ashurst

Petroleum in Australia

An introduction for investors

2015

Foreword

We are pleased to publish *Petroleum in Australia – An introduction for investors*.

The Australian petroleum sector is important to Australia's economy and offers significant opportunities for investors.

Strong and substantial growth in the Asia Pacific economies has created significant trade and investment flows between the region and the resources rich Australian continent. The high level of interest shown in the petroleum sector from China, India and Japan, in particular, has been an impetus for us developing this guide. We have a strong commitment to the Asia Pacific region and our regional clients. Ashurst has offices in Singapore, Hong Kong, Beijing, Shanghai and Tokyo and an associated office in Jakarta.

The purpose of this guide is to assist you, as a prospective investor, to gain a better understanding of:

- Australia's legal and regulatory petroleum framework; and
- practical aspects of Australia's petroleum industry.

Ashurst's Energy and Resources practice is recognised as one of the best in the region. Our expertise in the sector is supported by experience in related areas such as infrastructure, engineering and construction, native title, project finance, industrial relations, corporate, mergers and acquisitions, litigation and dispute resolution, taxation and property.

Our considerable experience in assisting our regional clients on their Australian petroleum investments, combined with our strong commitment to client service, means we are the legal advisor who can assist you and your team to achieve your goals.

We wish you every success for your business ventures in Australia.

Peter Vaughan
Global Co-head – Oil and Gas, Ashurst

Contents

Introduction 4

Chapter 1 – Australia's lawmakers 5

Onshore petroleum is largely covered by State laws, while offshore petroleum is largely governed by Commonwealth laws (although State offshore areas are governed by State laws).

Chapter 2 – Petroleum titles 6

Governments issue titles granting various rights to titleholders, including rights to explore for, or produce, petroleum. Different licences are required for different stages of a petroleum project, from exploration to production.

Chapter 3 – Coal seam gas regime 10

Queensland's coal seam gas regime is described as the most developed legislation in this area in Australia.

Chapter 4 – Exploration and production regime – offshore 14

Commonwealth legislation establishes a statutory regime governing offshore petroleum and greenhouse gas storage operations conducted in all adjacent areas beyond the limits of coastal waters, to the point at which international waters start.

Chapter 5 – Holding petroleum interests in Australia 16

Petroleum interests in Australia are often held by companies through joint ventures. This chapter describes the different forms of joint ventures.

Chapter 6 – Royalties and taxes 20

Australian petroleum projects are subject to a range of different taxes which may be imposed by the Commonwealth or the States and Territories, including royalties, income tax, withholding tax, petroleum resource rent tax, goods and services tax, oil excise and stamp duty.

Chapter 7 – Land access 26

Petroleum projects require access to land, which must be obtained separately.

Chapter 8 – Native title and cultural heritage 28

Land required for petroleum projects may be subject to native title and cultural heritage laws. Access negotiations will then be required.

Chapter 9 – Access to infrastructure 32

Access to significant infrastructure, both publicly and privately owned, is subject to both Commonwealth and State regulation in Australia.

Chapter 10 – Environmental law 34

Each State and Territory has environmental laws, and regulators who oversee the impact of petroleum activities. In addition, the Commonwealth regulates certain aspects of environmental law.

Chapter 11 – Industrial relations, employee relations, and workplace health and safety 38

An employer in Australia must navigate a layered safety net of minimum terms and conditions of employment. Onshore petroleum operations are subject to State or Territory workplace health and safety laws. Offshore petroleum operations are subject to Commonwealth laws.

Chapter 12 – Foreign investment approval framework 41

Foreign investment in Australian petroleum interests is subject to a Commonwealth Government approval process.

Your key contacts 44

Introduction

Australia's petroleum industry offers a diverse range of opportunities for overseas investors.

This guide highlights some of the key legal issues associated with a petroleum project of which investors should be aware. These issues often become apparent when an investor conducts due diligence with a view to acquiring petroleum assets and interests, or seeks to raise funds for petroleum projects in debt or capital markets.

The guide discusses:

- laws made by the State, Territory and Commonwealth Governments in relation to petroleum and the right to explore for and produce petroleum, both onshore and offshore;
- the different regulatory approvals required for petroleum projects, including petroleum titles, land access rights and environmental approvals;
- the different activities investors in petroleum projects may undertake, such as exploration or production, or building petroleum infrastructure;
- the most appropriate ways to structure petroleum interests, either through a company or joint venture;
- tax implications of an investment in petroleum activities, including the implications of double taxation agreements with other Governments;
- land access issues including possible compensation payments to private owners;
- complying with native title and cultural heritage laws;
- workplace health and safety issues relating to petroleum projects;
- competition issues and access to major infrastructure services; and
- regulation of foreign investment in Australia's petroleum sector.

1 Australia's lawmakers

"Australia offers international investors an effective and innovative place in which to do business."

State and Federal Governments

In 1901, the Australian Constitution established Australia as a federal system. The Australian Constitution defines the boundaries of lawmaking powers between the Commonwealth, States and Territories.

State and Territory Parliaments are subject to the Commonwealth Constitution, as well as their own Constitutions. A Commonwealth law within Commonwealth powers overrides any inconsistent State or Territory law. The third tier, Local Government, has restricted powers. Land use and development falls within its control, although on major development projects Federal, State and Territory Governments may also have authority.

Petroleum laws

Petroleum exploration and production activities in Australia are regulated by the Commonwealth, State and Territory Governments.

- State and Territory Governments have broad residual authority derived from resource ownership and State and Territory Constitutions.
- State and Territory Governments have considerable jurisdiction over petroleum resources on land situated in a State or Territory or in coastal waters generally within three nautical miles from the baseline of the territorial sea.
- The Commonwealth Government has exclusive jurisdiction over offshore petroleum resources in Commonwealth waters, which are the waters seaward of the three nautical mile limit from the baseline of the territorial sea. In addition, the Commonwealth has certain specific powers in relation to native title, environmental matters, foreign investment and taxation, which apply across all States and Territories.

The primary legislation governing offshore petroleum is the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), which governs operations conducted in all Commonwealth waters. Various State and Territory legislation govern the coastal waters adjacent to them. Each State and Territory has its own legislation covering the grant of titles to explore for and produce onshore petroleum situated within its borders.

2 Petroleum titles

"A feature of Australia's petroleum laws is that the relevant State or Territory owns the petroleum located in that State or Territory. Petroleum in Commonwealth waters is owned by the Commonwealth. The relevant Government then grants various titles to persons to allow exploration, production and other activities in relation to that petroleum."

Petroleum titles

The details of these regimes vary between jurisdictions, but have common features. All regimes comprise at least two stages: exploration and production. Some regimes include an intermediate stage allowing retention of an area after discovery until commercial production is viable.

The title granted by the relevant Government typically gives the holder the exclusive right to explore for petroleum in, or extract petroleum from, the area specified in the title, in accordance with its conditions. Where the title is over land, the title overlays the underlying land title and generally allows the title holder to enter the land for prescribed petroleum exploration and production purposes, subject to the payment of compensation to the landholder.

Royalties are payable to the relevant Government in relation to petroleum produced and sold pursuant to a title. Three specific fiscal instruments are used to raise revenues from upstream petroleum operations: royalty, crude oil excise (often described as the crude oil levy) and Petroleum Resource Rent Tax (PRRT).

Other titles may also be required and may be granted in relation to developing petroleum interests including:

- **an infrastructure licence** – which authorises construction and operation of infrastructure facilities in the licence area, such as processing facilities; and
- **a pipeline licence** – which authorises construction, ownership and operation of a petroleum transmission pipeline. Such a licence may also require obtaining access to land and consultation with Indigenous groups over native title and cultural heritage laws.

Typically, legislation in each jurisdiction sets out:

- the types of titles that may be granted;
- the processes to be followed in relation to the grant of titles (including dealing with priority issues, for example where competing applications are lodged);
- the rent and royalty payable for each type of title; and
- the processes for the revocation and surrender of titles.

The relevant law also sets out the consequences if a licence is transferred or otherwise dealt with (such as the need to notify the relevant Government agency and, in many, cases to obtain the consent of the relevant Minister or the Titles Administrator). However, the latter provisions seldom apply where there is a change in the shareholding or control of the entity that holds the title.

Types of titles

The main types of petroleum titles granted by Government agencies under legislation are summarised in the table below.

	Exploration permit	Production licence	Retention lease
Purpose	Exploration for petroleum sources	Extracting and selling petroleum from licence area	Title over petroleum discovery where recovery is not currently commercially viable
Coverage	Designated area; minimal/ limited ground disturbance	Designated area taken out of the exploration permit	Designated area taken out of the exploration permit
Period	Granted for a period specified in the relevant Commonwealth, State or Territory law (may be renewed)	Granted for a period specified in the relevant Commonwealth, State or Territory law (may be renewed)	Granted for a period specified in the relevant Commonwealth, State or Territory law (may be renewed)
Rights	Land entry Drilling, surveys and recovery on an appraisal basis Automatic right to apply for production licence over petroleum discovered within the exploration permit area	Land entry Recovery and exploration Operation of production facility (subject to obtaining an additional title) To sell petroleum recovered on condition of payment of a royalty	Exploration and recovery on an appraisal basis Protects interests of the leaseholder where production is likely to become commercially viable within 15 years of discovery
Obligations	Rent Expenditure commitments Reporting obligations	Rent and royalties To develop and commercialise discovery PRRT Reporting obligations	Rent Leaseholder may be required to carry out a works program to establish the nature/extent of the resource and/or its commercial feasibility Leaseholder may be required to re-evaluate commercial viability and apply for a production licence if the resource is determined to be commercially viable during the retention lease period

Registers and interests in titles

The laws of each State and Territory appoint an administering department and Minister to maintain registers of petroleum titles and interests. The laws of the Commonwealth appoint the Titles Administrator to maintain such registers. Some information from these registers is available to the public. The information made publicly available varies considerably between jurisdictions.

Registration of a transfer of an interest against a title on a register is not conclusive proof of ownership to that title, however it is prudent to register transfers as a failure to enter a transfer or dealing on the register may render the transfer or dealing of no force.

There is no system of indefeasible title (ie guaranteed title) by registration. If there is a flaw in the process of application for a title, a court may rule the title invalid, regardless of the registration of the title.

Verifying good title to a petroleum title generally requires a "chain of title" examination of the successive transfer and dealings in respect of that title from the date it was granted.

Title conditions

All titles may be granted subject to conditions, mainly to regulate the manner in which activities may be conducted. For example, exploration licences will typically have "minimum expenditure" conditions and an applicant may need to prove that it has the financial and technical capability to carry out the exploration work. There will also be reporting obligations, which may exist under legislation and/or conditions attaching to a title. These obligations require the title holder to provide regular reports to the relevant Government department. To obtain approval to produce petroleum, the title holder is usually required to submit a development plan and safety case to the relevant Government department. Title holders are often required to lodge security deposits when titles are granted to ensure the performance of environmental and rehabilitation obligations.

Annual rental payments are generally required under titles based on area size, and royalties must be paid based on the amount of production under a production licence.

If a title holder does not comply with the conditions of a title or an obligation set out in legislation, including the rental or royalty obligations, various compliance or enforcement tools (depending on the State or Territory) may be used. These include cancellation of the title or imposition of a penalty on the title holder.

3 Coal seam gas regime

"CSG is an increasingly important energy source in Australia."

Coal seam gas (CSG), also known as coal bed methane, is licensed as a form of petroleum under Australian legislation. It is mostly methane in composition and is typically attached to coal along its natural fractures and cleats. The gas is released when pressure on the coal seam is reduced, usually by removal of water from the coal seam.

CSG is an increasingly important energy source in Australia, particularly in Queensland, which has the highest level of production of any State or Territory. As with all other forms of petroleum, CSG in the ground is reserved to and owned by the relevant State or Territory and is subject to licensing and leasing regimes under the relevant jurisdiction.

CSG production is subject to payment of State royalties and PRRT as a form of petroleum.

Queensland's CSG regime

As Queensland has the majority of CSG production, the Queensland regime is set out in some detail here as an example.

Exploration and production of CSG in Queensland falls under the State's broader petroleum legislation, which governs the grant and management of petroleum licences and authorities, coal seam gas production, underground storage, safety and landholder issues, including compensation (CSG Regime).

Generally, the commercial extraction of CSG can only take place under a petroleum production licence (known as a petroleum lease) granted under the *Petroleum Act 1923* (Qld) (Petroleum Act) or the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (PGPS Act).

Competing interests between mining and petroleum licence holders and applicants over overlapping areas of land are a critical issue and have been the subject of recent statutory reform.

If a party wants to acquire a petroleum lease or an interest in a lease, it will need to consider whether there are any overlapping areas of land and, if so, whether there are any coordination arrangements or other cooperation agreements for the development of resources. The existence of overlapping areas of land and co-ordination arrangements may have a significant affect on the value of the project.

The following table sets out types of petroleum authorities relevant to the CSG Regime.

Authority/licence	Purpose
Authority to prospect (ATP) **(a form of exploration licence)**	Entitles holder to explore for petroleum (including CSG) and test and evaluate the feasibility of petroleum production within the area of the ATP and: • where the ATP overlaps with an existing mining lease, within the area of that overlapping mining lease (subject to the mining lease holder's written agreement); or • where the ATP overlaps with an existing coal or oil shale exploration licence, within the area of that overlapping exploration licence (subject to the coal or oil shale exploration not having commenced and the ATP not adversely affecting the coal or oil shale exploration licence). Issued following a tender process; Minister fixes the area, terms and conditions. Usually granted for a term no greater than 12 years and may be renewed if period of grant is less than 12 years. The renewal period cannot be greater than the period of the initial grant (and must not exceed 12 years). A relinquishment of the area of the ATP is required at least every four years during the term of the ATP. Relinquishment requirements are calculated as 8.33% of the area initially granted for the ATP on a yearly basis. At the end of a 12 year period, the whole of the area initially granted to the holder would have been relinquished. An ATP holder must have a work program to allow resource management decisions to be made and ensure appropriate development of the ATP. ATP must be used in conjunction with a corresponding notice of entry and compensation agreement for land access.

Authority/licence	Purpose
Petroleum lease (PL)	A form of production licence which authorises the holder to explore and produce all naturally occurring petroleum from the specified area and: • where an application is made by the ATP holder or by a person in cooperation with an existing ATP holder, it is granted subject to satisfaction of various safety, environmental, capability and development requirements; and • otherwise, is granted subject to a competitive tender process. A tender process is not available where the land that is the subject of the proposed petroleum licence is in the area of a coal or oil shale mining lease. Applications for a PL must be accompanied by a development plan detailing the nature and extent of the proposed activities. A PL is generally granted for 30 years and cannot exceed 75 sub blocks (slightly over 200 square kilometres). A PL holder is obliged to start petroleum production under the lease within two years of the lease taking effect, unless otherwise specified. A royalty is payable at 10% of wellhead value of all petroleum produced from the lease.
Potential Commercial Area (PCA)	An ATP holder may apply for a PCA if the holder of an ATP makes a petroleum discovery and the discovery is not currently commercially viable (but is likely to become commercially viable within 15 years). Upon declaration, a PCA remains part of the area of the ATP. A PCA allows its holder to evaluate potential petroleum production in the area of the declaration and assess market opportunities for the potential petroleum production. Applications for a PCA must be accompanied by an evaluation program. Maximum area of an ATP that can be declared a PCA is 75 sub blocks (slightly over 200 square kilometres).
Data acquisition authority	Permits the ATP or PL holder to enter adjacent land to conduct a geophysical survey.
Petroleum survey licence	Allows entry to land for surveying proposed petroleum pipeline routes or processing plants.
Pipeline licence	Allows for construction of petroleum transportation pipelines.
Water monitoring authority	Enables the holder of an ATP or PL to enter land not the subject of the ATP or PL to comply with, or assess the need to comply with, an obligation to restore water supply to a landowner from a bore (or compensate the landowner) where supply was unduly affected by the ATP or PL holder's activities. This authority will terminate automatically with the expiration of the ATP or PL.

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nless a person holds a mining lease (ML) granted before 31 December 2004 which includes the right to explore for or mine incidental CSG, the right to commercially extract CSG is available only by obtaining a PL. Such a lease can also be obtained by dividing an existing lease.

Overlap with mining lease holders

Overlapping tenure issues have significant implications for mining and resources industries including coal, petroleum, CSG and liquid natural gas (LNG). Recently, there has been significant legislative reform in this area with the introduction of the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (Act).

The Act is the first part of a series of reforms to give effect to the Queensland Government's plan to unify and modernise the existing resources legislation in Queensland.

If these amendments become law, the key issues for the new regime will be as follows:

- **Direct path to grant:** The Act establishes a direct path to the granting of coal and CSG production tenure. Provided all requirements for a grant are satisfied, an application for production tenure will be granted even where it overlaps an existing exploration or production tenure.
- **Right of way for coal:** The Act provides for a "right of way" for coal which grants the ML holder sole occupancy in pre-determined areas for certain periods of time. Sole occupancy will be granted where it is required for safe and efficient coal mining. In these areas the rights of the CSG tenure holder will be temporarily suspended.
  - The ML holder will only be granted sole occupancy in its Initial Mining Area (IMA) and any additional Rolling Mining Areas (RMA). The IMA is the minimum area reasonably required for 10 years of safe mining as well as any area required for surface infrastructure. RMAs are areas within the overlapping area required on a year by year basis to carry out the authorised activities.
  - Outside of the area of sole occupancy and in the remainder of the overlap area, the ML holder and CSG tenure holder will have joint occupancy. In the area of joint occupancy, the CSG tenure holder may carry out authorised activities where they are consistent with the agreed joint management plan (Plan). Both the ML holder and CSG tenure holder have a mandatory obligation under the Act to negotiate the Plan in good faith and, once agreed, comply with it.
  - The Act provides that in certain circumstances the ML holder must provide compensation to the CSG tenure holder (eg where the activities of the ML holder mean the infrastructure of the CSG tenure holder must be abandoned or replaced). The compensation is calculated by considering lost production and the cost of replacing infrastructure.
- **Information exchange:** The Act requires the ML holder and CSG tenure holder to meet at least once a year to exchange information relevant to optimising the use and development of coal and CSG resources in the overlapping area.
  - The information exchanged may include operational and development plans, infrastructure locations, timetables, environment and safety matters. All information exchanged must be kept confidential.
- **Right to negotiate bespoke agreement:** Apart from some mandatory provisions included in the Act, the ML holder and CSG tenure holder may contract out of the legislative regime and agree to their own method of development of the two resources.

Further details of the new regime will be governed by the Act's regulations, which have yet to be released.

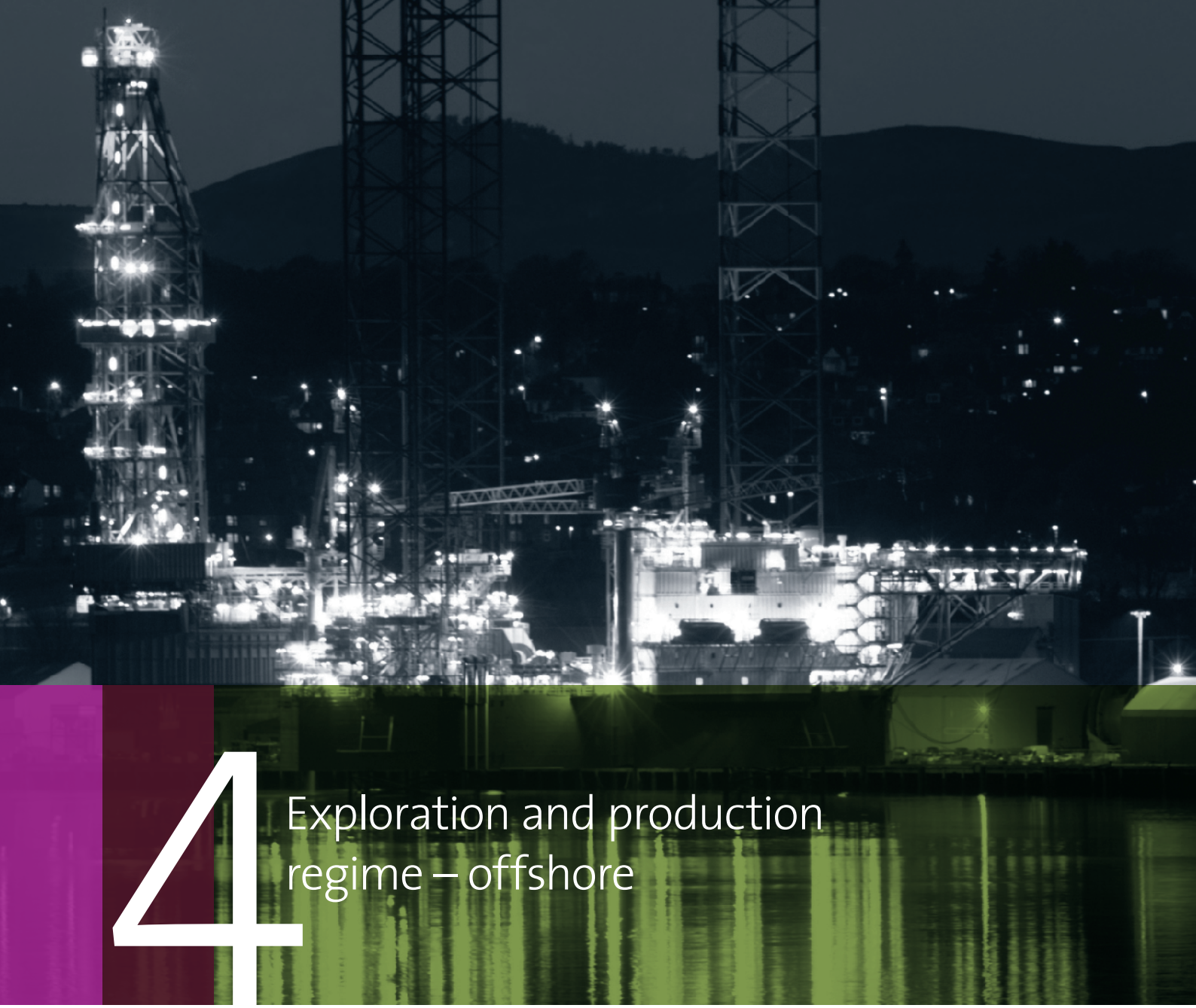
Associated water

As water generally needs to be removed from a coal seam to allow recovery of CSG, dealing with associated water production is an environmental issue which a CSG licence holder must manage at its cost. An ATP or PL holder is allowed to take or interfere with underground water on the ATP or PL which arises during the course of, or as a result of, activities that are authorised activities under the terms of the ATP or PL, for example where:

- underground water is necessarily or unavoidably taken during the drilling of a petroleum well or water observation bore; or
- underground water is necessarily or unavoidably taken during petroleum production.

The ATP or PL holder is entitled to use such water within the area of the ATP or PL for the purposes of the ATP or PL, or to supply it to an owner or occupier of the land or adjacent land for limited stock or domestic purposes. Other uses of such water are controlled by the *Water Act 2000* (Qld), the *Water Supply (Safety and Reliability) Act 2008* (Qld) and the *Environmental Protection Act 1994* (Qld).

The Government's current policy preference in relation to managing associated water includes the development of project strategies involving, for example, reinjection into the coal seam, reuse for other compatible uses or treatment to facilitate a broader range of uses.



4 Exploration and production regime – offshore

"In the event of a petroleum discovery, the holder of an exploration permit is entitled to the grant of a production licence over the block or blocks containing the petroleum reservoir."

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGSA) establishes a statutory regime governing offshore petroleum and greenhouse gas storage operations conducted in Commonwealth waters. State or Territory legislation governs coastal waters adjacent to each State or Territory, and that area is administered by the relevant Government department for that State or Territory.

Three main titles are provided for: exploration, production and retention. There is a Joint Authority for each offshore area (constituted by the responsible State Minister and the responsible Commonwealth Minister), which administers the OPGGSA on behalf of the Commonwealth and invites applications for an exploration permit over specified blocks.

Applicants then submit competing applications for the areas being released. An exploration permit is usually awarded to the applicant proposing the most extensive work program. In certain circumstances, the Joint Authority may seek cash bids rather than work program bids.

The Joint Authority may grant a petroleum exploration permit subject to whatever conditions it thinks are appropriate. Usually, an exploration permit will be granted for a term of six years and can be renewed for a further five years.

The holder of an exploration permit may engage in a wide range of exploration activities, including the drilling of wells to recover petroleum on an appraisal basis. In the event of a petroleum discovery, the holder of an exploration permit is entitled to the grant of a production licence over the block or blocks containing the petroleum reservoir. A production licence (if granted on or after 30 July 1998) remains in force as long as petroleum is produced from the licence area. If no petroleum recovery operations have been carried out at any time for a continuous five year period, the Joint Authority may terminate the production licence.

If, following a petroleum discovery, commercial production is not commercially viable, an exploration permit holder may apply for a retention lease rather than a production licence in respect of that discovery.

However, the Joint Authority may only grant a retention lease if satisfied that the relevant block does contain petroleum and that production on the applicable block or blocks is likely to become commercially viable within 15 years.

The holder of a retention lease may apply for renewal of the lease, however the Joint Authority may refuse to renew a retention lease if it is satisfied that recovery of petroleum from the lease area is commercially viable at the time. The retention lease holder may then apply for a production licence over one or more of the blocks comprising the lease area.

The offshore petroleum regime confers substantial discretionary powers on the Joint Authority relating to the:

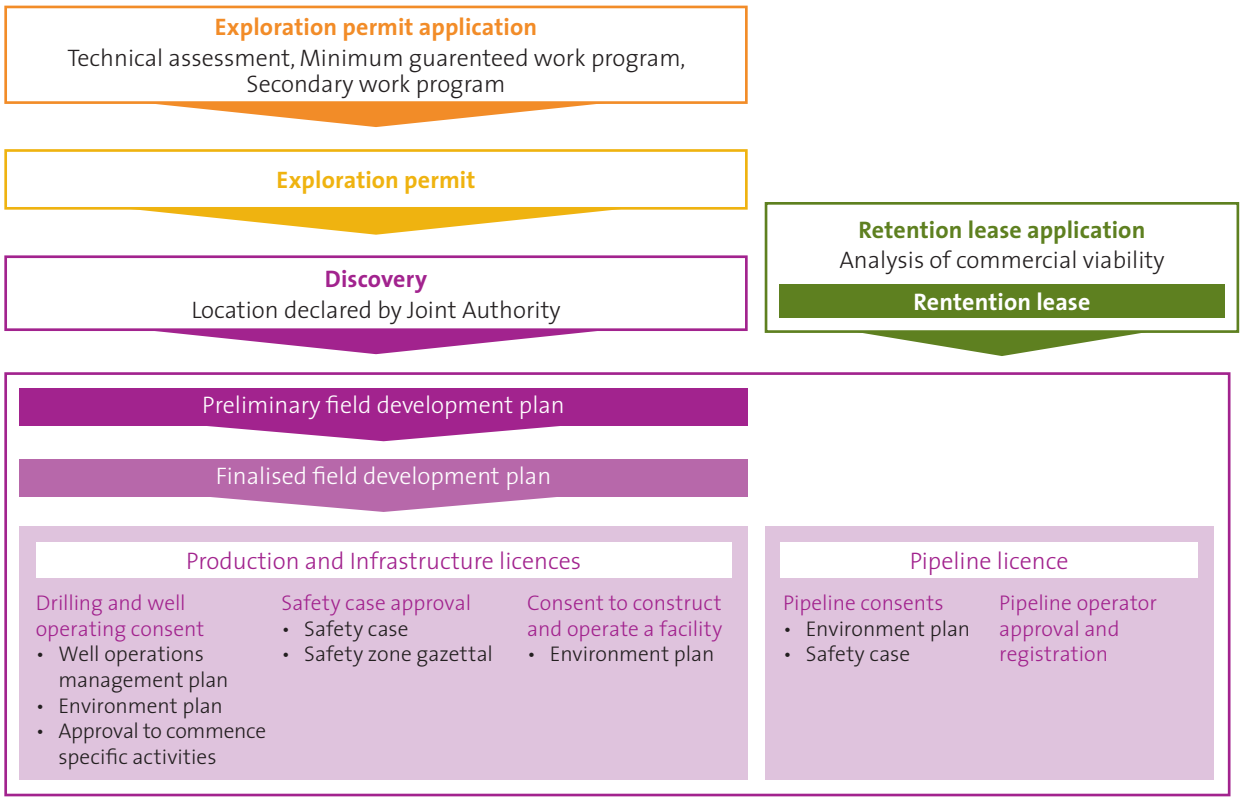
- grant of exploration permits and retention leases;
- imposition of conditions on the grant of all petroleum titles (including production licences);
- timing and extent of development expenditure;
- rates of production from any field;
- abandonment of production facilities; and
- surrender of petroleum titles.

On 1 January 2012 the role of the Titles Administrator was established. The Titles Administrator is responsible for assisting and advising the Joint Authority and the responsible Commonwealth Minister, keeping registers of titles, and data and information management.

The Titles Administrator is also responsible for the approval and registration of transfers and dealings relating to petroleum titles.

The following diagram sets out the process for granting various titles under the OPGGSA.

Key steps in the regulatory process



5 Holding petroleum interests in Australia

"Foreign entities most commonly hold interests in petroleum titles in Australia by way of a company structure or investment in a joint venture."

In Australia, Governments or their agencies rarely participate directly in petroleum ventures. Private enterprise conducts the exploration and production operations. Entities gain the right to undertake exploration and production activities through titles granted by the relevant authority under statutory regimes. Foreign entities most commonly hold interests in petroleum titles in Australia by way of a company structure or investment in a joint venture.

Joint ventures

It is common in Australia to conduct petroleum activities as part of a joint venture. Different arrangements may be required for ventures formed for various related activities (eg exploration, production and the operation of a facility).

The joint venture agreement (or joint operating agreement) states the scope, purpose and duration of the joint venture, identifies the assets committed to it, describes and quantifies the interests of the participants and provides for the operation, management and control of the venture. The agreement also covers the subscription, holding and expenditure of funds, the apportionment of liability, the consequences of default, the use and disposal of the output of the venture, the assignment of interests and withdrawal from the venture.

There are two types of joint ventures commonly used in Australia: incorporated and unincorporated joint ventures. Each structure has different legal and taxation implications, which need to be carefully considered and assessed having regard to the commercial objectives of the parties.

Incorporated joint ventures

An incorporated joint venture involves a special purpose company in which the joint venturers are shareholders. The special purpose company has a separate legal identity and usually owns the petroleum assets. A shareholders agreement between the parties is entered into which generally permits each shareholder to appoint a certain number of directors to the board of the special purpose company. The shareholders agreement, together with the company constitution and other documents (eg a management agreement) set out the key principles of how the joint venture, through the special purpose company, is to be controlled and operated.

Unincorporated joint ventures

In unincorporated joint ventures, each of the parties agree to cooperate in relation to a commercial undertaking, but the parties hold their interests and entitlements in the venture separately rather than jointly. As there is no company structure, the contract (eg the joint operating agreement) between the parties governs their relationship, the operation of the venture and their obligations to each other.

Farm-in agreements

Farm-in agreements are often used in conjunction with a joint venture structure to share the risk of the exploration and development stages of a petroleum tenement. In a typical farm-in agreement, the owner of a tenement would offer to sell part or all of its tenement to another entity in return for assistance with exploration and development. The farm-in agreement generally specifies the financial contribution to be made, or work required to be carried out, within a certain time frame in exchange for the transfer of a percentage interest in the venture.

Comparison of incorporated and unincorporated joint ventures

The following table summarises the key features of incorporated and unincorporated joint ventures.

	Incorporated joint venture	Unincorporated joint venture
Legal entity	Separate legal entity	No separate legal entity It is common in an unincorporated joint venture for the parties to appoint an operator/manager (often a participant) to act as agent for the participants
Liability	The liability of a participant as a shareholder is generally limited to the amount unpaid on its shares subject to any funding requirements under a Shareholders Agreement	Liability is usually expressed to be several not joint The liability of a participant is generally its proportionate share of the joint venture's debts and obligations
Ownership	Ownership of interest in the joint venture is held by way of shares in the joint venture company	The parties own an interest in the assets of the joint venture according to their participating interests
Income	Any profits of the joint venture company will be distributed by way of dividends Any losses of the joint venture company cannot be offset against a shareholder's own income	A party is entitled to its share of production in kind from joint venture activities The party is free to market and sell that product to third parties Any income or loss from such a sale flows directly to the participant and forms part of overall income and losses of that participant
Partnership risk	Avoids being categorised as a partnership by having a separate legal entity	If taken to be a partnership, there may be undesirable tax consequences if there is a joint receipt of income (eg participants are taxed jointly on profit and cannot offset income against losses) or participants may be held to be jointly and severally liable
Transfer of ownership	Transfer of shares rarely requires notification to, or consent of, the relevant Minister Pre-emptive rights between shareholders are not uncommon	Transfer of interests in petroleum titles is likely to require notification to, or the consent of, the relevant Minister Pre-emptive rights between participants are not uncommon
Governance, reporting and decision making	The joint venture company and board of directors will need to comply with the *Corporations Act 2001* (Cth) provisions (eg reporting obligations, accounting and audit requirements, directors' duties etc) in addition to any contractual obligations	The primary source of governance is the contractual arrangements between participants (eg joint venture agreement or joint operating agreement)

Competition law considerations

The competition law provisions of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) should be considered before forming, or operating, a joint venture. Three of the provisions that commonly need to be considered are the prohibitions against cartel conduct, exclusionary provisions, and anti-competitive arrangements.

If a joint venture is formed between competitors or potential competitors (which will generally be the case by virtue of their participation in the joint venture), care needs to be taken to avoid contravening the cartel conduct and exclusionary provision prohibitions in the Competition and Consumer Act. In Australia, making or giving effect to a "cartel provision" may attract both civil and criminal penalties, and making or giving effect to an exclusionary provision may attract civil penalties.

For example, a "cartel provision" may arise in a joint venture agreement which provides for the joint marketing of petroleum produced by the joint venture if the agreement also requires the joint venturers to reach agreement on the prices and other terms at which the joint venture sells the products, and the customers they will sell to. The joint venturers may also contractually limit their capacity to produce petroleum outside of the joint venture and this may contravene the prohibition on cartel conduct, as well as the prohibition against exclusionary provisions.

The prohibition on cartel conduct is subject to an exception, and the prohibition against exclusionary provisions is subject to a defence, which aims to avoid punishing certain types of legitimate collaborative business activity (the Joint Venture Exceptions). However, the Joint Venture Exceptions have strict requirements, and do not apply to all types of joint venture activities.

Even where the Joint Venture Exceptions apply, the formation and operation of a joint venture is subject to other provisions of the Competition and Consumer Act, including the general prohibition against anti-competitive arrangements. These other provisions also apply to joint ventures between parties that are not competitors or potential competitors with each other.

It is therefore important to consider competition law issues carefully and upfront.

There are a range of ways to manage competition law risk. One option for dealing with these issues is to apply to the Australian Competition and Consumer Commission (ACCC) for an official authorisation for conduct that may breach the Competition and Consumer Act (including the prohibition against cartel arrangements). Such an authorisation provides immunity from prosecution if the ACCC is satisfied that the public benefits outweigh the anti-competitive detriment. However, as the authorisation process can be time consuming, and is public, businesses may need to take this into account when forming a joint venture, and may wish to carefully consider their options before applying for authorisation.

State agreements, Government agreements and indentures

A feature of Australia's resources law is the use of agreements between Governments and project proponents which facilitate the implementation of large scale resources projects (Government Agreements). These Government Agreements are usually authorised and ratified by their own specific legislation.

Government Agreements are more common in the mining industry, but are also used in the development of petroleum projects and facilities. An example is the *Cooper Basin (Ratification) Act 1975* (SA), which authorises and ratifies the agreement entered into by the South Australian Government to support the development of a significant gas resource in central Australia.

The content of Government Agreements varies from project to project, but typically they allow the producer access to the land, set out detailed requirements for the development of infrastructure relating to the petroleum facility, railway and port, provide for the payment of royalties (and may include a discounted royalty rate for a period) and set out information requirements. They have few, if any, tax provisions.

Government treaties implemented by Australian legislation such as that between Australia and Timor Leste covering petroleum exploration and production activity in the Zone of Cooperation (a designated area located in the Timor Sea) may also create obligations on Australian offshore petroleum developments in the relevant area.

6 Royalties and taxes

"In Australia, three levels of Government impose different taxes or duties."

The Commonwealth imposes income taxes, goods and services tax (GST), PRRT, customs and import duties, fuel tax and withholding taxes. State and Territory Governments impose stamp duty, land tax, payroll tax and resource royalties. Local Governments may impose land tax in the form of rates.

PRRT

The Commonwealth Government currently imposes a 40% tax on profits relating to onshore and offshore oil and gas projects.

The following table summarises the key features of the PRRT:

Scope	All petroleum projects, both onshore and offshore
Rate	40%
Uplift rate	Various uplift rates apply depending on the class and timing of expenditure
Deductibility of capital expenditure	Expenditure of a capital nature is deductible immediately in the year it is incurred
State royalties	Credits against PRRT liability for State royalties Unutilised credits will be uplifted to apply against future liabilities but are not transferable or refundable

Royalties

Each State and Territory currently imposes royalties relating to the extraction of petroleum. The Government royalty rate for petroleum is between 10% and 12.5% of the value at the well head depending on the jurisdiction. That value is calculated under the legislation of each State or Territory using the sales price and permitted deductions.

In addition to Government royalties, private royalties created under contracts may exist and need to be considered in transactions.

Income tax

Broadly speaking, a non-resident company will only be subject to tax on income that is sourced in Australia, subject to the application of any applicable double tax agreement (DTA). If a DTA applies to a non-resident company, the company will only be taxed on income attributable to any permanent establishment it has in Australia. (Other Australian sourced income such as dividends, interest, royalties and payments for construction and related activities are subject to a withholding tax regime.)

Under a DTA, Australia generally has the right to tax the profits attributable to the non-resident company's permanent establishment. The profits are subject to tax at the corporate tax rate of 30%. The term "permanent establishment" is defined in a DTA. There are also provisions in a DTA which can deem a non-resident to (and deem a non-resident to not) have a permanent establishment. Ultimately, a determination of whether the non-resident company has a permanent establishment will be based on the actual activities undertaken by the non-resident company in Australia.

Withholding taxes

Only certain forms of income derived by non-residents is subject to Australia's withholding tax regime. The table below sets out the rates of withholding tax applied on a gross basis:

Income	Withholding Tax Rate
Dividends*	30%**
Interest	10%**
Royalties	30%**
Construction or related activities***	5%

* No withholding tax is imposed on fully franked dividends. Broadly speaking, a fully franked dividend is a dividend paid out of profits on which the Australian company has paid underlying Australian corporate tax.

** The rate applied under Australian domestic law. The rate may be lower under an applicable DTA.

*** The ATO may grant an exemption or variation to the 5% foreign resident withholding tax in certain circumstances (such as where the non-resident does not have an Australian permanent establishment and is resident of a DTA country).

Capital gains

Broadly speaking, a non-resident shareholder is only subject to capital gains tax in respect of a gain derived from the disposal of:

- Australian real property (including mining and petroleum interests);
- more than 10% of shares in a "land rich" Australian company (ie more than 50% of the market value of the company's assets relate to Australian real property) and the interest held by the non-resident passes the "non-portfolio interest test". The 10% test is applied on an associate inclusive basis with a "look back" period of up to two years before the disposal; or
- assets used in carrying on business at, or through, an Australian permanent establishment.

Excise duty and fuel tax credits

Excise duty is a tax on certain types of goods produced or manufactured in Australia. Excisable goods include petroleum, gaseous fuel and alternative fuels. Customs duty is imposed on certain imported goods to ensure consistent treatment with local goods. The rates, together with precise product definitions and descriptions, are set out in a schedule to the *Excise Tariff Act 1921* (Cth) and vary considerably depending on the exact form of the fuel.

Fuel tax credits provide businesses with a credit for the fuel tax (excise or customs duty) included in the price of fuel used in business activities, machinery, plant, equipment and most heavy vehicles. Heavy vehicles travelling on public roads and using gaseous fuels are effectively ineligible for fuel tax credits. The amount of fuel tax credits available depends on the specific business activities. The only fuels that are not eligible for credits are aviation fuels, alternative fuels and fuels used in light vehicles – those with 4.5 tonne gross vehicle mass or less – travelling on a public road.

GST

The Commonwealth imposes GST on supplies made by entities which are registered, or required to be registered, for GST. An entity is required to be registered for GST when its annual turnover from supplies connected with Australia (having regard to the previous 12 months and the following 12 months) exceeds $75,000. An entity can elect to register for GST if it is carrying on an enterprise.

GST is imposed at a rate of 10%. Supplies can be subject to GST if they are connected with Australia and made in the course or furtherance of an enterprise. Some transactions are not subject to GST because they are GST-free (such as exports) or are input taxed (such as supplies of certain precious metals). Except to the extent an entity makes input taxed supplies, an entity which is registered, or required to be registered, for GST can claim back as input tax credits any GST incurred on its costs and expenses, subject to holding a valid tax invoice.

Participants in a joint venture can apply to the Commissioner of Taxation to have the venture approved as a GST joint venture. Where a GST joint venture is approved, the joint venture operator (either one of the joint venturers or another entity) has the responsibility, on behalf of all of the participants, to account for GST liabilities, input tax credit entitlements and adjustments relating to the operations of the joint venture. Supplies that are made by the joint venture operator to other participants are not subject to GST.

Stamp duty

All States and Territories impose stamp duty on the transfer of interests in real property[1] and goods transferred with real property. Stamp duty can also apply to transfers of business assets, transfers of shares/units and the grant of mortgages in some jurisdictions. Different rates apply in each State and Territory and the rates also vary between different types of transactions.

The table below sets out the types of duty and the relevant rates in each jurisdiction.[2]

State/ Territory	Duty on transfer of interests in land and goods transferred with land	Duty on transfer of non-real property such as goodwill and intellectual property	Duty on transfer of shares/units in unlisted companies/trusts	Duty of grant of mortgages
ACT	5.25%	Not imposed	Not imposed	Not imposed
NSW	5.5%	5.5%	0.6%	0.4%
NT	5.45%	5.45%	Not imposed	Not imposed
QLD	5.75%	5.75%	Not imposed	Not imposed
SA	5.5%	5.5%	0.6%	Not imposed
TAS	4.5%	Not imposed	Not imposed	Not imposed
VIC	5.5%	Not imposed	Not imposed	Not imposed
WA	5.15%	5.15%	Not imposed	Not imposed

States and Territories also impose stamp duty on the acquisition of interests in companies or trusts that own real property. This is known as "land rich" or "landholder" duty. Duty is generally imposed on the value of the land held by the relevant entity (or the value of land and goods in New South Wales, Western Australia and South Australia) and is imposed at the same rate as that imposed on the transfer of land. The table below sets out the relevant thresholds in each State and Territory for duty to apply.

State/ Territory	Land rich threshold test[3]	Local land holdings value test	Acquisition threshold[4]
ACT	NA	NA	50% or more if unlisted
NSW	NA	$2,000,000	50% or more if unlisted, 90% or more if listed/widely held
NT	NA	$500,000	50% or more if unlisted, 90% or more if listed
QLD[5]	NA	$2,000,000	50% or more if unlisted, 90% or more if listed, nil for private unit trusts
SA[6]	NA	$1,000,000	50% or more if unlisted, 90% or more if listed
TAS	60%	$500,000	50% or more
VIC	NA	$1,000,000	50% or more if unlisted, 90% or more if listed/widely held, 20% or more for private unit trusts
WA	NA	$2,000,000	50% or more if unlisted, 90% or more if listed

[1] Real property may include mining and exploration interest, depending on the jurisdiction.
[2] The rates specified in the table are the maximum rates.
[3] Total land-holdings of the corporation within and outside Australia as a percentage of all its property excluding certain "liquid" assets.
[4] Percentage that must be owned in the company or unit trust.
[5] Separate rules for trusts.
[6] Separate rules for trusts that are not registered, managed investment schemes, approved deposit funds or pooled superannuation trusts.

Fees and levies for offshore petroleum licences

Transactions involving offshore petroleum licences may attract fees and levies imposed by the relevant Government regulator.

Summary of taxes

The table below provides a summary of each of the taxes described above:

Tax	Rate	Comments
Corporate tax	30%	Consolidated regime to all 100% owned subsidiaries
Withholding tax		
Dividends	30%	DTA rate may be lower
Interest	10%	DTA rate may be lower
Royalties	30%	DTA rate may be lower
Construction or related activities	5%	Exemptions or variations may apply
GST	10%	Generally not payable on exports or Input taxed supplies
Stamp duty		
Transfer of land or shares/ units in a landholder company/trust	4.75% – 5.25%	All States/Territories
Transfer of certain non-real property assets	5.15% – 5.75%	NSW, QLD, NT, WA, SA
Transfer of unlisted shares/units	0.6%	NSW and SA
Mortgage duty	0.4%	NSW


350
371
344

7 Land access

"Petroleum exploration and production companies may face issues in relation to land access, native title and cultural heritage in the context of onshore and – to a lesser extent – offshore petroleum exploration and production."

The primary issues that exploration and petroleum companies face in relation to land access include:

- obtaining access to land controlled by the Commonwealth, or the relevant State or Territory Government (known as Crown Land);
- compensating private land holders; and
- native title (discussed in more detail in Chapter 8).

Access to Crown Land such as State forests, roads, land reserved for Indigenous Australians and other reserves for exploration and petroleum activities is generally restricted and varies according to the land category and the State or Territory in which the activity is carried out. Often approval from the relevant Minister is required to conduct exploration or petroleum activities on Crown Land.

An important issue concerning access to private land is the payment of appropriate compensation to landholders. Arrangements for determining compensation payable to private landholders are described in the petroleum legislation of each State and Territory. In all jurisdictions, a petroleum tenement applicant will need to enter into compensation arrangements with underlying land holders like pastoral lessees and if those arrangements cannot be agreed, compensation will be determined by a court process. Compensation is generally payable for land surface damage, restrictions on right of way, damage to improvements and reasonable expenses to control damage.

8 Native title and cultural heritage

"A licence holder's relations with Indigenous Australians can be a key determinant of the successful implementation of a petroleum project in Australia."

Australian law recognises and protects the traditional connection to land of Aboriginal people and Torres Strait Islanders (Indigenous Australians).

A licence holder's relations with Indigenous Australians can be a key determinant of the successful implementation of a petroleum project in Australia.

From a legal perspective, the issues requiring consideration include:

- whether the project affects land where native title does or may exist, in which case processes in the *Native Title Act 1993* (Cth) (Native Title Act) will need to be followed;
- the potential for the project to affect places or objects within the landscape which are of cultural significance to Indigenous Australians; and
- whether the land proposed to be used for a project is reserved under State or Territory based land legislation introduced for the benefit of Indigenous Australians.

Native title overview

Native title is the set of rights and interests of Indigenous Australians over land and waters arising from their traditional laws and customs. These rights are recognised by Australia's common law.

The Native Title Act is Commonwealth legislation which establishes the system through which native title is integrated into the Australian legal system. It applies in each State and Territory. The Native Title Act has four objectives which are reflected in its operation:

- **Protection of native title:** to provide for the recognition and protection of native title.
- **Validation of prior invalid tenures:** to provide for, or allow, the validation of historic actions which may have been invalidated because of the existence of native title.
- **Validity of future acts:** to establish ways in which future dealings affecting native title may proceed, and to set standards for those dealings.
- **Native title claims resolution process:** to establish a mechanism for determining claims to native title.

Where does native title exist?

In general, native title does not exist over, or has been extinguished by, freehold title. It can exist in relation to Crown Land and much of Australia is comprised of Crown Land. For example, in Western Australia over 90% of that State is Crown Land.

Extinguishment of native title by the grant of certain tenures and construction of public works

The Native Title Act confirms that the grant of certain classes of land tenure, including freehold and leases conferring exclusive possession, as well as the construction of public works, have extinguished native title. It is usual to review the area of a proposed project to assess whether native title to the relevant land parcel continues or has been extinguished. If extinguished, there is usually no need to consider the requirements of the Native Title Act any further.

Native title claims

Indigenous Australians have made several hundred claims seeking recognition of their native title through the processes in the Native Title Act. Many claims have been determined in favour of native title claimants, and there are large areas of land in Australia where native title has been formally determined to exist. For petroleum proponents, in practical terms there is not a great difference between determined native title holders and registered claimants. Both enjoy the same procedural rights under the Native Title Act in respect of the grant of petroleum tenements.

Future land use

The Native Title Act protects native title from invalid interference by setting out a regime that governs all "acts" (such as the grant of tenures and petroleum licences) that occur on land and waters after 1 January 1994 that affect native title (called "future acts"). A future act will be valid if it is done pursuant to the requirements of the Native Title Act.

The procedural requirements associated with the particular classes of future acts vary. Generally, the greater the impact on native title rights, the more onerous the procedural requirements.

In most cases, the creation of a right to mine or the compulsory acquisition of native title for use by a non-Government party will attract the "right to negotiate". This requires a minimum of six months good faith negotiation as to the terms on which the acts proposed can occur, between the relevant State or Territory, the tenure applicant and registered native title holders or claimants. Such agreements commonly involve the payment of money, provision of employment opportunities to native title group members and protection for areas of cultural heritage significance. If no agreement is reached, the National Native Title Tribunal can determine whether the grant or compulsory acquisition can proceed.

In most cases, the future acts processes will not confer a right of veto to native title claimants and holders over whether a project will proceed. However the processes can be time consuming and create critical delays if not managed carefully. Some projects cannot be implemented without an Indigenous land use agreement to ensure that the project is valid from a native title perspective. In those circumstances, the native title claimants have a veto. This is usually dictated by State policy or legislation rather than the Native Title Act. An Indigenous land use agreement requires the consent of the relevant native title parties and can therefore operate as a veto in some circumstances.

Aboriginal cultural heritage overview

Areas and objects of archaeological importance or cultural heritage significance to Indigenous Australians are protected from harm under Commonwealth, State and Territory laws. Indigenous cultural heritage is protected irrespective of whether the heritage is listed on a register or is otherwise identified and located.

The States and Territories each have their own Aboriginal cultural heritage protection laws, which vary considerably across the jurisdictions. Queensland, Victoria and New South Wales, in particular, impose significant approval obligations and significant monetary penalties if unauthorised harm to indigenous cultural heritage occurs. Proponents may also be ordered to stop work if protected heritage is at risk of harm. In practice, regardless of the specifics of the regulatory regime, cultural heritage protection requirements are often time consuming and onerous approvals to obtain which can cause considerable delay to a project.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Commonwealth Heritage Act) also operates to protect areas or objects of particular heritage significance at imminent risk of harm. In those circumstances, under the Commonwealth Heritage Act, the Minister can require the works to stop.

The laws regarding heritage protection in Australia have become considerably stricter in the past decade. The penalties, statutory obligations and risk of being ordered to stop work after construction has commenced mean that it is important to assess and address cultural heritage risk early in any major project.

Obtaining an approval to conduct a project that will impact Aboriginal cultural heritage will require the proponent to engage with Indigenous Australians with traditional connection to the land in question. Proponents will often, but not always, be dealing with the same Indigenous Australian group in connection with both native title and cultural heritage approvals.

State and Territory land rights schemes overview

Many States and the Commonwealth in the Northern Territory established schemes allowing the transfer of freehold interests in certain public lands to Indigenous Australian groups with connection to those lands. Reserves created for the benefit of Indigenous Australians also exist in many States. There are, as a result, large areas of land held as freehold by Indigenous Australians for the benefit of their communities.

The use of this land for petroleum and infrastructure projects will require the consent of the relevant community and is tightly regulated. As a result, the agreements that need to be negotiated in respect of these lands can be more difficult to negotiate and more favourable to Indigenous Australians than native title agreements. It is also possible for native title to exist over these areas.

9 Access to infrastructure

"A company investing in significant infrastructure should consider the potential for third parties to utilise an access regime to gain access to the infrastructure."

In Australia, many public and privately owned infrastructure facilities are subject, or potentially subject, to access regulation. There are both State and national statutory access regimes, as well as frameworks for infrastructure owners to submit voluntary access undertakings. Access regulation is particularly common in relation to gas pipelines, railways and ports.

What does access regulation mean for investors in Australia?

Access regulation can have significant consequences for investors in Australia. A company investing in significant infrastructure should consider the potential for third parties to utilise an access regime to gain access to services provided by the infrastructure. Providing access to third parties under an access regime may significantly affect the commercial returns to a facility owner, the financial stability of proposed infrastructure as well as limiting the owner's operational control and flexibility in its use of the infrastructure. Third party access may also impose regulatory and compliance costs, including involvement in expensive disputes.

Conversely, an investor interested in using another company's infrastructure facility may have the option of negotiating access under an existing access regime, or applying to have the infrastructure facility subjected to an access regime, if that other company is not prepared to reach a reasonable commercial agreement.

Part IIIA of the Competition and Consumer Act

Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) establishes a general national regime for access regulation that can be applied to nationally significant infrastructure.

Under Part IIIA of the CCA a party may apply to the National Competition Council (NCC) to have access to a service provided by an infrastructure facility "declared". Declaration confers a legally enforceable right on third parties to negotiate with an infrastructure owner for use of that service. Part IIIA sets out a process under which the NCC reviews the application for declaration and makes a recommendation to the relevant Minister. The Minister then decides whether or not to grant a declaration of access to that service.

In making the decision, the Minister must be satisfied that:

- access would promote a material increase in competition in a relevant market;
- it would be uneconomical to develop another facility to provide the same service;
- the facility is of national significance;
- use of the facility is not already subject to an effective access regime; and
- access would not be contrary to the public interest.

If a service is declared and an access dispute arises, the regulator can arbitrate the terms and conditions of access, including price.

A State or Territory access regime may be "certified" as an effective regime. Access to infrastructure services which are subject to an effective access regime cannot be declared under the Part IIIA access regime. For example, some Australian railways are already regulated under State access regimes.

Voluntary access undertaking

Under the CCA an infrastructure owner may seek approval from the Australian Competition and Consumer Commission (ACCC) for an access undertaking which is offered on a voluntary basis by the infrastructure owner. This access undertaking is intended to provide a framework for negotiation of the terms and conditions upon which the owner will provide access to third parties. If the ACCC approves the voluntary access undertaking, access to the infrastructure cannot be declared under Part IIIA of the CCA. Once approved, the undertaking is binding on the owner and enforceable by the ACCC.

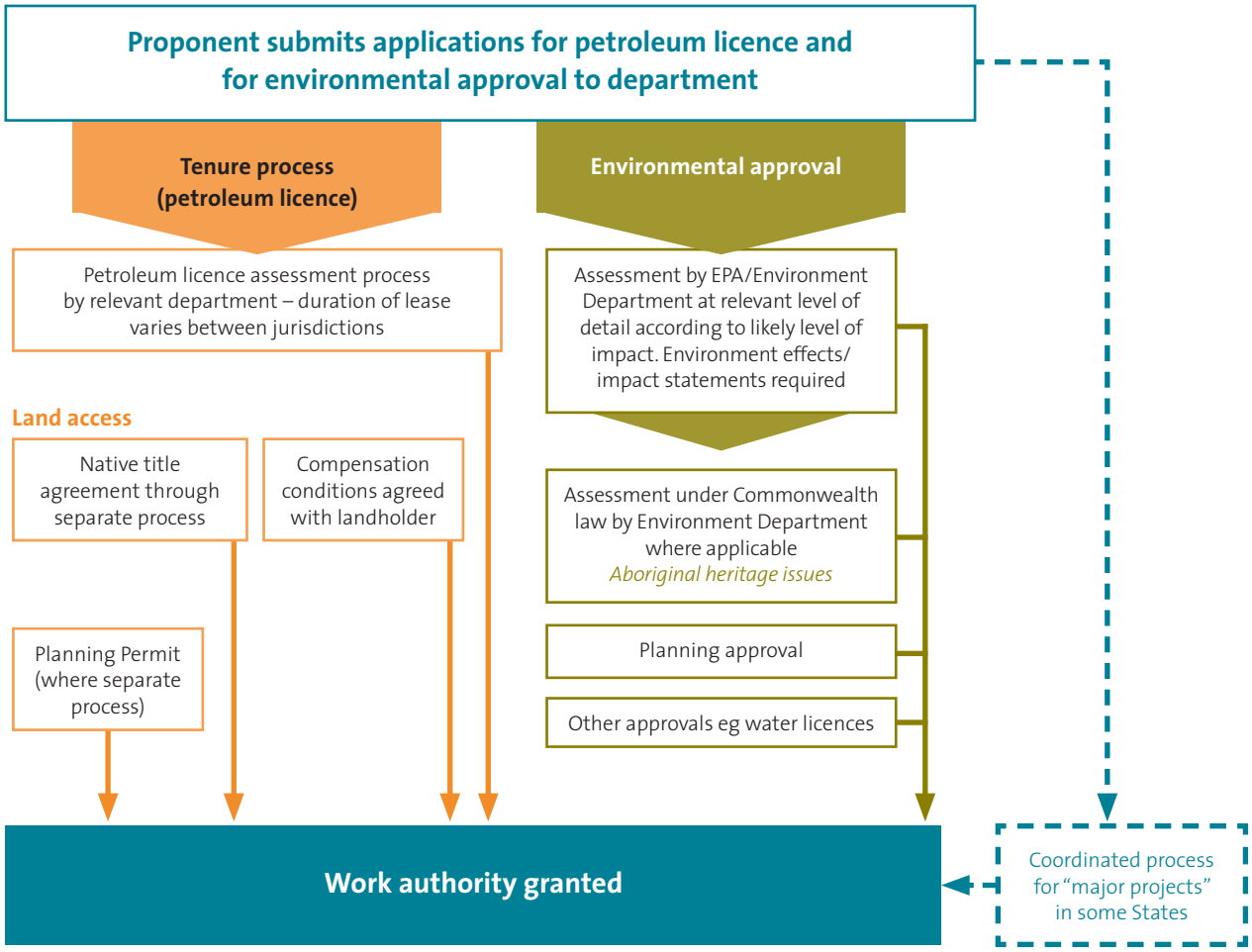
10 Environmental law

"Proponents of a petroleum project must prepare an assessment of the environmental impact of their project in accordance with the relevant State or Territory legislation."

A key issue for the petroleum industry in Australia is to minimise potentially negative environmental impacts. This involves both assessment before the commencement of exploration and adherence to environmental conditions and regulations during production and after closure of the facility.

The diagram below describes the interaction between licensing and environmental approvals.

General process for petroleum project approvals in Australian jurisdictions



Environmental assessment

The environmental assessment of petroleum projects in Australia is largely governed by State and Territory environmental protection legislation, which set out requirements for assessing environmental issues. This legislation is typically administered by an environment protection agency or authority, or environment department in each jurisdiction.

The key matters addressed by State and Territory environmental legislation include:

- managing air, water, land and noise pollution;
- protection of flora, fauna and habitat; and
- recognising and preventing impact on Indigenous sites.

Proponents of a petroleum project may be required to prepare an assessment of the environmental impact of their project in accordance with the relevant State or Territory legislation. The assessment may be open to public consultation and appeals (including by third parties in some jurisdictions).

A determination about the proposed project is made by the relevant environmental authority or department with final determination made by the relevant State or Territory Minister. The grant of an environmental approval will usually be subject to conditions requiring the proponent to minimise environmental impacts.

Planning approvals

Like all development activities, petroleum projects involve the construction of buildings, roads, pipelines and other infrastructure which may require Local Government or State Government planning approval. In some jurisdictions, planning approval is integrated into the project approvals process or is covered by the petroleum licence.

Planning approvals are driven by State and Territory planning legislation and standards. Local Governments have a key role under this legislation in formulating and administering planning schemes. Assessment for issuing permits under planning schemes needs to take account of the potential for a petroleum production or processing project to affect future uses of the area.

Project facilitation

In some States and Territories, proposed petroleum projects can receive special status which leads to the involvement of a centralised Government coordinating authority. These bodies can facilitate large scale petroleum projects by planning and coordinating land and infrastructure requirements including land tenure and infrastructure.

Beyond facilitation, some States and Territories commit to seeking the passage of project-specific legislation to ratify agreements between the Government and the proponents of the petroleum project (including processing facilities)(ie "State Agreements"). Each agreement specifies the rights, obligations, terms and conditions for development of the project and establishes processes for ongoing relations between the Government and the proponent. State Agreements are discussed in more detail in Chapter 5.

The Commonwealth

While land management and onshore petroleum production is not generally a Commonwealth responsibility, the exploration and approval framework is affected by certain Commonwealth laws, including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

The EPBC Act is concerned with matters of national environmental significance. It sets out the circumstances in which an environmental impact assessment may be required and provides legislative timeframes in which Commonwealth decisions must be made. It is of particular importance in conducting petroleum operations in offshore waters.

When a project is likely to have a significant environmental impact or an impact on sensitive areas, it must be referred to the relevant Commonwealth Minister, who will decide whether the project requires an environmental assessment and a decision under the EPBC Act.

The Commonwealth can delegate supervision of the process to the relevant State or Territory, provided agreements are in place between the State or Territory and the Commonwealth that accredit that State's or Territory's environmental assessment processes and systems.

11 Industrial relations, employee relations and workplace health and safety

Employment and industrial law

Employment in Australia is contractual in its base, including for employees working under a modern award or collective industrial instrument. However, an employer in Australia must also navigate a layered safety net of minimum terms and conditions of employment.

Legislative framework

Currently, the centrepiece of the Australian industrial relations legislative framework is the *Fair Work Act 2009* (Cth) (Fair Work Act). The Fair Work Act applies generally to corporate employers (foreign, trading or Australian constitutional corporations) and their employees.

Safety net entitlements

The Fair Work Act governs a system of minimum terms and conditions of employment that cannot be undercut in an individual contract. These "safety net entitlements" can be found in:

- The National Employment Standards (NES), setting a statutory minimum for leave entitlements, termination of employment, maximum hours of work and flexible working arrangements.
- Modern awards, prescribing the minimum terms and conditions relating to employers and employees in particular industries (eg mining, construction, and oil and gas) and occupations.
- Collective enterprise agreements – an employer and its employees may negotiate a collective enterprise agreement that sets out the minimum conditions of employment that will apply in a particular business. As a general principle, industrial action (eg a strike or work ban) is only allowed during negotiations for a new enterprise agreement. The Fair Work Act puts a priority on collective enterprise bargaining in which unions have an entrenched and privileged role.
- Long service leave legislation, prescribing entitlements to leave for employees with long periods of service.
- Superannuation legislation, prescribing superannuation contributions to be made by employers on behalf of employees to recognised superannuation funds. Some States and Territories have specific legislation dealing with superannuation contributions in the coal and oil shale mining industries.

Enterprise agreements

Many employees work under terms regulated by collective enterprise agreements. These are underpinned by the safety net entitlements and must be approved by the Fair Work Commission.

Terms and conditions of employment which are equal to, or more generous than, the safety net entitlements and which are tailored to the needs of an enterprise may be bargained for, and contained in a collective enterprise agreement. There is a facility for multiple enterprise agreements (which are not common) and for a greenfields agreement where a new enterprise or project is being established.

An enterprise agreement other than a greenfields agreement must have the approval of a valid majority of employees employed in the enterprise who will be covered by the agreement.

Unions

The Fair Work Act empowers employee representational organisations (trade unions) as the default representatives of employees. Unions have an entrenched and privileged role in bargaining a collective enterprise agreement and their agreement is crucial in setting up new projects (greenfield agreement).

Union right of entry

The Fair Work Act permits active participation by unions in employment matters. The level of unionisation varies from industry to industry, but is comparatively high in the mining, construction, resources and maritime industries.

Employees have a right under the Fair Work Act to choose to belong or not belong to a union or a particular union, or to involve a union in enterprise bargaining on their behalf.

The Fair Work Act provides that unions are the default representative for employees in enterprise bargaining. To put in place enterprise agreements for new projects (greenfields agreements), there is a requirement for agreement with unions.

Unions are entitled, through an officer or employee holding a relevant permit, to enter premises where their members or eligible members work in each of these situations:

- holding discussions with those employees the union is entitled to represent;
- investigating a suspected breach of industrial laws; and
- investigating a suspected breach of State work health and safety laws.

Transfer of business

Investment often implies the transfer of assets from one company to another, with or without transferring the employees of that business. The Fair Work Act generally requires that the enterprise agreement applying to the "transferring" employees transfers to bind the purchaser or the business.

Unfair dismissal and adverse action

Under the Fair Work Act, subject to various exceptions and eligibility rules, employees are able to claim reinstatement or compensation if they can prove that termination of their employment was harsh, unjust or unreasonable.

The Fair Work Act prohibits any "adverse action" by the employer that results in the dismissal, injury, prejudicial alteration of position or discrimination of an employee for a prohibited reason listed in the Fair Work Act.

Discrimination

Unlawful discrimination in employment and employment related activities is regulated by Federal, State and Territory anti-discrimination legislation.

The laws have wide coverage prohibiting discrimination on a number of grounds listed in the legislation (eg age, sex, pregnancy, carer's responsibilities, race, disability). Unlawful discrimination can also occur in the context of non-employment relationships and in broader business activities, including the provision of goods and services to customers.

Limits on certain senior management employment termination benefits

The termination benefits of senior management personnel is generally limited to the amount of salary received in the previous 12 months, unless shareholder approval has been obtained.

Workplace Health and Safety

The States and Territories each have in place workplace health and safety (WHS) legislation that applies generally (with some exceptions) throughout the State or Territory.

WHS Legislation

On 1 January 2012, new WHS laws commenced in most jurisdictions in Australia. This followed a lengthy process of national review and harmonisation of Australia's WHS laws. As at 1 January 2015, the new WHS laws operate in all jurisdictions in Australia except Victoria and Western Australia. In Victoria and Western Australia, existing WHS laws continue to operate, although Western Australia proposes to introduce the new WHS laws in 2015.

Some States and Territories have specific WHS laws that regulate oil and gas operations including facilities and pipelines located onshore and in coastal waters. Workplace health and safety on offshore oil and gas facilities located in Commonwealth waters operates under a national statutory framework, separate to the State and Territory WHS laws.

Liability

Under the new WHS laws, the primary duty of care is imposed on a person who conducts a business or undertaking. This person must ensure, so far as is reasonably practicable, the health and safety of workers. A worker includes direct employees and also other workers such as contractor personnel.

The new WHS laws also impose obligations on those who manage or control workplaces and on those who design, manufacture, import and supply plant, substances or structures for use at work. Duties also apply to those who install, construct or commission plant or structures for use at work.

Officers of corporations have duties to exercise due diligence to ensure that the relevant business or undertaking complies with the WHS laws. Workers also have duties to take reasonable care for their own health and safety and to ensure their acts or omissions do not adversely affect the health or safety of other persons.

Safety management system

Persons who conduct a business or undertaking generally comply with the WHS duty of care by developing and implementing a safe system of work that has various components. These components include a risk management system and management structure which identifies the positions having responsibility for applying the risk management system.

Compulsory workers compensation

Each State and Territory has legislation in place that regulates workers compensation in the event of a workplace injury or illness. An employee does not need to prove a fault by the employer in order to be entitled to workers compensation. The employer is required to obtain appropriate insurance against the risks of workers compensation claims.

12 Foreign investment approval framework

"A foreign person proposing to acquire petroleum interests needs to make an application to the Foreign Investment Review Board for approval where such an interest provides the right to occupy urban land and the term of the licence or lease (excluding extensions) is likely to be more than five years."

Who needs to apply?

Investments by foreign persons in Australia are regulated under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA). Foreign persons include Australian subsidiaries of foreign companies.

A foreign person or privately owned foreign company, acquiring 15% or more (or 40% or more in aggregate with other foreign persons or companies) in an Australian business or corporation with a value over certain specified monetary thresholds (currently, A$252 million, unless a Free Trade Agreement applies – see below) must notify the Foreign Investment Review Board (FIRB) of its proposed acquisition.

A foreign government (including any State-owned enterprise and sovereign wealth fund) and its related entities must notify FIRB before making a "direct investment" in an Australian business or corporation regardless of its value or before beginning a new business. Under Government policy, a direct investment is described as one which is made with the objective of establishing a lasting interest in, and strategic long term relationship with, the target. Generally, but not in all circumstances, this requires the acquisition of an interest above 10%. Once notified, FIRB will consider and advise the Commonwealth Treasurer of the proposed investment, with the Treasurer being able to object to the investment if it is not considered to be in Australia's national interests.

Additional provisions applicable to petroleum interests

Foreign persons proposing to acquire an interest in certain petroleum titles need to make an application to FIRB for approval where:

- such an interest provides the right to occupy urban land and the term of the licence or lease (including extensions) is likely to be more than five years; or
- such a licence or lease provides an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, urban land.

"Urban land" includes any land that is not rural land (ie land that is used wholly and exclusively for carrying on a business of primary production), including all seabed within Australia's Exclusive Economic Zone. The extension to such seabed means that the acquisition of offshore petroleum production licences and other offshore tenements may require a FIRB application.

Government policy also suggests that certain exploration permits may also confer interests in "urban land" to the extent that they can satisfy any of the criteria set out above.

While this is the general position regarding petroleum interests, investors should carefully consider whether other acquisitions forming part of a proposed transaction require FIRB approval.

What should be included in the notification?

The Regulations prescribe what needs to be included in any application to FIRB. As of 2015, applications can now be made online via the FIRB website.

At a minimum the application will need to include information about:

- the relevant parties;
- the investment (including its nature, the method of acquisition, its value, and the timetable);
- reasons for the proposal; and
- the investor's intentions (immediate and future).

As the Government considers each application against national interest considerations, the application should also indicate how the proposal will impact:

- national security;
- competition;
- other Australian Government policies (including tax and environmental matters); and
- the economy and the community,

and include information about the character of the investor.

Within what period will the Treasurer respond?

The Treasurer has 30 days from receipt of the application to make a decision, unless an interim order is made to extend this period up to a further 90 days. An applicant will be informed of the Treasurer's decision within 10 days of it being made. The Treasurer can make an order prohibiting the acquisition if satisfied that it would be contrary to the national interest or can apply conditions to ensure that the acquisition is not implemented in a manner contrary to the national interest. Often these conditions are the subject of negotiation.

Additional agreements applicable to certain investors

A Free Trade Agreement (FTA) is an international treaty which removes barriers to trade with the intention of facilitating stronger trade and commercial ties and as a result, increased economic integration between participating countries.

For investments in Australian petroleum projects, the primary benefit to foreign investors of certain participating countries, is a significant increase in the usual investment value over the certain specified monetary amounts, must notify the Commonwealth Treasurer (through FIRB) of its proposed acquisition.

For example, non-Government investors from Chile, Japan, Korea, New Zealand and the United States may make investments of up to A$1,094 million in "non-sensitive" sector investments without prior notification to the Commonwealth Treasurer, which is significantly higher than the A$252 million threshold for other foreign investors generally. These monetary thresholds are current as at 1 January 2015 and are subject to annual indexation.

Australia currently has:

- nine FTAs in force;
- one FTA that has been concluded but not yet signed; and
- eight additional FTAs under negotiation.

Australia is a participant to the FTAs set out below:

FTAs in force	Concluded FTAs	FTAs under negotiation
• ASEAN-Australia-New Zealand FTA • Australia-Chile FTA • Australia-New Zealand Closer Economic Relations • Australia-United States FTA • Korea-Australia FTA • Malaysia-Australia FTA • Singapore-Australia FTA • Thailand-Australia FTA • Japan-Australia Economic Partnership Agreement	• China-Australia FTA (expected to enter into force late 2015)	• Australia-Gulf Cooperation Council (GCC) FTA • Australia-India Comprehensive Economic Cooperation Agreement • Environmental Goods Agreement • Indonesia-Australia Comprehensive Economic Partnership Agreement • Pacific Agreement on Closer Economic Relations (PACER) Plus • Regional Comprehensive Economic Partnership • Trade in Services Agreement • Trans-Pacific Partnership Agreement

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Design AU Ref: 17292 Jun 15