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Coordination Agreements for Coal Seam Gas

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SUMMARY

On I January 2005, a new, comprehensive regime commenced in Queensland in relation to the interplay of coal mining and coal seam gas extraction. Like most new legislative regimes, the architecture is quite complex and, at times, seems quite daunting. The experience to date has been one of a well-meaning bureaucracy coming to grips with the regime and an eager though anxious industry trying to plough through the requirements of the regime while otherwise meeting the very tight deadlines associated with an expanding resources industry.

INTRODUCTION

There have been a couple of givens in Australia in terms of the resources sector, in general, and Queensland, in particular. One of those givens is that we are rich in natural resources. Another of those givens is that we need to continue to develop those natural resources if we are to provide the mainstay for high levels of employment and to fund critical social policies (such as health and education). More recently, those givens have undergone refinement. The first of those refinements contemplates that the development of our natural resources in an environmentally friendly manner means more than just in respect of the immediate site but also to ensure that broader community goals are met (such as the reduction in greenhouse gas emissions). The second of those refinements contemplates that economic development means more than just "first in, best dressed" but rather that optimisation occurs when there is a competition for development of natural resources at a specific site.

In terms of Queensland, these refinements have found their natural expression in the "new P&G regime".[1] This paper focuses upon a pixel in the picture

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[1] For the purposes of this paper, the new P&G regime refers to the raft of changes to Queensland's mining and petroleum legislation, and which is now principally contained

contemplated by the new P&G regime. Namely, the need for approved coordination arrangements to regulate the activities of the relevant tenure holders where there is an overlap of a petroleum lease for the extraction of coal seam gas[2] and a mining lease for the mining of coal.

POLICY BACKGROUND TO COORDINATION ARRANGEMENTS

A confluence of forces form the policy background to coordination arrangements under the new P&G regime in Queensland. These forces are well described by Susan Johnston in a previous edition of the AMPLA Journal[3] and include:

(a) from a coal mining perspective, CSG is primarily recognised as a significant safety hazard to underground miners and ordinarily is vented (or flared). Removal of CSG has therefore tended to be treated as a sunk cost of an underground coal mining operation rather than an activity with commercial value;

(b) conversely, the extraction of CSG has increased as a specific energy commodity in its own right and it has also been acknowledged that there are considerable reserves of CSG contained in what have been the traditional black coal areas of Eastern Australia; and

(c) the Queensland Government has adopted an energy policy which has given the commercial extraction of CSG a further boost.[4]

During the course of her earlier article, Susan Johnston observed:

> "The growth in commercial interest in CSG development has set the scene for possible disputes between those wanting to extract CSG from coal seams in stand-alone gas operations; and those wanting to primarily mine coal, (and in the process extract CSG for safety purposes). It is highly likely that at

in the *Petroleum & Gas (Production and Safety) Act 2004* (P&G Act) and the *Mineral Resources Act 1989* (MRA).

[2] For the purposes of this paper, it will be referred to as "CSG".

[3] S Johnston, "Whose Right? The Adequacy of the Law Governing Coal Seam Gas Development in Queensland" (2001) 20 AMPLJ 258.

[4] In May 2000, the Queensland Government released *Queensland Energy Policy – A Cleaner Energy Strategy*. To the extent now relevant, that policy provides:

"The Queensland Government's objectives are to:

- diversify the State's energy mix towards the greater use of gas and renewables; facilitate the supply of abundant and competitively priced gas in Queensland;
- facilitate the development of gas fired power stations, particularly a base load power station in Townsville; and
- reduce the growth in greenhouse gases.

Key Initiatives

The key initiatives in the Cleaner Energy Strategy are:

- A licence scheme which will require electricity retailers that operate in Queensland to source 15 per cent of their electricity sold in Queensland from gas-fired or renewable generation from 1 January 2005 …"

some future point 'there may be two separate parties wishing to extract different resources, ie coal and methane [CSG] from the same area'.

Moreover there would appear to be growing potential for two separate parties to seek to extract the same resource – CSG – for different purposes in the same area.

In such a climate, rights to explore for and extract CSG need to be clearly stated, consistently administered, and commonly understood. If the development of both the coal and the CSG industries is to proceed a 'secure and clear investment climate' needs to be provided. Unfortunately, as government, coal industry, and gas industry operators all acknowledge, the current legal regime governing the development of CSG in Queensland does not provide the security and transparency needed. Under the existing status 'the rights to explore and produce coal seam gas are unclear and related Departmental policies and administrative practices have been inconsistent'."[5]

To further put this paper in context, the possible interplay between coal mining and CSG extraction can be represented as follows:

Overlapping EPC / ATP	Overlapping EPC / PL
Overlapping ML / ATP	Overlapping ML / PL

Putting aside the possibility of multiple tenements of one kind or another, this paper is concerned with the interplay of two production tenements (that is, the overlap between a coal-mining lease and a petroleum lease). In fairness, however, it is probably the hardest overlap to resolve, because the issues of optimisation and safety are at their most acute.

THE LEGISLATIVE FRAMEWORK FOR COORDINATION ARRANGEMENTS

When introducing the then Petroleum and Gas (Production & Safety) Bill 2004 the then Minister for Natural Resources, Mines and Energy, the Hon Stephen Robertson, observed:[6]

> "Industry will receive a major boost from these laws not only through full competition in awarding exploration tenure but through the benefits to our rapidly growing coal seam gas industry as they implement the Beattie government's coal seam gas regime, which will clearly define the legal rights, obligations and priorities for developing coexisting petroleum, coal, and coal seam gas resources."

and later:

[5] Johnson, op cit n 3, at 261.

[6] Queensland *Hansard*, 12 May 2004 at 897 and 898.

> "It is a regime that will create greater certainty for explorers and developers to invest in the industry as well as provide clear rules, rights and obligations for the coal and petroleum industries to work cooperatively. Parties from the two sectors will need to cooperate, consult and negotiate to reach mutually agreeable solutions that benefit both, respect the existing rights of each, and lead to the coordinated development of both resources. When both parties reach agreement, overlapping leases and other tenure applications can be granted with clear definition rights. That means the applications can proceed quickly, without unnecessary delays or barriers. If agreement cannot be reached, then the framework allows the Land and Resources Tribunal to recommend the best outcome in the interests of resource management – decisions that will be open, transparent, and available for public scrutiny."

As matters currently stand, the jury is still out on whether the new P&G regime has actually fulfilled the potential identified for it in the Minister's Second Reading Speech.

For the sake of brevity, set out below is the legislative framework for a coordination arrangement from the perspective of a coal miner. For the purposes of this paper, there are two entrances to the same room for a coordination arrangement: one via the MRA in a case of an application for a coal-mining lease and one via the P&G Act in the case of an application for a petroleum lease, and where for each of which there is an existing or overlapping tenement held by a petroleum or coal-mining interest (as the case may be).

For a coal miner, Pt 7AA of the MRA contains the primary provisions for the interplay between coal mining and CSG extraction.[7] The main purposes of Pt 7AA are set out in s 318A of the MRA. More particularly, Div 5 of Pt 7AA of the MRA deals with obtaining a coal-mining lease over land in the area of a petroleum lease (and in circumstances where the application for the coal-mining lease is other than by or jointly with the petroleum leaseholder).[8] Importantly, in these circumstances, a coordination arrangement is not the only requirement for the application for the coal-mining lease.[9] An applicant for a coal-mining lease must, within 10 business days after lodging the application, give the petroleum leaseholder a copy of the application.[10] After receiving the copy of the application, the petroleum leaseholder must use reasonable attempts to reach a coordination agreement with the applicant for the coal-mining lease in relation to particular matters.[11]

[7] Conversely, Ch 3 of the P&G Act contains the primary provisions for the interplay with coal.

[8] See s 318BW of the MRA.

[9] There are also the additional requirements of the CSG statement and a proposed development plan, see s 318BX of the MRA.

[10] See s 318C of the MRA.

[11] More particularly, s 318CA provides:

> "(1) The petroleum lease holder must, after receiving the copy of the application, use reasonable attempts to reach a coordination arrangement with the applicant about

In the event that the parties do not reach a coordination arrangement, or if a coordination arrangement is reached but it is not approved by the Minister, there is effectively a road block which is set out in s 318CB of the MRA. Ultimately, it may result in the application for the coal-mining lease being rejected.

By way of summary to this point, in circumstances where there is an application for a coal-mining lease in respect of which there is an existing or overlapping petroleum lease, unless there is an approved coordination arrangement the application for the coal-mining lease will not progress and may ultimately be rejected.

Having identified that a coordination arrangement is required, it is necessary to ascertain what constitutes a coordination arrangement. Section 318AJ of the MRA provides that a coordination arrangement is a coordination arrangement under the P&G Act.

Schedule 2 of the P&G Act defines a coordination arrangement as an arrangement under s 234 of the P&G Act that, under s 236 of the P&G Act, has taken effect. Section 234(1) of the P&G Act provides that a petroleum lease holder and an applicant for a coal mining lease may make a coordination arrangement about particular matters. Section 234(2) provides that the matters in respect of which the parties may make a coordination arrangement are:

> "(a) the orderly –
>
> (i) production of petroleum from a natural underground reservoir under more than 1 of the leases; or
>
> (ii) carrying out of an authorised activity for any of the leases by any party to the arrangement; and
>
> (b) petroleum production for more than 1 natural underground reservoir under more than 1 of the leases."

Importantly though, a coordination arrangement has no effect unless it is approved by the Minister under s 236 of the P&G Act. To the extent relevant, s 236 (1) provides:

> "The Minister may approve the proposed coordination arrangement only if –
>
> (a) the Minister is satisfied –
>
> (i) the arrangement is in the public interest; and
>
> (ii) any inconsistency between the arrangement and a condition of a relevant lease and any sublease provided for under the arrangement is appropriate; and
>
> the following matters that provides the best resource use outcome without significantly affecting the parties' rights or interests –
>
> (a) coal or oil shale mining and any incidental coal seam gas mining under the proposed mining lease;
>
> (b) petroleum production under the petroleum lease for the land.
>
> (2) However, the obligation under subsection (1) applies only to the extent that a coordination arrangement is commercially and technically feasible for the petroleum lease holder."

(iii) if the arrangement applies to land that is in the area of a coal or oil shale mining tenement and in the area of a petroleum lease or 1923 Act lease – the arrangement clearly identifies the safety responsibilities of each party to the arrangement in relation to the land; and

(b) for an application required to be accompanied by a proposed later development plan for a relevant lease- the proposed plan has been approved; and

(c) the arrangement is consistent with –

(i) the purpose of this Act; and

(ii) if any relevant lease is a mining lease-the purposes of chapter 3 and the objectives of the Mineral Resources Act."

As matters currently stand, the Minister has not issued any guidelines as to the matters that will be considered for the purposes of s 236. Nevertheless, the critical elements appear to be:

(a) it must be in the public interest (this is not defined in the P&G Act, but surprisingly it is defined in the MRA);[12]

(b) on a mining lease/petroleum overlap, the safety responsibilities of each party to the coordination arrangement must be clearly identified;

(c) on a general level, the coordination arrangement must be consistent with the purposes of the P&G Act;[13] and

(d) on a specific level, the coordination arrangement must be consistent with the purposes of Ch 3 of the P&G Act[14] and the purposes of the MRA.[15]

While those various provisions contain a range of indicia, they can be summarised as:

(a) safety;

(b) optimisation; and

(c) ecologically sustainable development.

In other words, they are the indicia which have been previously been identified as forming the policy background to coordination arrangements. In saying that, however, while there is now a legislative framework, it has not necessarily provided an appropriate level of certainty about an outcome.

Finally, it bears noting that divorce in terms of a coordination arrangement comes at a very high price. In short, a coordination arrangement must remain current for the life of the relevant tenements and, if it ceases, both parties must cease all activities that were relevant to the coordination arrangement.[16]

[12] See s 318AK of the MRA.
[13] As to which, see s 3 of the P&G Act.
[14] As to which, see s 295 of the P&G Act.
[15] As to which, see s 2 of the MRA.
[16] See s 318CT of the MRA and s 365 of the P&G Act.

SOME OBSERVATIONS ABOUT COORDINATION ARRANGEMENTS IN QUEENSLAND

Although the P&G regime only commenced on 1 January 2005, it is possible to make some initial observations about coordination arrangements in Queensland.

In no particular order, they include:

(a) the principles which underlie the requirement for a coordination arrangement are those that apply ordinarily to a unitisation agreement, which are more common to petroleum producers. Indeed, a unitisation agreement, which is concerned with orderly production and sharing of petroleum amongst composite petroleum interests, is a coordination arrangement by another name. A debate which has tended to flare from time to time in relation to coordination arrangements is whether primacy should be given to the rights of the interest holders (in terms of their competing interests) or the State (in terms of the optimisation of the resources involved). While that debate undoubtedly has a rational foundation, it seems equally difficult not to concede that where competing interests are willing to agree on the commercial use of the relevant resources then optimisation has occurred. In terms of Queensland though, it is too early to tell whether primacy will be given to the State second guessing the parties in order to achieve optimisation or the parties being able to agree;

(b) like any new legislative regime which introduces new concepts (as opposed to merely reformulating or refining existing concepts), the P&G regime is forcing all affected by it to educate themselves and to adjust their expectations and behaviours. Principally, it affects coal miners and gas producers (whether applicants or holders) and the bureaucracy whose task it is to administer the P&G regime. To put it in context, at the time of writing this paper, there has only been one (1) single coordination arrangement approved (although admittedly others are close), and this at a time when the coal and gas industries are "booming";

(c) having regard to it being a new legislative regime which has introduced new concepts, and given how such regimes are ordinarily allowed to evolve, although slight "tinkering" may occur, those affected should not anticipate that radical changes will be made to the P&G regime, either in the short term (as the nostrum invoked will be that "industry should give it a chance to develop") or the longer term (as the nostrum invoked will be that "the smart players in the resources industry have embraced it and it is just the hard heads who never were going to embrace it who have not");

(d) one of the virtues of the regulatory regimes that affect the resources industry in Queensland is that they contemplate "parallel processing". That is, generally speaking, an applicant can comply with the requirements of two regimes simultaneously. Nevertheless, a particular flaw that currently exists in the P&G regime in respect of coordination arrangements is the inability for such "parallel processing".[17] This is the consequence of the operation of s 318CB

[17] It is acknowledged that, at the time of writing this paper, there will be "tinkering" to the P&G regime to address this flaw.

of the MRA and s 350 of the P&G Act. In short, those provisions prevent the relevant parties consenting to the relevant application proceeding, thereby enabling the balance of the application process to continue, on the basis that the grant of the mining lease or petroleum lease will only occur after a coordination arrangement has been approved. As noted in the course of this paper, as matters currently stand, there is simply a roadblock. That position can be contrasted with the position that exists for the treatment of native title or the determination of other land holder compensation;

(e) depending upon one's individual preference for prescription as opposed to open-ended discretion, the decision-making process for ministerial approval of a coordination arrangement is either a nightmare or a dream come true. Strangely, and as noted above, the public interest, which is a cornerstone to the process for ministerial approval of a coordination arrangement, is not defined in the P&G Act, but is defined in the MRA (which is unusual, in a sense, on another level as well). These concepts could be better aligned by clarifying the indicia of the public interest for the purposes of the P&G Act;

(f) experience to date suggests that a distinction is being drawn between the interplay between CSG extraction and coal mining by open-cut method as opposed to coal mining by underground method. Largely, this is because CSG extraction is not economic in the seams which are sought for open-cut mining. In addition, when CSG extraction occurs in lower seams than those subject to open-cut mining, the two operations can be more easily and practically separated. Conversely, by definition, with underground mining, both these issues (and as a consequence, optimisation) are more challenging;

(g) in terms of the broad architecture of coordination arrangements, it has as its elements:

  (i) commercial – which deals with such issues as the sharing of the operational and capital costs associated with degassing/extraction of CSG, the sharing of costs for rehabilitation and access to the relevant land and compensation for either the loss of access to a resource, delays in obtaining access to a resource or accelerated access to a resource;

  (ii) operational – which deals with the interplay of the relevant production activities, such as the location of infrastructure, processes to enable day to day activities to occur and the sharing of data;

  (iii) regulatory – which deals with the relevant consents to enable the various activities to occur and the process to be followed to enable the amendment of the coordination arrangement;

  (iv) safety – which deals with both the big picture (to ensure a comprehensible safety system) and on a smaller scale (to ensure a comprehensive safety system) – to ensure the relevant activities occur safely; and

  (v) miscellaneous – which deals with a raft of other issues but, most importantly, coal formation water (which is a by-product of CSG extraction and, in circumstances where there is a limited water available, may have a value to a coal miner) and dispute resolution; and

(h) finally, coordination arrangements are premised upon the basis that the relevant parties will reach agreement. While there are triggers to require the dominant party (that is, the interest holder that was the "first in")[18] to negotiate, time will tell whether there needs to be more robust requirements. As matters currently stand, in the event that at coordination arrangement is not reached, it is almost a presumption that the interest holder that was "second in" will be negated in the progress of that application, either actively or simply by delay.[19] In the absence of any preceding commercial arrangements between the parties, under which the interest holder that was first in obtained its interest, there is nothing to compel the interest holder that was first in to negotiate. The capacity to obtain some sort of declaratory relief in terms of whether the interest holder that was first in has complied with the relevant legislative requirements to negotiate or, even more unlikely, requiring the Minister to force the relinquishment of the dominant tenement is an Achilles heel of the P&G regime. Nevertheless, if the broader industry is unable to inculcate a culture that encourages relevant parties to reach agreements, it will have little to support any opposition it may have if, beyond "tinkering", at some stage in the future the P&G regime undergoes an overhaul which ultimately "compels" agreements.

CONCLUSION

Brave new worlds are, more often than not, worlds which exist immediately outside our comfort zone (either because of experience or competence). While the new P&G regime in Queensland raises a number of immediate challenges for industry and governments alike, on another level, it is nothing more than the continued refinement and articulation of a (more) sophisticated framework for resource development in Queensland. Industry should, and must, remain receptive to the change it represents, because it is not so much a question of coping with this particular change but rather developing a culture that acknowledges and continues to accept change as an ongoing phenomenon.

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[18] See ss 318CA and 318CW of the MRA and ss 349 and 366 of the P&G Act.
[19] See s 318CB of the MRA and s 350 of the P&G Act.