed solar PV capacity, with the installation rate in some suburbs as high as 65%. The South Australian Government's Low Carbon Investment Plan sets a net zero emissions target for 2050, seeking to make Adelaide the world's first carbon neutral city by 2020. Wind generation is also particularly strong, however, this primary reliance on intermittent generation technologies has presented challenges for the security of the grid.

Victoria

The Victorian Labor Government has committed to a RET of 25% by 2020 and 40% by 2025. It plans to support these targets by a competitive reverse auction scheme, designed to, among other things:

- deliver up to 1500 MW of new large-scale renewable energy capacity by 2020 and up to 5400MW by 2025, and
- support capital expenditure of around $9 billion in renewable energy projects (resulting in approximately $2.5 billion of direct investment in Victoria).

During August 2016, a consultation paper on the design of the renewable energy auction scheme was released and consultation workshops were held across the state. The Victorian Government received submissions from a range of renewable energy project developers, financiers, peak bodies, agencies and individuals and has released a summary of the submissions. The State's opposition has recently indicated that it will scrap the policy if it wins the 2018 election, instead supporting the national framework.

Between February and March 2016, the Victorian Government tendered for at least 100 MW of renewable energy projects, looking to invest approximately $200 million. New legislation also seeks to allow solar companies to install solar power systems in rental properties, providing cheaper power for tenants at no cost to landlords. These proposals have addressed some of the shortcomings in Victoria's renewable energy policy, which had previously lagged behind other states despite excellent wind and solar resources. To assist with this, in mid 2016 the Victorian Government issued approximately $300 million in green bonds to help fund its environmentally friendly projects.

Western Australia

Western Australia does not have a RET, as the Western Australia Government has opted to commit to the national framework. A state based RET has been a topic of debate in the lead up to the March 2017 state election. In October 2016, the Western Australia Labor opposition announced its intention to introduce a RET of 50% by 2030, however, has since indicated that it will not introduce a target if it wins the election.

In 2015, Western Australia generated 12% of its power from renewable energy. Australia's first large-scale solar PV project was established near Geraldton, in 2012, by Verve Energy with a 10 MW capacity. The government-owned retailer Synergy has also tendered for approximately 500,000 Large-scale Generation Certificates to help it meet its obligations under the national RET.

Tasmania

Tasmania does not have a RET, however generates more renewable energy than any other state. Despite challenges to its hydro power network presented by historical low rainfall and an extended outage of the Basslink cable connection to the NEM, Tasmania successfully generated nearly 100% of its energy from renewable sources in 2015 and returned to 100% in 2016. Hydro Tasmania's proposal to build a $2 billion, 600 MW wind farm on King Island, was discontinued on 27 October

2014. This project, if it goes ahead in future, could provide approximately 10% of the generation capacity required by Australia's national RET.

Corporate social responsibility and directors' duties

Following the recent publication of the G20 Financial Stability Board's Taskforce on Climate-related Financial Disclosures Recommendations Report, the issue of climate change in the corporate boardroom is as relevant as ever on a global scale. Among the many issues relating to the management of climate change, the role of corporate social responsibility is one which is emerging at the forefront across Australian industries.

On 7 October 2016, a senior member of the commercial bar, Mr Noel Hutley SC, released a legal opinion on the extent to which the law permits or requires Australian company directors to respond to climate change risks.

From an evidentiary perspective, Mr Hutley SC opines that the risks associated with climate change have evolved from 'ethical environmental' to material financial issues, and that directors who fail to appreciate them are 'legally exposed'.

The opinion also makes the following points relevant to Australian companies:

- 'climate change risks' represent, or are capable of representing, risks of harm to the interests of, and opportunities for, companies and their business models, which would be regarded by a Court as being foreseeable at the present time
- such risks are relevant to a director's duty of due care and diligence, and directors can, and in many cases should, be considering the impacts on their business, and
- the law does not prohibit directors from taking climate change and related economic, environmental and social sustainability risks into account where those risks are, or may be, material to the company's interests.

It is conceivable that directors may in the future face prosecution for breaching their statutory duty of due care and diligence for not addressing the impacts of climate change in their business models and the community, in the same way that this presently occurs in relation to environmental incidents and workplace health and safety matters.

It is critical that directors recognise this issue now and implement actions to balance the increased culpability on them and their companies in managing climate change risks for the future.

Review of Petroleum Resource Rent Tax

In the wake of falling revenues, the Federal Treasurer announced on 30th November 2016 that a review of the Petroleum Resources Rent Tax (**PRRT**) will be undertaken to provide advice on the extent to which the tax is operating as intended and to further ensure the sustainability, effectiveness and efficiency of the Australian tax system. The report, due before the Federal budget in May 2017, was prompted by findings from the Commonwealth Auditor-General that Woodside, the operators of Australia's biggest oil and gas project (the North West Shelf) had underpaid millions of dollars in royalties. Treasurer Scott Morrison has revealed that the PRRT has halved since 2012/13 to $800 million and crude oil excise has also fallen by more than half. Under the current rules, oil and gas companies with PRRT liabilities can deduct their exploration costs, indexed at the long-term bond rate plus 15%.

The industry body, the Australian Petroleum Production & Exploration Association (**APPEA**), has been highly critical of the Treasurer's decision to review the PRRT. APPEA Chief Executive Dr Malcolm Roberts has conveyed his support for the PRRT and its role in attracting more than $200 billion in new gas projects for Australia. APPEA has emphasised Australia's reliance on a stable policy setting to attract investors who are normally discouraged by Australia's reserves which are costly to develop and include high corporate tax rates and cost structures. APPEA's concerns regarding a change in the current system include diminishing confidence which may further impact domestically on investment, jobs and exports. The current system has been highlighted to maximise investment and returns to the community as well as help facilitate Australia's emergence as a major LNG exporter. APPEA is concerned that by adopting the taxes used in lower cost countries new investments in Australia will dramatically decline. APPEA explains that the system "isn't broken and doesn't need fixing" further highlighting that there are peaks in the system and also troughs which are caused by unavoidable low points in the commodity cycle.

New Critical Infrastructure Centre to support the existing foreign investment framework

A new Critical Infrastructure Centre has been established by the Australian Government to pre-emptively assess and manage national security risks for critical infrastructure. The new Centre will identify and record, by way of a new Critical Assets Register (**Register**), Australia's most critical infrastructure and will support the existing foreign investment framework by developing more coordinated, whole-of-government national security risk assessments.

Key issues

- The establishment of the Centre does not represent a change in Government policy or law governing foreign investment in Australia. Rather, the Centre will support the existing foreign investment framework and the Foreign Investment Review Board (**FIRB**), which will continue to assess and manage foreign investment applications on a case-by-case basis.
- FIRB will engage in pre-emptive consultations with the Centre and have regard to the Register in an effort to streamline its assessment of foreign investment applications involving critical infrastructure.

Implications

- It is envisaged that the new Centre will provide greater certainty and clarity for existing owners of critical infrastructure assets (including local and State governments) when seeking investment, as well as for potential investors, at the start of the sale process on the types of assets that will be classed as critical infrastructure attracting national security scrutiny by FIRB. This will assist all parties in making informed decisions about proposed transaction structures and other measures that may be required to address any national security concerns.
- If these intended benefits are realised, the new Centre may play an important role in creating predictability and building confidence for foreign investors. By the same token, it may also create another layer of conditions to the approval process for foreign investment in Australia. The precise scope of the Centre and its interplay with FIRB in practice is yet to be seen.

Current M&A transaction trends

M&A deal structuring for the energy and resources sector has never been as complex as it is today. We now find ourselves in a legal landscape which has been materially altered by a range of significant Federal and State regulatory and revenue changes. While the list of issues to work through can often be daunting, it is not all bad news. With some forward planning, most issues arising currently can be managed or dealt with through appropriate risk management strategies or as part of the broader commercial discussions for the transaction.

Private equity involvement

Current market conditions favour private equity over conventional funding alternatives. On this matter alone, parties should factor in that private equity will often have a five year investment horizon and seek to include contractual arrangements which allow for that exit.

For energy and resources M&A transactions particularly, the conventional model for joint investment has been by way of unincorporated joint ventures. However, it is possible that in time we will see a shift towards partnerships particularly as sellers may achieve a more efficient after tax position on retiring from their partnership investment rather than selling out of a joint venture structure. Private equity investors with a fixed investment time line might find this an advantage worth considering.

Dollar dazzler deals

The recent trend of owners wanting to exit poorly performing projects has introduced a new level of novelty to transaction structures. Deals involving these projects involve not only a nominal purchase price but also include ongoing commitments by the seller to fund ongoing project expenditure. Sellers in these types of transactions would ordinarily negotiate for a share of any future project upside. This could take the form of a royalty on future product sales or a share of the profit on any subsequent sale of the project.

Buyers need to adequately manage the risk that sellers under these arrangements are able to meet their ongoing commitments. Guarantees or other security may be required for the post completion performance obligations of the seller.

The ability to enforce guarantees or other securities provided by foreign entities needs to be tested both in Australia and in the home country of the seller.

The revenue costs for these types of transactions are not based on the nominal purchase price. It should not be assumed therefore that stamp duty and GST will be based on that nominal purchase price. This also applies to the foreign seller's withholding tax requirements which took effect on 1 July 2016.

Disclaimers of onerous contracts

Liquidators can disclaim onerous contracts and consideration is often had in the case of a sale and purchase as to whether the obligations under, for example, take or pay contracts can be terminated by disclaimer or other insolvency action (e.g. a DOCA). Being able to isolate those onerous contracts from other assets of a project might provide better value for the seller on the sale of those assets.

QUEENSLAND

Chain of responsibility guideline

The Department of Environment and Heritage Protection (**DEHP**) recently released the *Issuing 'chain of responsibility' environmental protection orders* (Guideline) which clarifies how the DEHP will apply the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) when issuing Environmental Protection Orders (**EPO**s) to 'related persons' of operators to, among other things, secure an operator's compliance with an environmental authority.

The Guideline is intended to clarify departmental decision making on matters such as whether a person has a 'relevant connection' with a company, how regulators should decide whether to issue an EPO to related persons of the company, and which related persons to appropriately target. DEHP must have regard to the Guideline when deciding to issue an EPO to a related person.

Some key principles from the Guideline include:

- the issue of a Chain of Responsibility EPO will be explored where enforcement against environmental authority holders or operators will not achieve restoration or rehabilitation of the environment, or the protection of the environment from harm
- being a related person does not of itself trigger the issue of a Chain of Responsibility EPO. Culpability will be established prior to a related person receiving a Chain of Responsibility EPO
- DEHP will only consider issuing an EPO to a related person where a company has avoided, or attempted to avoid, its environmental obligations
- there is no pre-determined order in which the DEHP will pursue related persons, and
- a security or bank guarantee will not be required under an EPO where it relates to the same matter for which financial assurance is already held and is sufficient to cover the cost of complying with the requirements of the EPO.

Relevant connection

One of the critical purposes of the Guideline is to clarify circumstances under which a person will be considered to have a 'relevant connection' with the company by virtue of a 'significant financial benefit'. The Guideline provides that:

- 'significant' means important, notable or of consequence, having regard to context
- relevant considerations include:
  - the proportion of the benefit relative to the total assets or benefit available from the activities carried out under the Environmental Authority (**EA**), or
  - the proportion of the benefit, relative to the costs of restoring or rehabilitating the environment, or protecting the environment from harm, and

- only significant financial benefits from the period of time relevant to the causation (and, if relevant, mitigation) of the issue or incident being investigated will be considered.

The Guideline provides specific examples of when the DEHP may determine that a person has a relevant connection on the basis of significant financial benefit. Similarly, examples are provided in relation to persons with a relevant connection on the basis of position to influence the company's compliance with environmental obligations.

Importantly, if it is determined that the related person was not culpable for a matter, or was culpable but took all reasonable steps in the circumstances, DEHP will not issue the person with an EPO.

Overall, the Guideline provides some level of comfort to 'related persons' as the prospects of being issued with an EPO have been clarified. The Chain of Responsibility Act will undergo review in Quarter 2, 2018.

Modernising Queensland's Resources Acts

The *Mineral and Energy Common Provisions Act 2014* (Qld) (**MERCP Act**) commenced on 27 September 2016, resulting in significant changes to the legislative framework governing resources in Queensland.

The MERCP Act is the first stage of new resources laws being introduced under the Queensland Government's 'Modernising Queensland's Resources Acts Program' (**MQRA**). The purpose of the MQRA is to consolidate (as far as possible) Queensland's five existing resources statutes into a single common resources law.

Among other things, the MERCP Act introduces a new overlapping tenement regime for coal and coal seam gas (**CSG**). The new regime seeks to optimise the safe development of Queensland's coal and CSG resources. It does this by:

- simplifying the pathway to and improving the certainty of the grant of overlapping resource tenements
- incentivising negotiated arrangements for cooperative concurrent production of both coal and CSG in overlapping areas
- providing a default set of arrangements and dispute resolution processes to provide certainty to arrangements for coordination of activities if the parties cannot agree between themselves, and
- preserving production rights already granted.

The new associated water licence arrangements

Another important facet of the MERCP Act is the introduction of a limited statutory right to take or interfere with groundwater in the area of a tenement if it happens during the course of carrying out authorised resource activities. Since the introduction of the MERCP Act, other legislative amendments have been introduced to limit this broad entitlement in some circumstances and a new 'associated water licence' may be required prior to taking or interfering with groundwater.

In particular, the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Act 2016* (Qld) and the *Water Amendment Act 2016* (Qld) (together, the **Groundwater Management Acts**) commenced on 6 December 2016 which require in many circumstances mining companies to have impacts on groundwater approved in one of three ways:

- under an EA that has been assessed against new and increased requirements relating to groundwater impacts
- (where for example an EA has been applied for prior to commencement of the Groundwater Management Acts), under a newly created associated water licence, or
- under a deemed associated water licence in circumstances where minerals had been won from the area of an MDL, or in payable quantities under an ML before commencement.

Many mining companies are still determining whether they can rely on transitional arrangements which provide "deemed" water licence for those mining operators that are subject to a mining lease from which material had been won before the introduction of the legislation on 6 December 2016. It has come to light that there may be projects that have a mining lease, are for all intents and purposes "shovel ready" but now have to apply for an associated water licence before mining operations can begin.

In addition, the intent of the Groundwater Management Acts is to impose on coal and other mining projects similar 'make-good requirements' that have been borne for some time by coal seam gas operators. As a result, any activities impacting groundwater – whether they are carried out under a tenement that is the subject of a deemed water licence, associated water licence or otherwise – must be carried out with regard to the underground water obligations. Accordingly, a tenement holder is required to use best endeavours to negotiate an agreement with the owner of each water bore that the holder reasonably believes has had its capacity impaired by its mining operations.

Master planning for priority ports

Following the enactment of the *Sustainable Ports Development Act 2015* (Qld) (**Ports Act**), the Department of State Development released the '*Guideline: master planning for priority ports'* (**Ports Guideline**) in November 2016.

The Ports Guideline outlines a strategic implementation framework for master planning of priority ports, to be applied in the context of the individual circumstances of each port. It is a non-statutory tool for use by the State in preparing priority port master plans and port overlays and to assist port authorities, local governments and others involved in the master planning process.

A port master planning process will take approximately 12 to 18 months, depending on the nature of each priority port. In the development of master plans and port overlays, if there are any inconsistencies between the Ports Guideline and the Ports Act, the Ports Act prevails.

North Queensland Regional Plan

The development of a regional plan for North Queensland will be of interest to resource companies with operations, tenure or aspirations in North Queensland.

As with the regional plan for South East Queensland (**SEQ**), formal consultation will occur through a Committee, which will be formed by the local Mayors and the State Government, rather than a broader group of stakeholders. As occurred with the SEQ plan, the Queensland Planning Department is forming a working group of broader stakeholders.

Land Court – objections and appeals

The misuse of the objections and appeals process for resources projects in the Land Court has been an ongoing issue for the mining industry in Queensland. The industry has pushed for a two pronged approach to reform: legislative change to the approvals process itself as well as strong direction from the Land Court on how future cases aimed at drawing out the process will be managed.

Every new resource project will be vulnerable to lengthy delays and increased costs due to time in court from objectors. These impacts have the potential to have a detrimental effect on Queensland's ability to attract new investments.

In late 2016, the Land Court began a consultation process with stakeholders as part of a Strategic Review seeking ideas to improve processes such as applying timeframes on the Court for decisions and having a more case managed approach. The review is being conducted for the Land Court by Mr Barry Walsh who specialises in advising on court administration and justice sector reform programming. The results of this review are expected in the first half of 2017 and are expected to be in two parts: reforms the Court can undertake itself; and reforms that require legislative change.

Changing landscape for 'fly-in fly-out' (FIFO) workforce

The Queensland Government's anti-FIFO legislation, called the *Strong and Sustainable Communities Bill 2016* (Qld), was introduced in November 2016 to prompt a 'locals first' employment approach and formalises social impact assessment requirements for future resource activities in the State.

The Bill seeks to prevent owners of new large resource projects from operating with 100% FIFO workers in circumstances where nearby regional towns have a capable workforce. These restrictions will not apply to construction of new mines unless the Coordinator-General decides that it should apply. The Bill also applies a retrospective anti-discrimination prohibition on the basis of being a "resident of a nearby regional community." A nearby community is one within 100km of a project and which has a population of 200 persons or more. It is retrospective because it applies to projects approved since June 2009, but also applies prospectively to future hiring. The Bill applies a reverse onus of proof and applies it to a project owner who may not be in a decision making position with respect to the engagement of workers.

Health and Safety, Workers Compensation – *Coal Workers Pneumoconiosis (**CWP**)*

Changes to the coal mining safety and health regulations have been introduced by the *Mining Safety and Health Legislation (Coal Workers' Pneumoconiosis and Other Matters) Amendment Regulation 2016* as part of the State Government's response to coal workers' pneumoconiosis (CWP). As at February 2017, there had been 19 cases of CWP confirmed in Queensland in recent years.

The changes, which commence 1 January 2017, relate to respirable dust monitoring and reporting, and health assessments for coal mine workers.

Developed in consultation with the Coal Mining Safety and Health Advisory Committee (the Committee) and stakeholders, the amendments will require coal mining companies to:

- regularly report dust monitoring results to the Mines Inspectorate – for underground longwall and development operations, at least every three months
- advise inspectors every time dust concentrations exceed prescribed levels
- report known cases of certain occupational lung diseases, including coal workers' pneumoconiosis, to the Department of Natural Resources and Mines, and
- provide respiratory function and chest x-ray examinations for retiring coal mine workers at their request.

Regulated changes to health assessments for coal mine workers include:

- new underground and above-ground coal mine workers to undergo a chest x-ray when they enter the coal mining industry
- above-ground coal mine workers to have respiratory function and chest x-ray examinations at least once every 10 years
- current employees who are or have worked in an underground coal mine to have respiratory function and chest x-ray examinations at least once every five years
- respiratory function examinations undertaken as part of health assessments to be compared to a worker's previous results where available, and
- chest x-ray examinations to be performed in accordance with International Labour Organisation guidelines.

There is also an ongoing Parliamentary Inquiry into CWP, with public hearings with coal companies Anglo American, Glencore, BMA and Peabody. The Committee's report is scheduled to be delivered by 12 April 2017. The Committee is expected to make observations about the adequacy of the work done by companies to prevent dust exposure in their workforce. Subject to the Committee's findings, it is possible that further legislative changes will be recommended, beyond those already implemented.

The other area of focus for the Committee has been compensation for workers diagnosed with CWP. The Committee has also shown sympathy for the mining unions' call for a separate CWP compensation fund, financed through a 10 cent per tonne coal production levy. At the instigation of the Queensland Resources Council back in November 2016, the Minister for Employment and Industrial Relations has established a Tripartite CWP Compensation Stakeholder Reference Group. The Stakeholder Reference Group has been established to review the current gaps in the Queensland workers' compensation scheme, including in relation to retired coal mine workers and workers who have left the industry. The Group is due to report to the Minister by 31 March 2017.

NEW SOUTH WALES

Proposed reforms to the planning assessment process in NSW

In January 2017, The NSW Department of Planning and Environment (**DPE**) released the *Environmental Planning and Assessment Amendment Bill 2017* (NSW) (**Bill**) for public consultation.

The Bill proposes a number of significant changes to the current planning regime in NSW, in particular:

- the replacement of the existing Planning Assessment Commission (**PAC**) with the Independent Planning Commission (**IPC**), which may become the 'consent authority' for all mining development. Currently the Minister is the consent authority for mining development in NSW however the Minister's determination function for the majority of mining development has been delegated to the PAC in the past. Of concern to industry is that there will be no ability for the project proponent or the Planning Department to respond after the IPC's second stage hearings
- the repeal of the 'transitional Part 3A' provisions and the transition of all existing Part 3A projects to the State significant development (**SSD**) regime under Part 4 of the Act. This would mean that any further applications for modifications of Part 3A approvals would need to be made under section 96 of the EP&A Act which has a higher threshold for modifications requiring the development as modified to be 'substantially the same development as the development for which the consent was originally granted'. If a proposed modification does not meet the 'substantially the same' test, a new DA will be required. This is to be contrasted with the current modification pathway for Part 3A projects which is found in the now repealed section 75W, which is considered by the Department to be 'a much broader modification power
- the introduction of a concept referred to as 'transferrable conditions' to address the current overlap between conditions of a development consent (or project approval) and licences and approvals issued by other agencies. The proposed provision seeks to enable the repeal of overlapping conditions to avoid duplication
- the requirement for community consultation plans (**CCPs**) to be prepared, exhibited and followed by consent authorities in determining development applications to ensure appropriate community consultation has been undertaken, and
- provisions enabling conditions of consent to be imposed requiring a bank guarantee, bond or other form of security to guarantee funding for or towards the carrying out of works or programs required by the consent, as well as conditions requiring additional offsets (other than biodiversity) to be provided by a proponent.

Land access arbitration reforms

The *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015* (**Land Access Arbitration Act**) commenced on 1 December 2016, together with associated amendments to the *Mining Regulations 2016* (NSW). The Land Access Arbitration Act focuses on the negotiation, mediation and arbitration process for access arrangements to establish "a fairer, more efficient, consistent and transparent land access arbitration process for all [affected] parties".

The amendments apply in circumstances where access to private land is required to carry out prospecting operations under an exploration licence or assessment lease in NSW. The Land Access Arbitration Act introduces a number of significant reforms to both the *Mining Act 1992* (NSW) and *Petroleum Act 1991* (NSW), including:

- imposing an obligation on the prospecting titleholder to pay the reasonable costs of a landholder in negotiating, mediating and arbitrating access arrangements, except in very limited circumstances. These costs may cover the landholder's time, as well as legal and expert services. A cap will apply in respect of the reasonable legal costs that can be claimed by a landholder for the negotiation of an access arrangement. The cap will be up to $1,500 (ex GST) in relation to exempt prospecting operations and $2,500 (ex GST) for assessable prospecting operations; however nothing prevents titleholders voluntarily paying landholders more in the course of negotiating a land access arrangement. The landholder's reasonable costs for mediation, arbitration and proceedings in the Land Environment Court are also paid by the prospecting titleholder. Due to the unpredictable nature of mediation, arbitration and court proceedings, there is no cap on the landholder's costs to be paid by the prospecting titleholder, however the costs payable must be reasonable

- imposing an obligation on the landholder and prospecting titleholder to conduct negotiations in relation to an access arrangement in good faith. Any conduct by the landholder to the contrary will be taken into consideration when determining reasonable costs that may be claimed
- enabling an "access code" (**Code**) to be prescribed by Regulation which may contain non-binding guidelines in relation to negotiating and agreeing to access arrangements and may also designate any of the provisions of the Code as mandatory provisions
- providing clarity to the mediation and arbitration process by changing the definition of 'significant improvement' and 'compensable loss', and
- introducing a number of other significant reforms to the land access arbitration process, including:
  - requiring mediation before arbitration
  - providing a right for both parties to be legally represented during mediation and arbitration
  - requiring the Secretary of the Department of Industry, Skills and Regional Development (Department) to keep and maintain a register of all final access arrangements provided. The register is to be made available for public inspection on the Department's website, and
  - establishing a rigorous selection process to appoint members of the Arbitration Panel by the Minister. The selection procedure and eligibility criteria will be set out in relevant Regulations.

Changes to laws governing biodiversity conservation and management

On 22 November 2016, the NSW Parliament passed the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**).

The reforms attempt to slow down and reverse the long-term decline of biodiversity in NSW and the BC Act represents a radical shift in conventional biodiversity conservation in NSW. A central element of the new scheme is the introduction of a single biodiversity assessment method (**BAM**) that will replace the myriad of previous methods used.

An offsets payment calculator will determine how much an applicant must pay to offset the biodiversity impacts of a development.

The new biodiversity offsets scheme will introduce a consistent approach to biodiversity assessment and offsets and provide certainty to landowners, developers and the community.

The key reforms to biodiversity conservation in NSW as a result of the new BC Act and amendments to the *Local Land Services Act 2013* (NSW) **(LLS Act)** are as follows:

- the BC Act will repeal the *Threatened Species Conservation Act 1995* (NSW), the *Nature Conservation Trust Act 2001* (NSW) and parts of the *National Parks and Wildlife Act 1974* (NSW) and introduce a new biodiversity offsets scheme
- the new BAM will assess biodiversity impacts and consent authorities will in turn impose conditions of consent requiring developers and mining companies to offset requirements
- development consent cannot be granted for non-State significant development if the consent authority is of the opinion it is likely to have serious and irreversible impacts on biodiversity values
- developers and mining companies may discharge offset requirements imposed by conditions of consent by making payments into the Biodversity Conservation Fund (**BCF**). The BCF will be used to source biodiversity offsets
- under the BC Act, there will be three tiers of voluntary private land agreements, which will include BSAs, conservation agreements and Wildlife Refuge agreements, and
- the LLS Act will repeal the *Native Vegetation Act 2003* (NSW) and there will no longer be a ban on broad scale clearing, mandatory soil, water and salinity assessment or 'maintain or improve' standards.

The BC Act is yet to formally come into force and the regulations accompanying the BC Act have not yet been released. We expect that the draft regulations will be released for consultation in early 2017.

Overhaul of the mine subsidence compensation regime

On 12 October 2016, the Minister for Finance announced an overhaul of the *Mine Subsidence Compensation Act 1961* (NSW) (**MSC Act**) following a comprehensive review of the Mine Subsidence Board (**MSB**). The review concluded that the current compensation process is flawed and the current MSC Act is out-dated and focused on old mining methods. It also found that the Government's Mine Subsidence Fund is being called on to mainly pay for damage caused by the current activity of a small number of active mines.

The reforms will see the MSB transform into a new Subsidence Advisory NSW that will be responsive for facilitating all claims and providing strategic and technical advice to the Government and industry. Mining companies will be required to cover the cost of damage that they cause from active mining operations.

Damage caused by old abandoned mines will be covered by the Government's Mine Subsidence Fund. A new case management team has been established to deal with the current backlog of claims. Independent assessors will be appointed to determine compensation entitlements.

WESTERN AUSTRALIA

The Western Australian State election occurred on 11 March 2017 with the Labor Party elected to Government. As a result of the recent election, the following emerging issues are expected to play out over the coming months and years ahead.

Proposed iron ore taxation may be unconstitutional

The Western Australian National Party has proposed raising production taxes for BHP Billiton and Rio Tinto from 25 cents to $5/tonne on the current rental and royalty arrangements in order to raise an additional $7.2 billion over four years. This "iron ore tax" is being fiercely opposed by the Minerals Council of Australia (**MCA**) and the WA Chamber of Minerals and Energy after a Deloitte Access Economics report has revealed that the proposed tax would see the Australian economy shrink by $2.9 billion a year as a result of the tax in conjunction with a 4.3% reduction in employment across the Pilbara (costing 7,200 jobs in total).

The Chief Executive Officer of the MCA has said that there won't be any extra revenue raised for Western Australia with most of the money ending up in other states by virtue of Australian GST distribution arrangements. Western Australia Premier Colin Barnett has confirmed that the Liberal Party are not in support of the proposal. Further, there is constitutional doubt surrounding the introduction of the 'iron ore tax' given that Section 90 of the Australian Constitution prevents a State from introducing taxes on production, manufacture, sale or distribution of goods.

Uranium mining given the green light

After the removal of the ban on uranium mining in 2008, the Western Australian Government has recently granted the approval for three additional uranium mining projects. Yeelirrie, Wiluna and Kintryne projects have received the green light.

Specifically, the Yeelirrie Project was dismissed by the Environmental Protection Authority in August 2016 due to failure to meet nine key environmental factors in relation to the protection of subterranean fauna. However, the Western Australian Government has granted approval for the Project subject to 17 "strict conditions". The Western Australian Environment Minister has conveyed his support for the project which is predicted to generate 1,200 jobs and $5 billion in investment.

In contrast, the Western Australian Labor Party has indicated that they opposed the development of uranium mining in Western Australia and they will only allow mines that have already been approved to start construction.

The use of FIFO workers is in jeopardy

The Western Australian National Party is vehemently opposing declarations regarding FIFO operations in mining, oil and gas with a strong push for an increase in the use of local workers in the Pilbara region.

For example, Woodside Petroleum was in need of FIFO workers while in the construction phase of the Pluto LNG Project however with a transition to operation, the Western Australian Nationals now proposes that the renewal of FIFO leases in the accommodation villages around Karratha and Newman should be denied to allow for workers to be locally based.

Pilbara residents have claimed that fly-in, fly-out "breeze ins" are being favoured over locals in the resources industry, leaving many locals with no option but to leave their homes. Residents of the North West region are pushing the Government to change the law to require greater local employment.

Both sides of Government have indicated their intention to create long-term local employment opportunities by reducing the high costs of FIFO workers and working with resource companies to ameliorate FIFO work practices.

Potential ban to onshore fracking activities

The Western Australian Labor party has proposed that the regions of Perth, Peel and South West will be declared as "frack free zones" on the basis that hydraulic stimulation (or "fracking") highlights an unacceptable risk to farming, tourism and biodiversity within the region. The WA Chamber of Minerals and Energy, has declared the proposal as a "joke" by feeding fear in the community when there is no potential for fracking within the region.

The Western Australian Labor leader cited that the catalyst for the ban arose from the potential of companies such as Cal Energy and Bunbury Energy's plans to frack for gas within the region. However both companies and the Department of Mines and Petroleum have ruled out any intention to frack reiterating that fracking has been done safely in Western Australia since 1958. Australia's Chief Scientist, the NSW Chief Scientist and the CSIRO have all confirmed that with proper regulation fracking is safe. Further, peak national body APPEA's Chief Executive has highlighted the great opportunities fracking presents in relation to decreases in unemployment levels as well as increases in competition in the local gas market and funding for new regional infrastructure.

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