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Emerging with strength

Developments and key considerations for the oil and gas industry

JUNE 2020

Welcome!

Although it is too soon to predict the full impact of COVID-19, the future of the gas industry in Australia remains bright. Global demand for gas is projected to grow at a steady rate over the coming decades, driven by growing populations and economic development in emerging economies, together with the global trend of an expanding middle class. Gas is also expected to play an important role as a transition fuel to renewable energy, due to its lower carbon output.

The Federal Government's 'technology investment roadmap' released on 21 May 2020 by the Minister for Energy and Emissions Reduction, Angus Taylor, recognises the important role of gas in balancing renewable energy sources.

However, there are challenges ahead. The first quarter of 2020 has seen considerable disruption from COVID-19 which has restricted demand, the recent OPEC disputes continue to affect supply and ongoing trade wars create unwelcome uncertainty. Crude oil prices dropped to a 17-year low in March 2020 but have begun to slowly recover, with some analysts expecting prices to stabilise around the US$40–50 per barrel mark by the end of the year. In response, a number of oil and gas companies have announced delays in the sanction of projects, considerable cuts or deferrals in capital expenditure and plans to reduce operating costs.

The current circumstances have also impacted M&A activity, with companies re-assessing their acquisition and divestment strategies. Market volatility, disruption in credit markets and the uncertain business outlook have made M&A challenging in the immediate term. Even so, the oil and gas sector continues to take a long term view of value and there could be an increase in M&A activity once the initial shock of COVID-19 and its related social and economic disruption subsides. Some companies may face distressed asset sales and take-over bids from other companies, or seek to monetise some of their infrastructure assets.

While market conditions evolve, legal reform in the oil and gas space has continued. Recent months have seen numerous draft reports, inquiries and legislative amendments. These are covered in some detail in the insights that follow. It is a good time to consider the impact of these legal developments alongside likely future trends such as hydrogen, climate change and decommissioning related issues.

Needless to say I would be interested to hear how your plans evolve over the coming period. I'd also welcome any feedback on these insights and suggested topics we should cover in future editions. Please feel free to contact me or our authors with any queries.

Igor Bogdanich
Oil and Gas Sector Leader, Allens

How COVID-19 has shaped the oil and gas landscape

TEMPORARY FLEXIBILITY INTRODUCED FOR WORK-BID EXPLORATION PERMITS

The Department of Industry, Science, Energy and Resources released a new fact sheet, 'COVID-19 Fact Sheet: Work-Bid Exploration Permits' which is effective from 20 April 2020 (***COVID-19 Fact Sheet***). The COVID-19 Fact Sheet sets out the following measures to provide flexibility for offshore oil and gas explorers during the COVID-19 pandemic (***COVID-19***):

- **(Suspension and Extension Applications)** The Joint Authority regards COVID-19 as a force majeure event in which a titleholder may apply for a suspension, or suspension and extension, in order to meet a work program commitment that has been adversely impacted by COVID-19. The documentary requirements are now simplified with the applicant needing only to show:
  - resource constraints (financial and/or physical); and/or
  - changes to contractual arrangements with third parties (ie the inability to secure a staffed vessel).

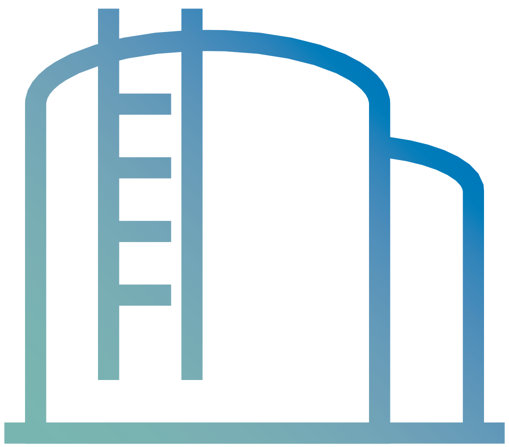
  The Joint Authority will generally allow up to a 12 month suspension and extension of the permit title conditions unless exceptional circumstances can be demonstrated by the applicant.

- **(Renewal Applications)** Additional flexibility will be built into the consideration of renewal applications. Typically, titleholders are expected to drill wells within the first three years of the new permit term, when no well was drilled in the previous term. The Joint Authority has noted that in these challenging times, financial and staffing restraints may limit a titleholder's ability to meet this expectation. Accordingly, the Joint Authority will apply flexibility when considering proposed alternatives and will consider requests on a case by case basis.

- **(2019 and 2020 Acreage Releases)** The assessment of bids made in the 2019 Acreage Release is proceeding and NOPTA can grant flexibility in the response timeframes for requests for further information. In addition, typically, a company must accept an offer for grant of a petroleum exploration permit within 30 days. An additional period of up to 30 days may be given upon written notice to NOPTA. The preparation for the 2020 Acreage Release is also proceeding.

The COVID-19 Fact Sheet should be read in conjunction with the Offshore Petroleum Exploration Guideline: Work-Bid (July 2019) and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). It has also been noted that the COVID-19 Fact Sheet will be revoked in the future. A copy of the fact sheet can be found at this link.

We consider that these temporary measures will be helpful to ensure that exploration activity can still continue during the current crisis and beyond, and will assist titleholders to manage and plan their future activities to address the impacts of COVID-19.



NOPSEMA ISSUES SAFETY ALERT FOR COVID-19 ROSTER CHANGES

On 7 April 2020, the National Offshore Petroleum Safety and Environment Management Authority (***NOPSEMA***), issued a Safety Alert to all operators of offshore facilities who may be considering modified roster arrangements to reduce the spread of COVID-19 among members of the offshore workforce. NOPSEMA advised that operators considering roster changes in response to COVID-19 should ensure that risk assessments for fatigue and psychological hazards are undertaken and engage in extensive workforce consultation. Any changes to rosters should be managed and documented through established management of change processes. NOPSEMA has been conducting inspections in response to proposed COVID-19 roster modifications and will continue to do so.

Operators of offshore facilities seeking to modify their roster arrangements due to COVID-19 should ensure that all required risk assessments and workforce consultations are undertaken prior to implementing such modifications.

NOPSEMA continues to actively pursue the threat posed by COVID-19 and has published an extensive range of documents in support of industry managing these risks which can be viewed at this link. NOPSEMA has also published a new compliance strategy for effectively regulating the offshore industry during COVID-19 which can be viewed at this link and a list of better practice responses to inspection questions which can be viewed at this link.

ACCC CONDITIONAL INTERIM AUTHORISATIONS

Since 20 March 2020, the ACCC has granted a number of urgent interim authorisations across a range of industries allowing businesses to collaborate in response to COVID-19 . A summary of the latest authorisations can be found here.

In the oil and gas space, interim authorisations have been targeted at loosening communication and coordination restrictions and allowing companies to work together to ensure the security of fuel and energy supply for Australian businesses and consumers. The ACCC has granted the following interim authorisations impacting the oil and gas industry:

- **(Oil Co-operation Authorisation)** On 3 April 2020, the ACCC granted major oil refiners (BP Australia, Caltex Australia, Mobil Oil Australia and Viva Energy Australia) and their representative body, the Australian Institute of Petroleum (***AIP***), a conditional interim authorisation to discuss and put in place measures so fuel supplies remain available for Australian businesses and consumers during COVID-19, and after the economic shutdown ends. Measures allowed to be put in place by the Oil Co-operation Authorisation will allow fuel companies to coordinate the refining and storage capacity of fuel required to keep oil refineries operating, thereby ensuring the security of supply of fuel products to Australian businesses. However, the ACCC emphasised that the Oil Co-operation Authorisation does not grant permission to coordinate pricing agreements in relation to the supply of fuel products.

  In addition, the ACCC noted that participation in the discussions is not compulsory. The Oil Co-operation Authorisation is subject to the following conditions:

  - the AIP must notify the ACCC of any material arrangements entered into by oil refiners and the AIP within 24 hours of implementation;
  - the ACCC may request information from the AIP in relation to the proposed conduct by oil refiners and the AIP; and
  - any other parties wishing to obtain the same protection must seek approval from the ACCC.

The ACCC's full authorisation decision can be found at this link.

Since 20 March 2020, the ACCC has granted a number of urgent interim authorisations across a range of industries allowing businesses to collaborate in response to the COVID-19 pandemic.

- **(Gas and Energy Co-operation Authorisation)** On 3 April 2020, the ACCC granted a conditional interim authorisation to the Australian Energy Market Operator Limited (***AEMO***) allowing gas and electricity market participants to co-operate on measures to ensure secure and reliable energy supply and integrity of wholesale markets during COVID-19. Measures that may be co-operated on include all those deemed necessary to minimise the risk of outages and if necessary, to share resources to maintain and operate energy infrastructure and coordinate repairs and maintenance. However, parties are prohibited from entering agreements about the wholesale or retail price of energy or sharing confidential information on pricing or profits. The Gas and Energy Co-operation Authorisation is subject to the following conditions:
  - AEMO must regularly notify the ACCC of any material agreements or decisions made under the authorisation;
  - gas and energy participants must continue to comply with conditions of other authorisations; and
  - any agreements entered into under the authorisation cannot last longer than COVID-19 necessitates.

The Gas and Energy Co-operation Authorisation was revoked and replaced by the Expanded Authorisation on 17 April 2020. The ACCC's full Gas and Energy Co-operation Authorisation decision can be found at this link.

- **(Expanded Authorisation)** On 17 April 2020, the scope of the Gas and Energy Co-operation Authorisation was expanded. The Expanded Authorisation allows gas and electricity market participants to share information about the operation of critical facilities, risks to their continued operation, and to engage in other coordinated conduct for the purposes of ensuring ongoing energy supplies, provided the ACCC is notified. The Expanded Authorisation is subject to the same conditions as the Gas and Energy Co-operation Authorisation discussed above. The ACCC's full Expanded Authorisation decision can be found at this link.
- **(Financial Relief Authorisation)** On 1 May 2020, the ACCC granted a conditional interim authorisation allowing the Australian Energy Council (***AEC***) and its wholesale and retail energy member businesses to hold discussions, share information and enter into arrangements for the purpose of providing financial relief and other measures to businesses and expand support under existing hardship programs for residential customers. The Financial Relief Authorisation is subject to the following conditions:
  - the AEC must notify the ACCC of any new members who will engage in conduct allowed by the authorisation at least one business day prior to them doing so;
  - the AEC must provide the ACCC or Australian Energy Regulator (***AER***) with 24 hour prior notice of any meeting where discussion of conduct allowed by the authorisation will be discussed or entered into;
  - no conduct may be engaged in that is materially inconsistent with the AER's 'Statement of Expectations of Energy Businesses: Protecting consumers and the market during COVID-19';
  - the AEC must regularly update the ACCC/AER with details of any discussions or conduct entered into in reliance on the authorisation; and
  - any agreements entered into under the authorisation cannot last longer than COVID-19 necessitates.

The ACCC's full Financial Relief Authorisation can be found at this link.

UNPRECEDENTED CHANGES IN THE EVENT OF FORCE MAJEURE

The COVID-19 pandemic and its broad-reaching economic impacts poses a significant challenge to the continuous operation of oil and gas projects in Australia. In a very short space of time, companies have been forced to grapple with an unprecedented disruption in demand, evolving State and Commonwealth Government restrictions and re-working existing operational practices in a manner that ensures the health and safety of their employees.

It may be that members of industry are forced to look at calling force majeure under their existing contractual arrangements. This requires a close review of the relevant force majeure provisions to determine whether COVID-19 related events would constitute force majeure events, and to identify which obligations are suspended in times of force majeure. We note that some contractual arrangements may also have change of law provisions that capture the regulatory changes introduced to combat COVID-19, and in limited circumstances you may be able to rely on the common law doctrine of frustration to bring a contract to an end.

If there is a right to suspend operations in a contractual arrangement, take note of any notice requirements and obligations to mitigate, as they will need to be built into any suspension planning. If an operator determines that it does need to suspend operations, a clear strategy and work plan will be important to manage and minimise impacts to the business and ensure that the shift from care and maintenance back to operations can be as seamless as possible.

Key issues to consider in a suspension work plan:

- **(Employee arrangements)** Suspension of operations will have a significant impact on the workforce. It will be necessary to review employment arrangements of those workers who will not be required in any suspension period and develop a strategy to address the consequences of any reduction / end of employment. Contractor arrangements will also need to be considered to determine if there is a risk of claims to recover redeployment or redundancy costs. It is also worth considering whether suspension may require repatriation of employees subject to working visas.
- **(Environmental obligations)** It will be important to understand the ongoing environmental obligations that will continue throughout any period of suspension (for example, monitoring / reporting obligations), and the relevant plans which need to be developed and submitted to the regulator in accordance with applicable statutory requirements.
- **(Health and safety issues)** It will be necessary to conduct a hazard identification analysis and determine what is required to secure the site and ensure ongoing safety obligations are met. This analysis should also identify what will be required to ensure ongoing compliance with safety obligations under applicable legislation.
- **(Finance obligations)** A review of financing and security arrangements will be important to determine the extent to which financiers' rights are enlivened by the proposed suspension.
- **(Insurance arrangements)** A review of the terms and conditions of insurance arrangements (for example, business interruption insurance) should be undertaken to determine whether there will be any recovery for losses arising from the suspension. We note that losses caused by interruptions due to epidemics or pandemics are often excluded in these types of policies (although some extend the concept of damage to include notifiable disease).
- **(Disclosure obligations)** Listed entities will need to consider their continuous disclosure obligations and any necessary announcements to be made to the market regarding the suspension.

What should be covered in a suspension plan will depend on the phase of operations leading into the suspension and the number of stakeholders affected. Specialist advice from legal advisors, financial advisors, independent experts and communications advisors may be required to prepare and implement a suspension work plan that ensures the project remains in compliance with all of its legal obligations, while placing itself in the best possible position to re-commence operations.

For more insights and analysis regarding COVID-19 please see the dedicated hub on our website.

TEMPORARY FIRB CHANGES SIGNIFICANTLY LENGTHEN APPLICATION REVIEW PERIODS

On 29 March 2020, the Federal Treasurer announced major changes to Australia's foreign investment approval (***FIRB***) regime to address risks arising from the COVID-19 pandemic. These major changes are supplemented by 'Guidance Note 53 – Temporary Measures in Response to the Coronavirus' which addresses the effects of the temporary changes to the FIRB regime that have been announced.

The temporary changes substantially expand the scope of oil and gas transactions requiring FIRB approval and are likely to significantly lengthen FIRB review periods for applications. For all foreign investors and Australian companies looking to sell assets or shares to foreign investors, understanding their impact will be critical, especially throughout the next six months.

What are the changes?

Effective from 10.30pm AEDT on 29 March 2020:

- all monetary screening thresholds under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the ***Act***) will be reduced to $0. This applies to all foreign persons subject to the Act irrespective of the investor's country of origin, and irrespective of whether they are a private foreign investor or a foreign government investor; and
- FIRB review periods for new and existing applications under the Act will be extended by up to six months, with priority to be given to processing applications for investments that protect and support Australian businesses and jobs.

The reduced $0 threshold was implemented via the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* (Cth) (the ***Amending Regulations***) which amends the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (the ***Regulations***). The Amending Regulations were released on 17 April 2020 but take effect from 10.30pm AEDT on 29 March 2020. The Amending Regulations do not contain a sunset date, meaning the $0 threshold will remain in place unless and until repealed by further legislation. However, the Federal Government has indicated that the $0 threshold is a temporary measure and will remain in place for the duration of the COVID-19 crisis. This is expected to be a period of at least six months from 29 March 2020 until at least the end of September 2020.

The new $0 monetary screening threshold is intended to address concerns that the negative impact of COVID-19 on Australian businesses will likely result in an increase in distressed sales to foreign purchasers at prices that are below the usual FIRB monetary screening thresholds.

The extensions to the FIRB review periods on applications are intended to give FIRB and the Treasurer sufficient time to screen applications. This is an administrative change and has not involved any changes to the Act or Regulations. Further, the Act does not empower the Treasurer to unilaterally extend FIRB review periods for applications – apart from issuing interim orders to extend the period by up to 90 days. The Act effectively provides that extensions need to be agreed by applicants. It is expected that FIRB will revert to its usual processing time frames at the same time the $0 threshold is repealed.

With growing concerns regarding the new timeframes, on 22 April 2020, the Chair of FIRB, David Irvine, indicated that while timeframes have been extended, FIRB is working to introduce measures to ensure the majority of applications are processed much faster to meet commercial deadlines.

WHAT IS THE IMPACT OF THESE CHANGES?

The new $0 monetary screening threshold will have a significant impact on oil and gas transactions where the acquirer is a foreign person and will also have broader implications for the oil and gas sector as the number of transactions requiring FIRB notification will expand. For instance:

> As the applicable money threshold is now $0, all offshore acquisitions of a 20% or greater interest in a foreign company which holds an Australian land corporation requires FIRB approval.

- **(Australian oil and gas companies)** Every acquisition by a foreign investor of a 20% or greater equity interest in an Australian oil and gas company will now require FIRB approval irrespective of value, compared with the previous monetary threshold of $275 million (and $1.192 billion for certain free trade agreement investors).
- **(Australian oil and gas land corporations)** All share acquisitions of an oil and gas company that qualify as an Australian land corporation by a foreign investor will now require FIRB approval irrespective of value, unless it is a passive interest of less than 10% in a listed company or a passive interest of less than 5% of an unlisted non-residential company. Previously there were monetary thresholds that varied depending on the type of land held by the Australian land corporation. An Australian oil and gas company will qualify as an Australian land corporation if it holds interests in Australian land that account for more than 50% of the value of the entity.
- **(Australian land)** Every acquisition by a foreign person of an interest in Australian land will now require FIRB approval irrespective of value. This affects the acquisition of petroleum production licences, retention leases and certain other forms of petroleum tenure that constitute Australian land for the purposes of the Act. Previously, there were monetary thresholds that varied depending on the type of Australian land held by the Australian land corporation. As clarified in the Guidance Note, these distinctions between land remain relevant when considering the types of conditions that may be imposed to protect the national interest.
- **(Offshore acquisitions)** Where a private foreign investor indirectly acquires 20% or greater interest in an Australian oil and gas company via an offshore acquisition, the mandatory FIRB approval requirements will be triggered if the company is an Australian land corporation and the applicable monetary threshold has been exceeded. As the applicable monetary threshold is now $0, all offshore acquisitions of a 20% or greater interest in a foreign company that holds an Australian land corporation require FIRB approval (regardless of the value of the Australian land corporation). As clarified by the Guidance Note, where parties notify such actions and if they require urgent handling to facilitate a broader offshore transaction, the parties should advise FIRB accordingly.
- **(Capital raisings)** While the pro rata rights issue exception will remain, a foreign investor seeking to underwrite a capital raising by any Australian oil and gas company (regardless of the company's value) needs FIRB approval unless they enter into arrangements to cap their potential interest in the company to less than 20%, or the underwriter has an exemption certificate.
- **(Internal restructures)** More internal restructures of oil and gas companies will now require FIRB approval and be subject to oversight by government agencies, particularly the Australian Taxation Office.
- **(Delayed completion of acquisitions)** As a result of FIRB's extension of the nominal statutory review period from 30 days to up to six months, it is likely that current and future oil and gas transactions will be subject to delays, with the exception being for investments that FIRB considers will protect and support Australian businesses and jobs.

- **(Continuation of exemptions)** The various exemptions under the Act (including the rights issue exemption and moneylending exemption) will remain in place. However, there are no new exemptions including no ordinary course or business as usual exemptions. Importantly, grants of petroleum tenure captured by the definition of Australian land by Commonwealth and State Governments will continue to be exempt, other than for grants to foreign government investors.
- **(Exemption certificates issued before 29 March 2020)** The Guidance Note clarifies that existing exemption certifications granted prior to 10:30pm AEDT 29 March 2020 are still valid provided the conditions (if any) specified in the certificate continue to be met. Certain exemption certificates granted prior to 10:30pm AEDT 29 March 2020 contain conditions that exclude the acquisition of particular interests which were specified in subsection 52(6) of the Regulations – this subsection has now been repealed.

  However, transitional measures have been implemented so that subsection 52(6) (and associated provisions) continue to apply in relation to an exemption certificated (granted prior to 10:30pm AEDT 29 March 2020) as if the repeal had not occurred. As a result of the temporary changes, certain acquisitions may now potentially give rise to significant and/or notifiable actions where this would not have previously been the case
- **(Exemption certificates issued after 29 March 2020)** The Guidance Note indicates that new exemption certificates issued after 29 March 2020 are likely to include conditions that prevent the certificate holder from being able to acquire interests in sensitive developed commercial land under the certificate. Therefore, acquisitions of those relevant interests may require separate notification to FIRB (similar to the position with respect to exemption certificates granted before 29 March 2020).

It is important to be aware of the following key points for oil and gas companies that have not yet been impacted by the changes:

- **(Pre-existing agreements not affected)** The new $0 threshold will not apply to agreements entered into prior to 10.30pm AEDT on 29 March 2020, irrespective of any acquisition that has not yet completed and whether the agreement remains conditional. As clarified by the Guidance Note, in determining whether an agreement has been reached before the announcement, negotiations will need to have been completed and the parties have arrived at a mutual understanding of all essential elements of their bargain. Therefore, the concept of an agreement will not apply to preliminary stages in negotiations or other circumstances that fall short of a mutual understanding of all the essential elements of a bargain.
- **(No changes to non-monetary thresholds)** The non-monetary thresholds under the Act will not change, nor will the definitions of notifiable action and significant action.
- **(No changes to acquisitions of exploration permits)** As there are no changes to the definition of Australian land, acquisitions of interests in exploration permits by a foreign investor will not be impacted by these temporary changes.

FIRB's reporting expectations

Where FIRB conditions are imposed, clients should be aware of FIRB's recently revised (as of April 2020) reporting requirements and audit conditions:

- **(Guidance Note 51 – Reporting Requirements for Compliance and Other Purposes)** Provides FIRB's expectations on reporting, including information on circumstances where foreign investors need to report on their compliance with conditions and other matters, the different types of reports that might be required, and guidance on how a compliance report should be prepared.
- **(Guidance Note 52 – Independent Audit Conditions)** Following the grant of a no objection letter from the Treasurer, subject to one or more conditions, this Guidance Note provides background information on compliance and reporting, with more specific information on independent audit conditions and compliance conditions when they are applied.

Major proposed changes to FIRB regime from 1 January 2021

On 5 June 2020, the Federal Treasurer announced further major proposed changes to Australia's FIRB regime to address national security risks and ensure greater compliance with FIRB approval conditions.

The Government's proposed changes, if passed, will be the most comprehensive reforms to Australia's foreign investment review framework in more than 20 years, and will come into effect on 1 January 2021.

Most significantly. the proposed changes include, amongst others:

- the imposition of a permanent $0 threshold for all foreign investments in sensitive national security businesses, whilst the current temporary $0 threshold for all other foreign investments will revert to the pre-29 March 2020 thresholds (subject to indexation);
- the ability of the Treasurer to impose new conditions and to unwind a transaction after FIRB approval has been granted, in cases where new national security concerns arise; and
- certain types of passive investments ceasing to require FIRB approval.

While the extent and impact of these changes will vary depending on the actual legislation (and corresponding regulations) that is passed, they do not immediately affect the 29 March 2020 temporary changes set out above. The Government has indicated that it will release exposure draft legislation in July 2020 ahead of a six week consultation period. Following the consultation, the legislation will be introduced to Parliament with a scheduled commencement on 1 January 2021. So we can expect the current regime to continue until 1 January 2021.

For further details on the proposed changes, please refer to our full article here.

Decommissioning

UPDATE ON STATUS OF OFFSHORE OIL AND GAS DECOMMISSIONING INQUIRY

The Department of Industry, Innovation and Science (***DIIS***) is currently reviewing the policy, regulatory and legislative framework for decommissioning infrastructure in Commonwealth offshore waters under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (***OPGGSA***).

There has been a heightened focus on decommissioning activity in recent times as decommissioning activity in the petroleum sector is expected to increase in coming years, with certain late-life offshore projects approaching cessation of production in Australia. The DIIS released a discussion paper in October 2018 entitled 'Decommissioning Offshore Petroleum Infrastructure in Commonwealth Waters' (***Discussion Paper***) for industry comment.

The DIIS is currently developing an options paper detailing preferred proposed options to enhance the decommissioning framework, which is expected to be released in mid-2020 for industry comment.

Following this:

- the DIIS will provide the outcomes of the review and options for the proposed revised decommissioning policy framework to the Minister for Resources in late 2020. This will outline key legislative and regulatory changes that might be required; and
- once the proposals have been considered by the Government, the DIIS will start work on the changes required to implement the agreed decommissioning framework post 2020.

Likely changes following the inquiry:

- decommissioning obligations;
- legal responsibilty;
- financial responsibility;
- information available to government; and
- post-title compliance and enforcement.

LIKELY CHANGES FOLLOWING THE INQUIRY

In the Discussion Paper, the DIIS identified a number of elements of the current decommissioning framework that have the potential to be improved and has outlined potential improvements, which include:

- **(Decommissioning obligations)** Clarifying the scope of decommissioning obligations, including:
  - expressly requiring titleholders to either remove property or make alternative arrangements that are satisfactory to NOPSEMA. This could be introduced in parallel with an express obligation for titleholders to plug and abandon wells and remediate the title area. The effect of including these express provisions is they apply to all decommissioning projects, not just those where the titleholder has applied for consent to surrender their title; and
  - introducing a timeframe or more precise regulatory trigger for when titleholders must remove property or make alternative arrangements. Such an amendment is designed to encourage/oblige the removal of disused property periodically throughout the life of a title, separate to decommissioning obligations undertaken once operations have ceased entirely.

These amendments could be made by way of amending current provisions in the OPGGSA or inserting a standalone requirement to decommission.

- **(Legal Responsibility)** Clarifying who is responsible for ensuring decommissioning is carried out. Options to address this include:
  - introducing alternative liability arrangements where the OPGGSA is amended to provide that ongoing responsibility for decommissioning does not end at the point at which a title is transferred. Under this regime, all former titleholders could remain responsible for decommissioning in respect of infrastructure that has been installed prior to the transfer of title. This would apply irrespective of how many times the title has changed hands and such former titleholders may be required by the Government to pay necessary costs; or
  - expressly providing that each member of the titleholder group could be held to account for ensuring that decommissioning obligations are discharged, including responsibility for meeting the total costs of decommissioning, without government intervention.
- **(Financial Responsibility)** Ensuring titleholders have sufficient financial capacity to meet their decommissioning requirements and that appropriate financial responsibility mechanisms are in place. Options to address this include:
  - amending the OPGGSA to provide that NOPTA can conduct an assessment of a titleholder's technical and financial capacity to comply with their obligations at any time (and not only at the time a title is transferred);
  - implementing an express statutory requirement to provide financial security for decommissioning (this would be in addition to the existing obligation to provide financial assurance);
  - only requiring financial security for decommissioning on a discretionary basis;
  - establishing a dedicated decommissioning fund whether on an individual title basis or on a pooled basis; or
  - bolstering current financial assurance requirements to extend specifically to decommissioning costs.
- **(Information available to the Government)** Ensuring the Government has advance and up-to-date information on a titleholder's plans for decommissioning which could be achieved by requiring titleholders to include information about decommissioning activities in environment plans or to submit a stand-alone decommissioning plan. Any stand-alone decommissioning plan would likely be submitted at the same time as the initial field development plan and will be required to be periodically updated over the life of the field. Titleholders may also be required to submit a 'close-out' report after decommissioning infrastructure.

- **(Post-Title Compliance and Enforcement)** Making policy improvements to strengthen the tools available to ensure remedial work can be undertaken if required. Options to address this include:
  - amending the OPGGSA to ensure that a former titleholder operating under a remedial direction is subject to all the duties and responsibilities as if it were operating under its previous title (including in respect of financial assurance);
  - amending the regulations to enable a former titleholder to submit a risk management plan prior to commencing an activity;
  - establishing a new decommissioning title that would be issued to former titleholders to carry out decommissioning or ongoing post-decommissioning monitoring activities; or
  - broadening NOPSEMA's and the Minister's power to issue remedial directions to all former titleholders, including to former titleholders that have transferred their interests in the title. This amendment would allow the Government to pursue, if necessary, all former titleholders throughout the chain of ownership and not just the immediate former titleholder.

IMPACT ON THE OIL AND GAS INDUSTRY

Industry has indicated that a clear decommissioning framework implemented by way of legislative amendments to the OPGGSA, rather than through the issuance of guidance notes and policy would be welcomed to ensure that titleholders have a clear understanding of their legislative obligations. The implementation of the new decommissioning framework will be relevant for oil and gas companies as follows:

- In the context of M&A transactions, given the high likelihood that former titleholders' liability for decommissioning post-transfer of title will be clarified and NOPTA will likely more closely scrutinise the financial capability of incoming titleholders (whether by way of an asset or share transaction) to meet decommissioning costs:
  - sellers will need to carefully consider the financial strength of buyers to meet future decommissioning costs. This is important because there is potential for a seller, as a former titleholder, to be held liable for decommissioning costs if a buyer cannot meet such obligations;
  - both buyers and sellers will need to consider whether additional security needs to be provided by a buyer to ensure a buyer can meet decommissioning costs;
  - parties may wish to structure the approval of transfers of title and/or changes in operational control as conditions precedent to avoid an unwind of the transaction; and
  - parties will need to consider building in additional time in obtaining any joint venture consents or waiver of pre-emptive rights as continuing joint venture participants may require further oversight of arrangements that are ultimately agreed between the seller and the buyer.
- In the context of oil and gas projects, companies will need to ensure that any new regulatory requirements are complied with, for example (and depending on what is ultimately legislated as part of the reforms):
  - clearly reflecting that decommissioning is an ongoing process that needs to be considered from the outset of a project and throughout the life of a project including requiring the operator to either update current environment plans to cover decommissioning activities or prepare a stand-alone decommissioning plan;
  - considering whether additional requirements should be included for joint venture participants to provide security specifically in respect of decommissioning costs; and

- considering arrangements that will survive a transfer of title if former titleholders are held liable for decommissioning costs, including whether it is appropriate to allow for such former titleholders to be reimbursed for costs they incur in relation to decommissioning.

Companies participating in the oil and gas sector should be considering whether to amend existing joint operating agreements and include provisions in new joint operating agreements to reflect any new legislative requirements, either by way of generic provisions to comply with the relevant legal requirements once known or specific provisions once the new legislative requirements have been introduced and are understood.

NOPSEMA POLICY ON SECTION 572 OF OPGGSA MAINTENANCE AND REMOVAL OF PROPERTY

On 7 April 2020, NOPSEMA released a draft policy 'Section 572 Maintenance and removal of property' (***Draft Policy***). The purpose of the Draft Policy is to assist in clarifying how NOPSEMA intends to advise, promote, monitor and enforce compliance of the obligations under section 572 of the OPGGSA in relation to the maintenance and removal of equipment and property brought onto a title area.

The Draft Policy has been issued in response to the former Federal Minister for Resources and Northern Australian's Statement of Expectations given to NOPSEMA in October 2019, which set out a clear expectation that NOPSEMA would give heightened focus to oversight of titleholders' compliance with section 572.

The Draft Policy is helpful insofar as it clarifies and formalises NOPSEMA's position on section 572, but is broadly consistent with NOPSEMA's policy position as communicated to industry on a transaction/project basis and the DIIS' Offshore Petroleum Decommissioning Guideline released on 17 January 2018.

There is a strong focus in the Draft Policy on considering section 572 obligations as 'life-of-project' obligations rather than simply applying at the point of cessation of operations. The key features of the Draft Policy are:

- **(Maintenance of property)** NOPSEMA will apply the following principles, amongst others, to monitor compliance with the obligation to maintain property in good condition and repair:
  - property must be fit for purpose to perform its intended function during operations, including removal; and
  - property is monitored, maintained and where necessary repaired so that it can be removed in a safe and environmentally responsible manner. This includes a requirement to hold an inventory of all property in the title area at all times, including records of the condition of all property.
- **(Base case is full removal of property)** NOPSEMA will apply the following principles, amongst others, to monitor compliance with the obligation to remove property:
  - the base case is full removal of property from the title area;
  - all property is designed, installed and operated with the intention of being removed; and
  - removal is planned to take place throughout the operations, including with justified timeframes for removal and full removal which must be completed while the title is still in force.

- **(Alternative arrangements)**
- NOPSEMA will only accept partial removal if:
  - titleholders can demonstrate in an environment plan (***EP***) that arrangements other than full removal are acceptable and that the EP otherwise meets the criteria for acceptance;
  - the alternative is expected to have equal or better environmental outcomes when compared with full removal and will result in environmental impacts and risks that are reduced to a level that is as low as reasonably practicable;
  - NOPSEMA expects titleholders to address arrangements for long term monitoring and management and will not accept a notification ending the operation of the EP until the monitoring has been completed; and
  - NOPSEMA confirms that its acceptance of an Offshore Project Proposal does not constitute approval for proposed alternative arrangements and that this must be done through the EP process.
- **(Permissioning documents)** NOPSEMA expects that the section 572 requirements will be addressed in the permissioning documents, including the EP, safety case and well operations management plan. Relevantly, NOPSEMA has stated that the cessation of production is a new state of operations that requires an accepted EP to be in place.
- **(Current titleholder)** NOPSEMA confirms that where a title has been sold or transferred but has not been revoked, cancelled, terminated or expired, the duty to remove property will apply to the current titleholder, whether the property is operational or not.
- **(Engagement of contractors)** NOPSEMA states that if titleholders engage contractors to operate facilities, titleholders remain ultimately responsible.
- **(Title transactions)** NOPSEMA reiterates that it will provide title related compliance advice to NOPTA, including where there are outstanding section 572 obligations.
- **(Enforcement)** NOPSEMA reiterates that it may direct a titleholder or former titleholder to remove property or make alternative arrangements satisfactory to NOPSEMA and that it may seek to prosecute titleholders and have either civil or criminal penalties applied.

NOPSEMA is seeking feedback on the Draft Policy to inform its refinement prior to final publication. A copy of the Draft Policy can be found at this link. We will provide a further update once the Draft Policy has been finalised.

Productivity Commission report on resources sector regulation

On 24 March 2020, the Productivity Commission released its draft report on resources sector regulation. The Commission was asked to focus on regulation with a material impact on investment in the resources sector (both oil and gas and mining), identify effective regulatory approaches, and highlight examples of best-practice regulation. The review's scope was vast, particularly as the various states and territories have not adopted a uniform approach to regulation.

If implemented, the Productivity Commission's recommendations would have important implications for the sector. In particular, the report includes a number of recommendations focused on reducing delays in project assessment and approval and removing barriers to investment – without diluting environmental and other regulated outcomes.

In relation to removing barriers to investment, relevantly for the gas sector, the Productivity Commission made various draft findings, including that:

- domestic gas reservation schemes can reduce investor returns, thereby discouraging investment in exploration and extraction and leading to higher gas consumer prices;
- bans and moratoria are a response to community uncertainty about the environmental impacts of unconventional gas operations, however, the evidence available suggests that these risks can be managed effectively by consideration on a project-by-project basis; and
- the water trigger that applies to coal seam gas projects under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is creating unnecessary regulatory burden.

The Commission also made more general draft findings regarding government policy and investment, including that:

- abrupt and poorly explained government policy changes, with inadequate consultation and uncertainty regarding climate change and energy policies across jurisdictions, can undermine investor confidence;
- a lack of clarity in policy objectives can lead to inconsistent applications of regulations across resources projects; and
- deciding not to approve resources projects on the basis of potential greenhouse gas emissions in destination markets is not an effective way of reducing global emissions.

For further details on the key findings and recommendations set out in the draft report please refer to our full article here.

The Productivity Commission has invited submissions on the draft report, with the intention of releasing a final report by 7 August 2020. With governments likely to be keen to look at initiatives that could kick-start an economic recovery following COVID-19, its recommendations might find a receptive audience.

Update on the Australian Domestic Gas Security Mechanism

Australian Domestic Gas Security Mechanism (***ADGSM***) came into effect

1 JULY
2017

The Government announced that the 2020 statutory review of the ADGSM would be brought forward

6 AUGUST
2019

Released the report – 'Review of the Australian Domestic Gas Security Mechanism'

JANUARY
2020

The Resources Minister is due to issue a notification of intent to consider whether to determine a shortfall year

1 JULY – 1 OCTOBER
2020

ADGSM gives the Commonwealth Government the power to impose LNG export restrictions until 2023.

2023

By way of background, the Australian Domestic Gas Security Mechanism (***ADGSM***) came into effect on 1 July 2017 in a response to a forecast gas supply shortfall in the eastern domestic gas market. The ADGSM gives the Commonwealth Government the power to impose LNG export restrictions until 2023. If the Minister for Resources and Northern Australia (***Resources Minister***) determines that there will be a shortfall of domestic gas supply in a calendar year, and that LNG exports contribute to the shortfall, the Minister may declare a 'domestic shortfall year', and LNG exports will be controlled for that year.

Since the introduction of the ADGSM in 2017, the Resources Minister has not declared a domestic shortfall year.

On 6 August 2019, the Government announced that the 2020 statutory review of the ADGSM would be brought forward. Following that review, the DIIS released a report titled, 'Review of the Australian Domestic Gas Security Mechanism' in January 2020 (***ADGSM Review***). A copy of the ADGSM Report can be found at this link.

Key findings of the ADGSM Review include:

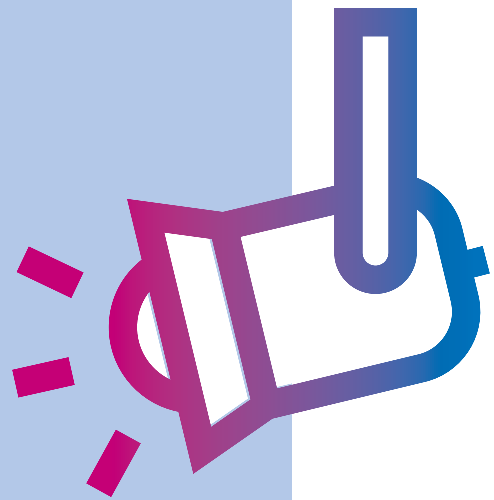
- the ADGSM has been working effectively to safeguard domestic gas supplies;
- gas offers are around half the peak prices of over $20 per gigajoule from early 2017, before the ADGSM was introduced;
- the improvement in the domestic supply outlook and subsequent market conditions can in part be attributed to the ADGSM. In particular, LNG exporters have increased their supply to the domestic market since the ADGSM was introduced and are currently, in aggregate, net contributors to the domestic market;
- the ADGSM Review acknowledges the important role the Heads of Agreement between the Commonwealth Government and LNG exporters has played in encouraging more gas into the domestic market and safeguarding against a shortfall;
- the ADGSM Review does not consider it likely that there will be a domestic gas shortfall over the life of the ADGSM, based on reporting by the ACCC and AEMO. As such, export restrictions are not envisaged particularly if LNG projects continue their contributions to domestic supply; and
- the ADGSM Review does not recommend adopting a direct price trigger as part of the ADGSM.

The ADGSM Review recommends:

- retaining the ADGSM until its scheduled repeal in 2023;
- considering a change to the Total Market Security Obligation to better enable it to recover sufficient gas in the unlikely event of domestic shortfall; and
- amending the ADGSM's guidelines to reference the ACCC's LNG netback price series in estimating a potential shortfall, given that price is an important indicator in establishing whether the domestic market is functioning effectively.

The ADGSM Review also refers to AEMO's Gas Statement of Opportunities for eastern and south-eastern Australia dated March 2020 (***GSO***) which concluded that supply from existing and committed gas developments will be sufficient to meet gas demand across eastern and south-eastern Australia until at least 2023.

The Resources Minister is due to issue a notification of intent to consider whether to determine a shortfall year by 1 July 2020 and by no later than 1 October 2020.



Greenhouse Gas reforms under the Offshore Petroleum and Greenhouse Gas Storage Act

On 28 April 2020, a number of amendments to the OPGGSA and the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* (Cth) (***Levies Act***) came into force.

The key amendments include:

- **(Transfer of regulatory authority to NOPSEMA)** Transferring various regulatory functions and powers for offshore greenhouse gas wells and environment management from the Minister of Resources, Water and Northern Australia to NOPSEMA to ensure an experienced and independent regulator has oversight of offshore greenhouse gas storage facilities. The Minister will also retain an existing general power to give directions to greenhouse gas titleholders under the existing section 580 of the OPGGSA. However, under the new section 580(8A) if there is an inconsistent direction given by the Minister and NOPSEMA, the Minister's direction will have no effect to the extent of the inconsistency.
- **(Strengthen powers of NOPSEMA inspectors)** Strengthening and clarifying the monitoring and enforcement powers of NOPSEMA inspectors. The amendments have given NOPSEMA additional power to conduct inspections without a warrant to monitor compliance by titleholders with well integrity-related obligations. Further, the amendments have expanded the categories of places that NOPSEMA inspectors may enter, without a warrant, for the purposes of conducting an environmental or OHS inspection.
- **(Levies extended to greenhouse gas wells)** The Levies Act has been extended to apply the well investigation levy, annual well levy and well activity levy to greenhouse gas wells. This is designed to ensure that NOPSEMA can recover the cost of its oversight of well operations under greenhouse gas titles.
- **(Well activity levy)** The Levies Act has been amended to impose a well activity levy on submission of a five-yearly revision of a well operations management plan, and to remove the levy imposed on applications for approval to commence well activities.

These reforms will ensure that there are adequate regulatory arrangements to manage a potential increase in greenhouse gas storage activities in the future.

On 15 May 2020, a number of further amendments to the OPGGSA and the Levies Act were passed. The key amendments include:

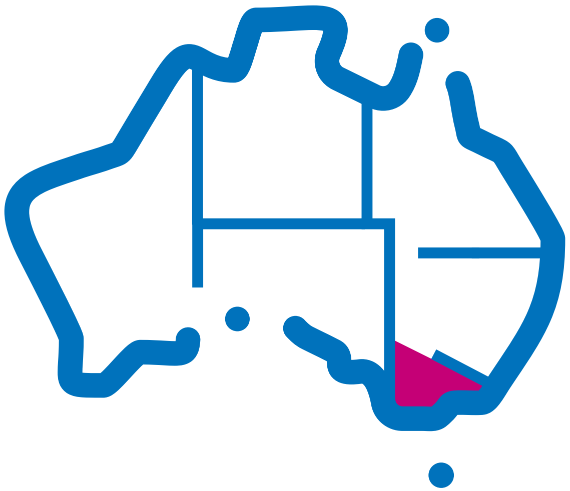
- **(Greenhouse gas cross-boundary storage)** Providing for the grant of single greenhouse gas titles that straddle the boundary between State/Northern Territory coastal waters and Commonwealth waters. Upon the grant of such title, the title area will become Commonwealth waters for all purposes of the OPGGSA. Decisions about the grant of such titles will be made by a newly established Cross-boundary Authority consisting of the responsible Commonwealth Minister and the relevant State or Northern Territory Resources Minister (this regime is similar to the current Joint Authority arrangements). The Levies Act has also been amended to ensure that the levies imposed by that Act apply to cross-boundary titles.
- **(Unification of adjacent Commonwealth greenhouse gas titles)** Enabling the holder of two adjacent Commonwealth greenhouse gas titles to apply for a single title across the two areas, where the holder has reasonable grounds to suspect that there is a geological formation that straddles the two titles.

- **(Strengthen powers of NOPSEMA inspectors)** Further strengthening and clarifying the powers of NOPSEMA inspectors. Currently, NOPSEMA does not have the power to inspect or enforce compliance by a titleholder in areas of State/Territory jurisdiction, such as in coastal waters or onshore. Obtaining a warrant or consent can impede compliance monitoring in emergency situations. The amendments strengthen NOPSEMA's powers to ensure compliance by a titleholder with its environmental management obligations in the event of an oil pollution emergency originating from operations in Commonwealth waters. Specifically, the amendments enable NOPSEMA inspectors to enter premises used for implementation of oil spill response obligations without a warrant, whether located in Commonwealth or State/Territory jurisdiction, in the event of an oil pollution emergency arising from operations in Commonwealth waters.
- **(Extension of polluter pays)** The amendments extend the operation of the 'polluter pays' obligations and the application of significant incident directions that may be given by NOPSEMA to areas of State/Territory jurisdiction.
- **(Levies Act)** The amendments ensure that levies are imposed on cross-boundary titles (including the part of the title that is in State/Northern Territory waters) and imposed in relation to regulatory activities undertaken in respect of greenhouse gas titles held by a State or the Northern Territory. These amendments will ensure that NOPSEMA and NOPTA are fully cost recovered for their regulatory operations.

These amendments come after the recently announced National Hydrogen Strategy and illustrate Australia's aspiration to be one of the first countries to create a hydrogen export industry, which relies on suitable carbon capture and storage. The amendments enable carbon capture and storage projects, such as the CarbonNet project, to proceed with plans to inject CO_2 into underground reservoirs offshore. Currently, the CarbonNet project is investigating the feasibility of a commercial-scale, multi-user carbon capture and storage network in Gippsland, Victoria. The proposed storage site under the CarbonNet Project is one such site that straddles the boundary between Commonwealth waters and State and Territory coastal waters.

Further, these amendments will ensure that the sector is adequately regulated and aligned with international best practice so as to attract investment in new industries for Australia.

New Victoria reforms: enhancing the security of gas supply

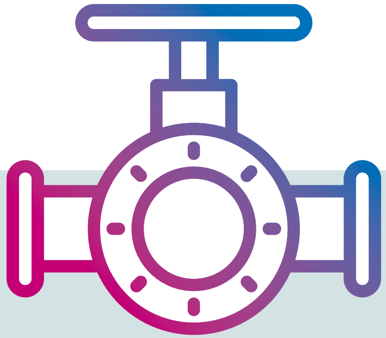


Gas regulation in Victoria is set for major reform after the Government introduced two new bills aimed at enhancing the security of gas supply for the State.

LIFTING OF ONSHORE CONVENTIONAL GAS MORATORIUM

The first Bill is the *Petroleum Legislation Amendment Bill 2020* (Vic) (***Petroleum Bill***) which allows for an 'orderly restart' of onshore conventional exploration and development from 1 July 2021. This Bill overturns Victoria's moratorium on onshore conventional gas production that was imposed in 2017.

In 2017, the Victorian Government placed a moratorium on onshore conventional gas production until 30 June 2020. The Petroleum Bill extends the moratorium period to 30 June 2021 which has been cited by the Government as facilitating the orderly restart of onshore petroleum exploration and petroleum production on 1 July 2021. It is expected that onshore conventional gas development could potentially start from 2023 to 2024. The Petroleum Bill also provides for submissions from the Victorian community to be taken into account in the making of certain decisions under the *Petroleum Act 1998* (Vic) (including the grant of petroleum exploration permits, retention leases and production licences), and to enable prescribed social, environmental and economic factors to be taken into account in the making of certain decisions under that Act.



The Petroleum Bill extends the moratorium period to 30 June 2021 which has been cited by the Government as facilitating the orderly restart of onshore petroleum exploration and petroleum production on 1 July 2021.

The announcement comes after the Victorian Gas Program's (the ***VGP***) studies concluded that there could be up to 830 petajoules of onshore conventional gas between the west, central and eastern areas of the onshore section of the Otway Basin and the central onshore area of the Gippsland Basin and confirmed that new natural gas development will have minimal environmental impact.

Although these amendments have been welcomed by industry as a step in the right direction, the specifics of how these reforms will be implemented are yet to be revealed and we expect that a lot of the detail will be set out in the regulations. Once the Petroleum Bill is passed, the department will start working with industry and other stakeholders to amend the *Petroleum Industry Regulations 2011* (Vic).

AEMO stated in the GSO that the lifting of the moratorium will allow the east coast gas market access to further sources of gas supply (which is expected to be sufficiently supplied until the end of 2023 based off existing and committed gas developments). However, AEMO stated that given the lead times required for exploration and development of projects, until exploration commences, the size of the resources and timing of any new supply remain unclear.

FIRST OPPORTUNITY FOR DOMESTIC CUSTOMERS TO PURCHASE PETROLEUM

The Petroleum Bill will also amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2010* (Vic) to require a petroleum production licensee to provide domestic consumers with the first opportunity to purchase petroleum recovered under the licence. All production licences granted on or after 1 May 2018 will be subject to a new condition that provides a licensee must not supply petroleum to an LNG exporter unless the licensee has first taken all reasonable steps to supply that petroleum to a domestic customer on reasonable terms and there is no domestic customer willing to buy the petroleum on reasonable terms. A licensee who proposes to supply petroleum to an LNG exporter must also notify the Minister of the proposed supply. The criteria for what constitute 'reasonable terms' will be set out in regulations.

Developers of any possible new LNG projects located in Victorian coastal waters should be aware of these new requirements and factor these requirements into any gas marketing activities and offtake contracts required to be executed in order to underpin a final investment decision.

Although this proposed new regime does not go as far as to expressly reserve gas for Victoria domestic customers (unlike the 15% reservation in Western Australia), interestingly, the Productivity Commission found in its draft report that domestic gas reservation schemes can reduce investor returns, thereby discouraging investment in exploration and extraction and leading to higher gas consumer prices.

BAN ON FRACKING ENSHRINED IN VICTORIA'S CONSTITUTION

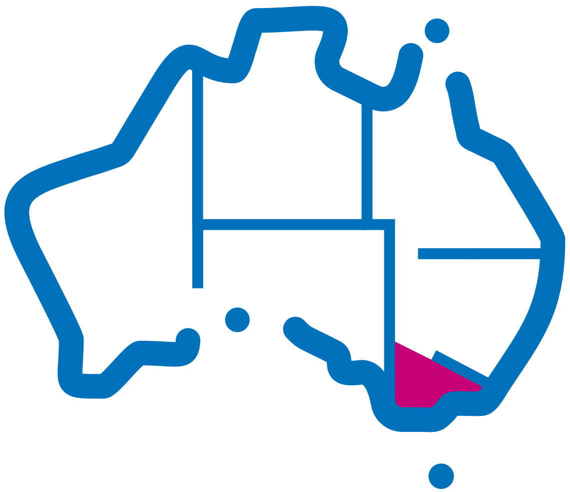
The second Bill is the *Constitution Amendment (Fracking Ban) Bill 2020* (Vic), which enshrines in Victoria's constitution Victoria's ban on unconventional gas extraction, which includes hydraulic fracturing and coal seam gas exploration.

By way of comparison, South Australia and Tasmania also have a fracking ban and Western Australia and the Northern Territory have fracking bans over 98% and 51% of the State and Territory respectively. Despite there being no fracking ban in Queensland and New South Wales, there are certain limitations and restrictions.

Interestingly, the Productivity Commission found in its draft report that bans and moratoria are a response to community uncertainty about the environmental impacts of unconventional gas operations, however, the evidence available suggests that these risks can be managed effectively by consideration on a project-by-project basis.

Although the Victorian unconventional gas industry is at a very early stage where there is currently no coal seam gas or shale gas production or confirmed resources, the passing of this Bill will prohibit any future developments of unconventional gas resources discovered if fracking is required. Having said this, it is possible that future governments could introduce legislation to remove this ban if unconventional gas resources are discovered and could come under increasing pressure to do so once Victoria's conventional gas resources near depletion.

Overhaul of Victorian environmental laws delayed



The *Environment Protection Amendment Act 2018* (Vic) (***EP Act***), which was set to commence on 1 July 2020 (and overhaul environmental laws in Victoria) will now commence on 1 July 2021 as a part of a suite of emergency measures in response to COVID-19.

By way of background, on 24 April 2020 the COVID-19 *Omnibus (Emergency Measures) Act* 2020 (Vic) (***COVID-19 Act***) passed the Victorian Parliament, and received royal assent. In addition to a host of other COVID-related reforms, this Act will delay the commencement of the EP Act until December 2021, at the latest.

The key takeaways of the COVID-19 Act are:

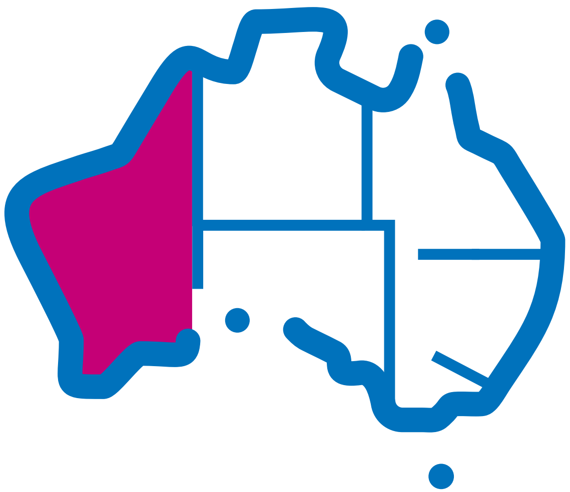
- the COVID-19 Act defers the mandatory commencement of all provisions of the EP Act that have not yet come into operation from 1 December 2020 to 1 December 2021 (unless an earlier date is proclaimed);
- the sections of the EP Act that have already commenced (Sections 19 and Part 3) will continue to apply as normal;
- the COVID-19 Act does not make any changes to the content of the laws under the EP Act;
- the COVID-19 Act revokes the previous proclamation of commencement made on 3 March 2020 (which proclaimed that the remaining provisions of the EP Act would commence on 1 July 2020); and
- the existing framework under the *Environment Protection Act 1970* (Vic) will continue to apply until the new laws commence.

The Victorian Government has advised that it intends to proclaim an earlier commencement date of **1 July 2021**, rather than using the full extension of time allowed under the COVID-19 Act. Therefore, we anticipate the EP Act commencing in full by 1 July 2021.

The Victorian Premier advised that the purpose of the deferral is to 'allow business and industry to focus on the immediate impacts of coronavirus.' The delay will also provide more time for the Environment Protection Authority (***EPA***) and the Department of Environment, Land, Water and Planning (***DELWP***) to finalise the regulations, environment reference standards, noise protocols and various compliance codes.

For further details on the COVID-19 Act please refer to our full article here.

WA: North West Shelf State Agreement extended for 25 years



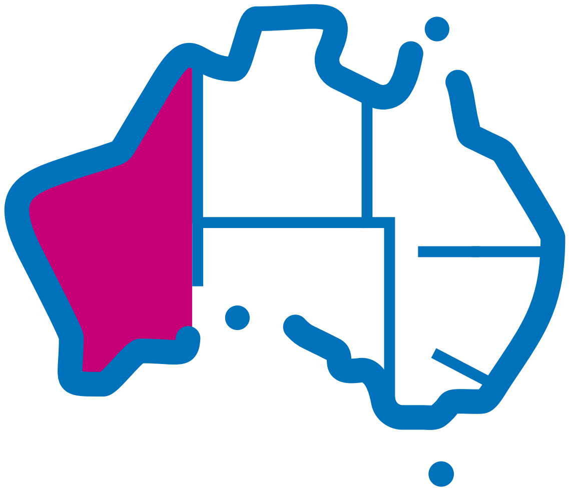
On 24 March 2020, the *North West Gas Development (Woodside) Agreement Amendment Act 2020* (WA) (the ***Act***) received royal assent. The Act amends the *North West Gas Development (Woodside) Agreement Act 1979* (WA) (***State Agreement***) and ratifies the Fifth Supplementary Agreement made between the West Australian Premier Mark McGowan and the North West Shelf Joint Venture Parties (***Joint Venturers***). The key operative provisions of the Act came into force on 25 March 2020.

The most significant impact of the Act is to extend the term of the State Agreement by a further 25 years from 31 December 2034 to 31 December 2059. This extended time period will create certainty for proposed third party processing of gas at the North West Shelf facilities. The processing of third party gas was permitted by the *North West Gas Development (Woodside) Agreement Amendment Act 2015* (WA) and is expected to begin when spare processing capacity becomes available in 2021.

Other impacts of the Act include requiring the Joint Venturers to prepare and implement a community development plan and local participation plan. These plans are required to be prepared and provided to the Minister by 25 June 2020. In respect of the submission of additional proposals (which are required for third party processing of gas), the Joint Venturers must, unless the Minister otherwise requires, give to the Minister information about how the proposed activities in the additional proposal may affect the original community development plan and local participation plan.

The most significant impact of the Act is to extend the term of the State Agreement by a further 25 years from 31 December 2034 to 31 December 2059.

WA: Greenhouse Gas Emissions Guideline



The Western Australian Environmental Protection Authority (***EPA***) has released its finalised Greenhouse Gas Emissions Environmental Factor Guideline (***GHG Guideline***). The final GHG Guideline dials back what had been described as some of the more controversial aspects of the initial guideline that was released (and subsequently withdrawn) in March 2019.

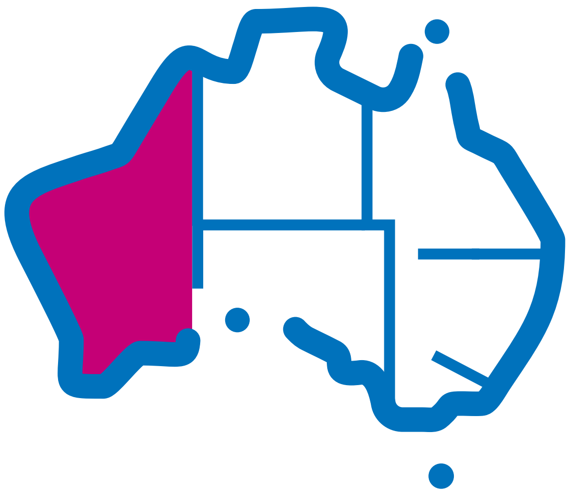
The key takeaways are:

- the GHG Guideline outlines the EPA's approach to assessing the GHG emissions of WA projects. It will be most relevant to new projects or existing projects going through an expansion phase, which are expected to have over 100,000 tonnes of scope 1 (direct) GHG emissions per year;
- projects referred to the EPA for assessment may need to include estimates of scope 1, 2 and 3 GHG emissions (annual and total) for the life of the project. The weight that the EPA will give to those emissions (particularly scope 3 emissions) in its assessment is not expressly stated; and
- projects to which the GHG Guideline applies will need to prepare and implement a GHG Management Plan that demonstrates the proponent's contribution towards the aspiration of net zero emissions by 2050.

Environment / approvals teams will need to be mindful of the GHG Guideline in engaging with the EPA, preparing environmental impact assessment documentation and planning for delivery of offsets where required. Proponents will need to ensure that the EPA has sufficient information regarding GHG emissions to inform its assessment report and that decision-makers have sufficient information to make lawful decisions.

For further details on the GHG Guideline please refer to our full article here.

WA: Key things you need to know about the proposed changes to the Environmental Protection Act 1986 (WA)



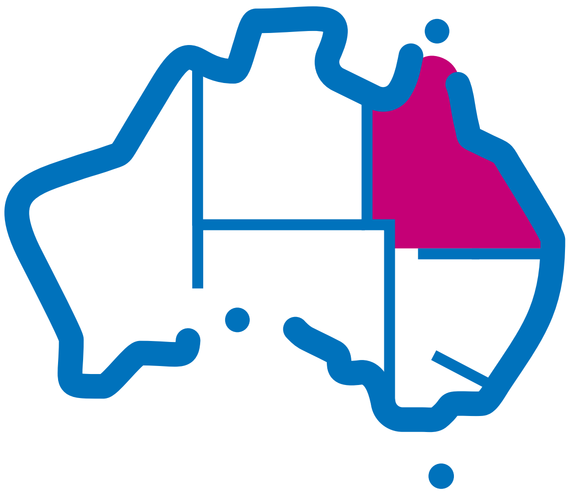
On 16 April 2020, the *Environmental Protection Amendment Bill 2020* (WA) was introduced to the WA Parliament. Although described in its second reading as the most significant reform of the *Environmental Protection Act 1986* (WA) (***EP WA Act***) since its inception, the changes proposed in the Bill reflect a fairly modest reform agenda targeting improvements to the existing legislative framework.

Below is a list of the key things you need to know about the reforms proposed in the bill:

- amendments to Part IV (Environmental Impact Assessment) of the EP WA Act;
- express power for other decision-making processes to be considered by the EPA;
- consideration of cumulative effect of impacts of the proposal will be required;
- Cost recovery in relation to the referral, assessment and implementation under Part IV processes to be introduced;
- new provisions for bilateral agreements between the Commonwealth and WA Governments to facilitate a streamlined approvals process for WA-based approvals;
- new 'opt-in' clearing referral process;
- new look to licensing of prescribed premises and 'voluntary' licences;
- part IV referrals would prevent 'related' decisions under Part V; and
- new levy for environmental monitoring programs.

For further details on the changes proposed in the *Environmental Protection Amendment Bill 2020* (WA) and their implications please refer to our full article here.

QLD: Safety reforms



The Queensland Parliament has passed the *Resources Safety and Health Queensland Act 2020* (Qld) (***RSHQ Act***), which when it comes into effect on 1 July 2020, will change the State's regulatory framework for health and safety in the resources industry.

Significantly, these laws are likely to further facilitate the increasing regulatory emphasis on enforcement actions and a further move away from what has been described as the 'light-touch' regulatory approach of advising and assisting duty-holders with compliance in Queensland's resources sector.

The aim of the RSHQ Act is to establish a revised regulatory regime for resources safety and health in Queensland that:

- gives rise to worker trust;
- ensures appropriate independence and transparency; and
- enhances independent oversight of the performance of the regulator.

The RSHQ Act establishes a new and independent:

- regulator that will be named Resources Safety and Health Queensland; and
- Commissioner for Resources Safety and Health.

The RSHQ Act will also allocate responsibility for the prosecution of 'serious offences' to the existing, independent Office of the Work Health and Safety Prosecutor of Queensland.

Relevantly, the RSHQ Act will affect resource businesses and other duty-holders that are covered by the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), which will be amended. Other legislation that will also be amended includes:

- the *Coal Mining Safety and Health Act 1999* (Qld);
- the *Mining and Quarrying Safety and Health Act 1999* (Qld); and
- the *Explosives Act 1999* (Qld).

Legal, risk and safety management teams need to be aware of these regulatory reforms that will commence on 1 July 2020 especially those individuals who may be tasked with making safety incident notifications to RSHQ or navigating other interactions with RSHQ, or the WHS Prosecutor.

Industry stakeholders should make their officers and workers aware of these newly incoming regulatory bodies as they relate to the management of safety and health matters and legal compliance.

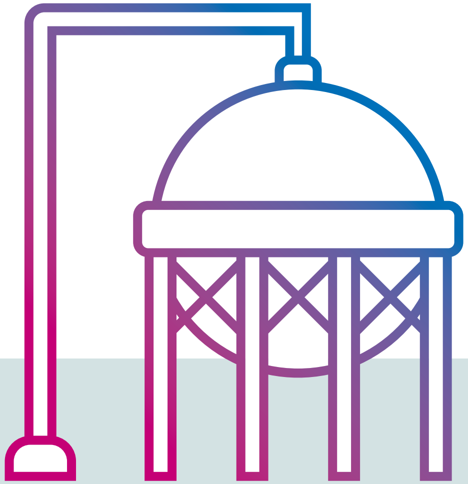
For further details on the key provisions of the Act please refer to our full article here.

Hydrogen

In November 2019, the COAG Energy Council released Australia's National Hydrogen Strategy. The Strategy provides a framework for leveraging Australia's significant natural resources and experience with resource development to develop a strong domestic hydrogen sector, which in turn will allow us to become a leading global exporter of hydrogen. A key element of the framework will be the development of hydrogen hubs – clusters of large scale demand – in places like ports, cities and remote areas, and the pursuit of the use of hydrogen in transport, industry and existing gas distribution networks. The focus at this stage is on providing targeted support for priority pilots, trials and demonstration projects and assessing supply chain infrastructure needs. This is reflected in the existing projects currently being developed in Australia.

These include:

- Jemena's Western Sydney Green Gas Project, which will convert solar and wind power into hydrogen (via electrolysis) which will then be stored for use in the existing Jemena Gas Network, the biggest gas distribution network in Australia;
- the multi-billion dollar H2-Hub Gladstone facility that will produce renewable hydrogen for use as an energy source and as feedstock in the production of ammonia;
- ATCO's Clean Energy Innovation Hub in Western Australia, a $3.3 million research and development facility which includes a demonstration project involving the storage and use of hydrogen produced by solar powered electrolysis, and the injection of blended hydrogen into a demonstration gas network;
- Australian Gas Networks' Hydrogen Park in South Australia, a $11.4 million demonstration project involving the supply of a blend of 5% renewable hydrogen in natural gas, delivered to customers through the existing gas network; and
- Engie and Yara Pilbara's demonstration-scale renewable hydrogen and ammonia production project. ENGIE and Yara Pilbara are together investigating the feasibility of producing hydrogen to convert into ammonia which will be sold into domestic and international markets.



'H2 under $2' (hydrogen under $2 per kilogram)

Ultimately, the Strategy includes as its measures of success for the hydrogen market in Australia, being one of the top three exporters of hydrogen to Asian markets, having an excellent safety track record, providing economic benefits and jobs in Australia and having a robust, internationally accepted, provenance certification scheme in place. In early progress towards these goals, Australia has signed the Joint Statement on Cooperation on Hydrogen and Fuel Cells with Japan which encourages Australia and Japan to exchange views on national hydrogen strategies and to shape the global hydrogen market regulations. A letter of intent has also been entered into with South Korea regarding the intent to collaborate and to develop a hydrogen action plan.

From a legal perspective, the Commonwealth Government is focused on removing market barriers while maintaining safety and environment protections with a nationally consistent regulatory framework. States are now considering whether regulatory reform is required to address the growing hydrogen industry and are developing their own investment programs and strategies to encourage investment and innovation.

Energy Minister Angus Taylor has provided that the first specific goal will be 'H2 under $2' (hydrogen under $2 per kilogram). BloombergNEF's recently published Hydrogen Economy Outlook predicts that Australia could deliver renewable hydrogen at US$1.48 per kilogram by 2030 and 84c/kg by 2050, and that hydrogen produced for US$0.8 to US$1.6/kg is equivalent to gas priced at US$6–12/MMBtu. According to BloombergNEF, this means that renewable hydrogen could cut the global greenhouse gas emissions of the fossil fuel industry by more than a third, while remaining competitive with natural gas from a cost perspective. To achieve this, significant subsidies and investments in hydrogen infrastructure will be required. However, the future is bright for hydrogen.

Amendments to PNG Mining Act and Oil and Gas Act

INDUSTRY CHANGES AFOOT

The Parliament of PNG has passed a series of amendments targeting the mining, oil and gas industries. We examine the significance of these amendments and the likely next steps.

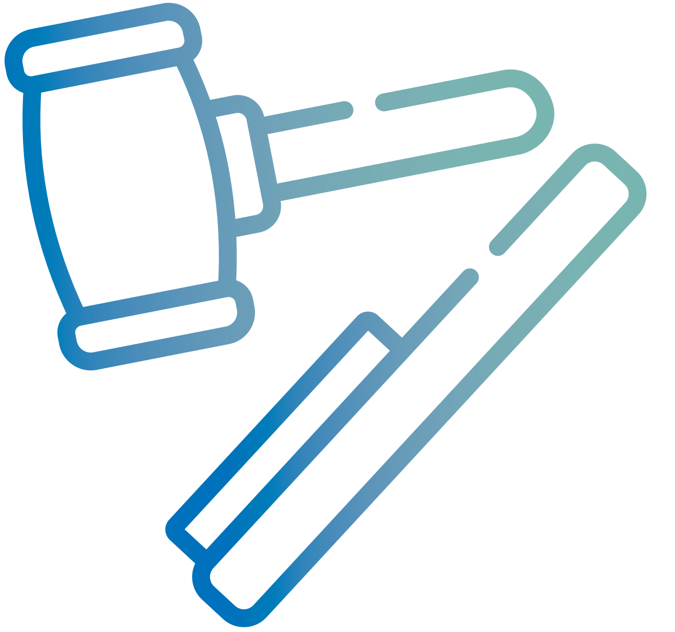
IN BRIEF

On 10 June 2020, the Parliament of PNG passed the Mining (Amendment) Bill 2020 (the ***Mining Amendments)*** and the Oil and Gas (Amendment) Bill 2020 (the ***O&G Amendments***). The Bills amend the *Mining Act 1992* and the *Oil and Gas Act 1998* respectively. The amendments will become operative upon certification by the Speaker of Parliament.

The Mining Amendments introduce a 'live data' reporting obligation and give State entities priority in tenement applications over 'reserved land'. The O&G Amendments give the Minister greater flexibility in determining whether to grant or refuse petroleum development licences (***PDLs***) and affect the sanctity of petroleum agreements and gas agreements.

KEY TAKEAWAYS FOR THE MINING INDUSTRY

- **Land reservation**
  The State is given the power to reserve land that is the subject of an expired, cancelled, surrendered or relinquished tenement. Upon the revocation or expiry of the tenement, wholly or majority-owned State entities are given priority over other applicants for the grant of new tenure over the reserved land. The Mining Amendments also provide that:
  - land reservations do not affect pre-existing applications; and
  - disputes regarding reserved land provisions must be settled in PNG under PNG laws.
- **Live data reporting**
  Every operating mine in PNG must provide 'live data' on mineral production, extraction and sales, and must submit all mineral and geological data and information to the Mineral Resources Authority. These obligations are in addition to extensive information rights of the State already in force. The limits of the new obligations are not clear, which is concerning given that failure to comply with the obligations is an offence. This new regime raises both confidentiality and logistical issues. The State may view this new disclosure regime as a natural corollary of the land reservation mechanism.



KEY TAKEAWAYS FOR THE OIL AND GAS INDUSTRY

- **Minimum return for the State**
  Where petroleum production under a PDL proposal would likely be of 'national significance', the Minister may impose a 'minimum expected level of return' for the State on the licensee. What the level of return might be, how it would be calculated and how it would be enforced are not prescribed in the O&G Amendments. Existing PDL applicants may be subject to these amendments if the Minister has not yet granted their PDL.
- **Refusal of PDLs**
  The Minister may refuse to grant a PDL, even where a current licensee has discovered petroleum and the licensee submitted a valid application. Further, the O&G Amendments:
  - reduce the procedural fairness and transparency associated with a refusal in these circumstances (eg the Minister is no longer required to give the applicant the opportunity to consult with the Minister regarding a proposed refusal); and
  - no longer contemplate the applicant being able to seek arbitration, even where an arbitration regime has previously been agreed between the applicant and the State.

  Again, existing PDL applicants may be subject to these amendments if the Minister has not yet granted their PDL.

  These amendments create uncertainty for licensees as to:
  - whether a PDL will be granted if they make a commercial discovery; and
  - the fiscal regime that would apply to any future development if a PDL were granted.
- **Enfeebled petroleum agreements and gas agreements**
  The scope of petroleum agreements and gas agreements has been reduced, so that these agreements can no longer be used to regulate the application of laws to a project (eg to fix a fiscal regime for the life of a project).

  The State is no longer strictly required to comply with its obligations under agreements with applicants, and before doing so must consider certain matters.

  While the O&G Amendments suggest that existing petroleum agreements and gas agreements are not affected by these amendments, it is unclear what is to happen where such an agreement specifically regulates the grant of PDLs or arbitration. That is, it is not clear which prevails between the existing agreement and the new provisions of the Act, which makes the grant of PDLs less certain and reduce the applicant's recourse where the grant of a PDL is refused.

NEXT STEPS

- The Mining Amendments do not implement the more substantial suite of amendments that were foreshadowed in the draft Mining Bill 2019. Accordingly, it is possible the Mining Amendments are only the first tranche of a broader reform package, and additional reforms, including those in the draft Mining Bill 2019, may still be passed.
- In his introduction of the O&G Amendments to Parliament, Minister Kua stated he would be introducing a new bill to move away from the current concession-based licensing system to a production-sharing arrangement, for both the mining and petroleum industries. While consistent with previous comments of the Minister, this would be a fundamental change to resource development in PNG.

A snapshot of our oil and gas experience

As advisors to the oil and gas sector, we work closely with our clients to help them navigate market uncertainty. From regulatory issues shaped by geopolitical stress to environmental sustainability, we work with clients across the project lifecycle. We have played a significant role in almost all of the major oil and gas projects in Australia, and many of the pre-eminent oil and gas projects in the Asia-Pacific region . A few examples include:

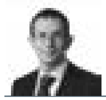
- **Alcoa, Alinta and DUET consortium** – advised on the acquisition of the Dampier to Bunbury Natural Gas Pipeline in Western Australia and the subsequent acquisition by DUET Investment Holdings Limited on its acquisition of Alcoa's 20% interest in the Dampier to Bunbury Natural Gas Pipeline.
- **Arrow Energy** – advised Shell on the joint $3.4 billion acquisition (with PetroChina) of Arrow Energy.
- **AWE** – advised AWE on the $602 million takeover by Mitsui.
- **Beach Energy** – advised Beach on the acquisition finance arrangements for its$1.585 billion acquisition of Lattice Energy.
- **CKI** – advised a consortium led by CKI Infrastructure (CKI) on its proposed A$13 billion acquisition of APA Group.
- **Crux Project** – advising for Osaka Gas in relation to its interest in the Crux Project, including the proposed FLNG tolling arrangements with Prelude.
- **ExxonMobil (PNG Projects)** – advising on the P'nyang LNG, PNG LNG and Papua LNG Projects and on the development and financing of the PNG LNG project.
- **Gladstone LNG** – advised TOTAL on the acquisition of its interest in the GLNG Project.
- **Gorgon LNG Project** – advised ExxonMobil in relation to the Gorgon LNG project, including joint venture, unitisation and associated project documentation and LNG off-take arrangements.
- **Ichthys LNG Project** – advised INPEX on the financing, reorganisation and restructure of the Ichthys LNG Project and on various equity sell-downs.
- **Ironbark Project** – advising Cue Energy on its Ironbark Project including various farm-in and option arrangements with BP, Beach Energy and New Zealand Oil & Gas.

- **JERA Co., Inc.** – advised on the Australian aspects of the formation of JERA Co. Inc., a 50/50 joint venture between Chubu and TEPCO.
- **Macquarie** – advised Macquarie as co-owner of its interest in Quadrant Energy, acquired by Santos for US$2.15 billion.
- **NSW LNG Receiving Terminal** – advising AIE Pty Ltd, including on the FSRU time charter party, which if developed, will be one of the first LNG regasification projects in Australia.
- **Oil Search** – advised Oil Search on its $1.16 billion placement and accelerated renounceable entitlement offer.
- **Pluto LNG hub expansion** – advising Woodside (operator) in relation to its US$10 billion expansion project.
- **QCLNG Pipeline** – advised APA Group on the acquisition of the QCLNG pipeline.
- **Santos** – advising on its acquisition of ConocoPhillips' northern Australia and Timor-Leste assets for US$1.265 billion, together with a US$200 million contingent payment and potential subsequent sell-downs.
- **Scarborough LNG Project** – advising Woodside on all aspects of its proposed development of the Scarborough Project, including the recent equity alignment with BHP.
- **Shell** – advised Shell on its $70 billion merger with BG Group in respect of Australian foreign investment and competition approvals.

Please contact our team to find out more.

Contacts

OIL & GAS



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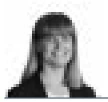

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