Welcome to the special APPEA edition of the Resources Update, Piper Alderman's publication designed to keep you up to date with legal developments that affect members of the Energy and Resources sector in Australia.

A national interest test for LNG exports?

At the recent Australian Domestic Gas Outlook conference held in Sydney in late February 2014 the issue of a 'National Interest' test for LNG exports was again raised. ***Senior Associate, Leanne McClurg*** *who attended the conference and* ***Lawyer, Shao Ma*** *revisit the issue and provide an update on current views.*

Approval process

In response to increasing gas prices and tightening of gas supply, generally considered to be caused by LNG projects, some have recommended the introduction of a national economic approval process for the purpose of limiting LNG exports overseas in favour of domestic supply. This process has been adopted in United States and Canada to protect their respective domestic LNG markets.

In July last year The Australian Industry Group, in their report titled "*Energy Shock: the gas crunch is here*", recommended that approval to develop new gas export facilities should only be granted where it is established that:

- Approval would leave adequate gas supply for domestic requirements in relevant Australian markets over the life of the facility. The report emphasised that the focus should be on supply, not just resources, as the rate of production is more important to consumers than the size of the resource.
- Approval is in the national interest, taking into account the economic, strategic and social impacts of the proposed expansion. This assessment should consider in particular the likely impact, if any, of the proposal on domestic gas prices.
- Opportunities for and net benefits of parallel supply to domestic and export markets have been adequately considered by proponents.

A barrier to development?

The Australian Petroleum Production & Exploration Association (APPEA) have said that a national interest test would be a barrier to the development of a natural gas industry. APPEA's concern is that such a test would impose further red tape and manipulate the gas market to deliver perceived benefits to manufacturers while driving away investment in the sector and thus hurting the wider economy.

APPEA highlights the situation in Queensland where the regulatory regime aids industry. That state employs 30,000 people in the coal seam gas industry and has contributed more than $100 MM to local community projects and causes. In contrast, in Victoria and New South Wales, where exploration has ground to a halt because of regulation, employment in the sector is low and they are facing a gas supply shortage.

The Resources Update team will monitor movements on a National Interest test and report on developments.

Leanne McClurg - lmcclurg@piperalderman.com.au
Shao Ma - sma@piperalderman.com.au

Foreign Investment Review Board
increasing focus on tax consequences

Treasurer Joe Hockey recently made comments indicating the Foreign Investment Review Board would be increasing its focus on tax consequences when making decisions about foreign investment.

Such a focus is particularly relevant to the oil and gas sector because of the highly capital intensive nature of developing projects.

With oil and gas explorers and emerging developers, together with those that service these sectors, increasingly looking offshore for new opportunities and market returns it will be important to receive clarity surrounding the increased focus and the weight to be given to such considerations.

Josh Steele - jsteele@piperalderman.com.au

Corporate Social Responsibility and resources projects in Australia

Senior Associate, Leanne McClurg *considers the implications for Australian resources projects of developments in international human rights. There is a relatively new framework for the activities of businesses and their impact on human rights which was endorsed by the United Nations Human Rights Council in 2011. In addition, there have been advances by the Australian Government in relation to its acceptance of the United Nations Declaration on the Rights of Indigenous Peoples.*

International developments in the thinking surrounding human rights are an important consideration for resources companies. In this context, human rights relates to a peoples' relationship with land and resources, as it is precisely those things, land and resources, whether minerals or hydrocarbons, which resource companies affect in the course of going about their business. In order to adequately satisfy their corporate social responsibility (CSR) obligations, companies should be conducting their business activities in accordance with internationally accepted standards. Merely satisfying domestic law may not be enough if that domestic law is lacking. The nature and extent of the risk to resource projects here depends in part upon how well the systems operating within Australia perform in producing outcomes that have companies meeting the requirements set at the international level.

The UN Human Rights Council has endorsed guiding principles on business and human rights as set out in a framework to ensure that human rights are an integral part of doing business. That framework has been dubbed the "Protect, Respect and Remedy" framework. It acknowledges that it is the duty of a State to protect against human rights abuses but it also points out that corporations have a duty to respect human rights. One way corporations can fulfil their obligation to respect human rights is through undertaking a due diligence process that considers these issues prior to the implementation of a project. The final part of the framework relates to the accessing of a remedy and considers that both the State and corporations should have appropriate grievance mechanisms to enable people to seek justice when they believe their human rights have been violated.

In addition to the 'Protect, Respect and Remedy' framework (the Framework), the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), formally supported by Australia in 2009, has significant bearing upon resources projects in Australia as it addresses the rights of indigenous people to use, develop and control their own land.

What both the Framework and Declaration do is provide internationally accepted standards for addressing the risk to human rights associated with undertaking business. By taking action in line with the Framework and the Declaration businesses can display an appropriate level of respect to human rights.

It is also important to recognise that the financial and social sectors may provide a means for the requirements set out in the Framework and the Declaration to be applied to companies within Australia and in particular for the purposes of Australian operations. Commercial banks have incorporated "Equator Principles" into their credit risk management processes that consider the social risk of a project, and are based in part on performance standards related to social and environmental sustainability. As a result such banks will only finance projects that have incorporated the standards encapsulated in the 'Equator Principles' into their risk management process. These principles have a dual role to both help protect the investment by the bank, as well as protect reputation. As evidenced by the action against ANZ as a result of their financing of Whitehaven Coal, there can be increased public scrutiny and damage to reputation by investing in projects that may be seen as not "ethical". The social influences on projects are also not to be underestimated. The views of investors, the general public and employees about the human rights impact of projects cannot be ignored in this process. Business must comply with core social expectations.

In Australia native title and land rights legislation are the primary means through which our governments (both at commonwealth and state level) seek to address the issues surrounding a peoples' relationship with land and resources. In this case, obviously Aboriginal peoples' relationship with land. For most companies operating solely within Australia there is limited market pressure to adhere to wider international human rights standards. Most corporations look to meet the domestic laws, rather than international standards which they may not technically be bound to obey.

Since our domestic legislation on these issues are considered by many to fall short in a number of areas in meeting international standards there is some risk for resources companies. It is therefore prudent for companies to look beyond compliance with domestic laws and specifically to the UN's Declaration and Framework to avoid being left vulnerable in terms of their corporate social responsibility.

**This is an extract of a paper prepared by Leanne McClurg for the Melbourne Law School to fulfil the requirements of a Master of Laws.*

Leanne McClurg - lmcclurg@piperalderman.com.au

Emissions Reduction Fund

In late December 2013, the Australian Government released its Green Paper further detailing the proposed development and implementation of an Emissions Reduction Fund. ***Senior Associate, Josh Steele*** *looks at the paper.*

The Green Paper is the culmination of the current Government's consultation with key stakeholders over the past four years and elaborates on its proposal for reducing Australia's greenhouse gas emissions following the expected repeal of the existing carbon pricing legislation in July 2014 and the ALPs emissions trading scheme (ETS).

Broadly, the Government has proposed the Emissions Reduction Fund (ERF) as a 'baseline-and-credit type' system whereby the Government will credit carbon reductions through both of the following:

- Activities Method, by endorsing specific projects/ emissions reduction activities through the direct purchase of emissions reductions. This will be undertaken through a competitive bidding process whereby the Clean Energy Regulator will run public tenders for eligible emissions reductions and will enter into forward contracts to purchase emissions reductions from the operators of the lowest-cost emissions reduction projects arising from that tender process.
- The types of activities/ projects that may be used will be required to meet pre-qualification requirements and the Government will establish defined methodologies for calculating the carbon reductions associated with different types of eligible projects.
- Facilities Method, by crediting businesses for relative reductions in carbon emissions based on historical emission levels, either from a mean or median average of emissions over a four or five year period for that business or, where the business is a new entrant, the industry average or best practice emissions intensity for that industry.

Under both methods the ERF will seek to utilise the infrastructure and reporting arrangements currently in place for existing carbon related schemes, including the Carbon Farming Initiative and the National Greenhouse and Energy Reporting Scheme. While the ERF model provides clear incentives for new entrants to pursue a best practise approach to emissions reductions, it is unclear how new entrants into particular markets will be incentivised for pursuing certain other lower carbon intensive projects over alternatives (for example, there is no clear incentive for a new electricity generator to utilise a gas fired station over a coal fired station).

This can be contrasted with the ETS which, as a cap-and trade scheme, sought to directly impose a carbon price on the 1,000 largest Australian companies by providing each entity with a right to specific amounts of greenhouse gas emissions per year and required that each entity surrender sufficient permits to cover those emissions, which could either be purchased from other parties or allocated to them through their own activities.

A White Paper elaborating on the detailed design of the ERF and incorporating feedback received on the Green Paper is expected to be released within the next month and, while subject to the Government passing the necessary legislation in the Senate, the ERF is expected to become operational on 1 July 2014. While many in industry may have become somewhat disengaged from the various carbon and climate change policies over the last few years, the proposed ERF will mainly affect those who are already subject to the National Greenhouse and Energy Reporting Scheme and other government initiatives.

Accordingly, until there is further clarity regarding the precise operation of the ERF, the key focus for those that are already subject to the National Greenhouse and Energy Reporting Scheme should be ensuring the accuracy and robustness of their internal processes for verifying and reporting emissions reductions so that they are ready for the transition to the new ERF.

Further information regarding the ERF and a copy of the Green Paper can be found here.

Josh Steele - jsteele@piperalderman.com.au

In this edition of Resources Update, we continue to profile members of our Energy and Resources team, with **Andrew Price, Partner**.

Andrew joined Piper Alderman's Sydney office nearly eight years ago after a long career in conventional property and construction transactions, having acted for principals, contractors, major consultants and state authorities in relation to all aspects construction, development and large scale development projects.

Since that time, Andrew has turned his attention to mining and resources transactions including the structure of acquisitions and disposals. He specialises in the procurement of planning approvals for major resources infrastructure, pipelines and projects. He has particular expertise in partitioned petroleum projects and representing participants with coal seam gas interests.

Andrew is a regular attendee at APPEA, having presented at past conferences. As an avid cyclist, you will likely spot him at the Cycle Tour on Sunday, 6 April, taking in the sights of Perth.

Unconventional gas in Australia
the battle for hearts and minds

Partner, Ewan Robertson *looks at the role of the media and public opinion in the debate over unconventional gas – a genuine alternative to fossil fuels - and its impact on achieving a safe, well regulated and monitored industry which has the trust of the community at large.*

Much has been made of the huge potential for shale gas and coal seam gas (CSG) across the world following the huge finds currently being exploited in the US. The governments of many countries including the UK and Australia are focussing on shale gas and other unconventional gas such as CSG to provide a bona fide alternative to conventional fossil fuels to meet the ever increasing global and national demand for energy.

However, as NSW Chief Scientist & Engineer, Professor Mary O'Kane highlighted in the report of her recent independent review, CSG is a complex and multi-layered issue which has proven divisive chiefly because of the emotive nature of community concerns, the competing interests of the players, and a lack of publicly-available factual information. In the UK there has been onshore fracture stimulation since the 1980's. Despite this, the print media run regular articles about fracture stimulation and there have been high profile campaigns and often violent protests across a number of sites including Balcombe, Barton Moss and ASX listed Dart Energy's sites at Farndon and elsewhere.

In the US, the #WhatTheFrack campaign against fracture stimulation is growing and is backed by high profile celebrity endorsements. The process is already banned in Vermont and parts of many other states such as New York, Pennsylvania and Ohio. There are calls for moratoriums in California, Colorado and elsewhere. Fraccing is also banned outright in France with a de facto moratorium currently in place in Germany.

Both Gasland 2, which is about to be released, and 2010's Gasland, are highly watchable documentaries focusing on unconventional gas in the US that have received critical acclaim but have also come under attack for being wildly inaccurate and irresponsible.

Whilst fracture stimulation has been carried out in Australia for well over 40 years, it has been typically far away from population centres and, as such, out of the public eye. However, the increasing globalisation of the media and proliferation of social media means that the process is now very much an issue for the general population with parliamentary enquiries happening in Western Australia and the Northern Territory and the National Party in Tasmania also pushing for an enquiry. These sit alongside the moratorium in Victoria which has been extended through to 2015 and the restrictions on CSG activities in New South Wales.

According to many, including NSW Resources Minister Chris Hartcher, despite its efforts to date the industry in Australia has so far failed to gain a social licence to operate. Indeed, the extension to the Victorian moratorium was announced around the same time in November 2013 as the Reith Report into the Victorian gas market actually called for the ban to be lifted. It is interesting to speculate how much public sentiment played in this decision given the make up of the Victorian parliament and high profile campaigns such as that by Coal and Gas Free Victoria.

The media presence and brand awareness of organisations such as Greenpeace show the power that environmental and political activism can wield, particularly in the younger, more activist generation which reacts so quickly and vociferously to social media posts. Indeed recent research from the University of Edinburgh and Masdar Institute of Science and Technology has shown that the speed, volume and ease with which information is shared through social networking sites may, in fact, be interfering with people's ability to think and analyse information before reacting. This is not going to change.

Given the controversial nature of unconventional gas and its many divisive issues, it seems more than likely that the 'anti-fraccing' lobby will continue to grow in Australia and become ever more vocal. Therefore, if Australia is to have any chance of really benefiting from an unconventional gas boom in the long term, environmental and other risks and concerns must continue to be properly and scientifically researched and evaluated. Equally important however will be the response of the industry to those opposing unconventional gas. Environmental activism will not go away. The industry must accept this and continue to put its message across in an open and transparent way.

Ultimately, the future of unconventional gas in Australia will be decided by politicians, and politicians need to be elected by popular support. The battle for hearts and minds should not be won by the loudest voice but by the voice of science and reason. It would be unfortunate to say the least if unconventional gas was blocked in Australia through unfounded environmental activism and hyperbole. Of course, our readers are not the ones who need to be convinced of this.

Ewan Robertson - erobertson@piperalderman.com.au

Contact us

Head of Energy & Resources

Gordon Grieve
Partner
t +61 2 9253 9908
ggrieve@piperalderman.com.au

Editor of Resources Update

Leanne McClurg
Senior Associate
t +61 8 8205 3416
lmcclurg@piperalderman.com.au

Sydney • Melbourne
Brisbane • Adelaide

Important Disclaimer: The material contained in this publication is comment of a general nature only and is not and nor is it intended to be advice on any specific professional matter. In that the effectiveness or accuracy of any professional advice depends upon the particular circumstances of each case, neither the firm nor any individual author accepts any responsibility whatsoever for any acts or omissions resulting from reliance upon the content of any articles. Before acting on the basis of any material contained in this publication, we recommend that you consult your professional adviser.