

3 May, 2013

*Practice Group(s):*

*Energy and  
Infrastructure  
Projects and  
Transactions*

*Energy*

*Mining and Metals*

## Resources Exploration Investment – Industry Has Its Say

*By Clive Cachia*

### Industry Outlines Impact of Government Interference

Earlier this year, we provided a summary of the Productivity Commission's review of non-financial barriers to exploration investment – please see the following [link](#).

Submissions are now closed and a draft response by the Productivity Commission is due in the next few weeks.

As expected, industry bodies have taken this opportunity to highlight regulatory interference as a key barrier to exploration investment. An illustration of this issue is demonstrated by a recent World Economic Forum report on global competitiveness which ranks Australia 20th out of 144 nations – five places lower than achieved in 2009/2010. On "transparency of government policy making"; Australia ranks 29th (down from 24th last year), and on "burden of government regulation"; Australia ranks 96th (down from 75th last year)<sup>1</sup>.

These rankings represent an industry overburdened by red tape, making it increasingly difficult to attract exploration investment. The sources of these investment barriers include:

- increased administrative workload
- lack of resources and expertise of regulators
- increased costs and time
- duplication and overlap between government agencies
- reactive rather than proactive regulation
- an overemphasis on exploration-stage regulation
- lack of flow-through tax deductions.

While these concerns are not new, the submissions do serve as a useful summary of the particular frustrations experienced by an industry currently facing significant headwinds. These concerns are explored in greater detail below.

1. **Increased administrative workload** – explorers have consistently lamented an increase in the administrative workload of preparing forms and submissions for exploration tenement applications, and renewals and compliance with tenement conditions. For example, in NSW, there has been a revision and extension of the requirements affecting drilling operations including

<sup>1</sup> World Economic Forum, *The Global Competitiveness Report 2012-2013*, September 2012 as cited in the *Submission to the Productivity Commission Mineral and Energy Resource Exploration Inquiry*, Minerals Council of Australia, March 2013, page 19

## Resources Exploration Investment – Industry Has Its Say

agricultural impact statements, groundwater modelling, and annual reports on stakeholder consultations which has resulted in a multiplication of documents required.<sup>2</sup>

2. **Lack of resources and expertise of regulators** – given the growth of the industry in Australia, the changes in the regulatory structure and the ongoing turnover of staff, there is a concern that government officials do not have the requisite skills to assess the types and volume of approvals that are now required.<sup>3</sup>
3. **Increased costs and time in obtaining approvals** – the above factors have resulted in increased delays and expenses for explorers to gain necessary approvals for exploration activities. For example, the Australian Petroleum Production and Exploration Association Limited (APPEA) has noted that it can cost in excess of AUD500,000 for approval of an environmental plan for a relatively simple seismic survey, and up to 200 days to complete the detailed justification. This includes the AUD30,000 application fee which is established on a costs recovery basis only in exchange for the abolition of fees on transfers or dealings. To date, these fees remain in place.<sup>4</sup> In NSW, administrative levies and fees were recently raised and the average time taken to receive a grant of exploration licences has nearly doubled in the space of 18 months<sup>5</sup>.

The WA Government has also submitted that obligations on explorers to consult with native title representative bodies and conduct anthropological and heritage surveys under Commonwealth and State native title and heritage legislation are increasingly expensive and time consuming.<sup>6</sup>

4. **Duplication and overlap between government agencies** – multiple submissions noted the overlap and duplication in regulatory requirements faced by resource explorers over essentially the same activities. Some examples include the administration of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) which is regulated by two Commonwealth agencies<sup>7</sup>, and the regulation of drilling activities in NSW which may, depending on the nature of the activities, require notification or approval from the Sydney Catchment Authority, the Office of Heritage and Environment, and the Environmental Protection Authority, each of which may impose further conditions on the proposed drill program.<sup>8</sup>

An example of this duplication is the recent addition in NSW of an exploration condition which requires ministerial approval of a change of control of a licence holder or a foreign acquisition of substantial control in that licence holder. This duplicates the role of the Commonwealth under the *Foreign Acquisitions and Takeovers Act 1975*.<sup>9</sup>

Even the Commonwealth regulatory agency for offshore petroleum, National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), has indicated that there are overlapping environmental regulations relevant to offshore petroleum operations under the *Offshore Petroleum and Greenhouse Gas Storage Environmental Regulations 2009* and the EPBC

<sup>2</sup> Submission by the New South Wales Minerals Council, March 2013, page 6.

<sup>3</sup> Submission by Australian Petroleum Production and Exploration Association Limited, 22 March 2013, page 15.

<sup>4</sup> Ibid.

<sup>5</sup> New South Wales Minerals Council, op cit, page 7. From an average of 139 days to 244 days between the periods 1 January 2011 – 1 July 2011 and 30 June 2012 – 31 December 2012.

<sup>6</sup> Submission by the Western Australian Government, April 2013, pages 11-13.

<sup>7</sup> Submission by Australian Petroleum Production and Exploration Association Limited, op cit, page 16. Both the National Offshore Petroleum Safety and Environmental Management Authority and the Department of Sustainability, Environment, Water, Population and Communities have responsibility for oversight of environmental issues associated with offshore petroleum activities.

<sup>8</sup> Submission by the New South Wales Minerals Council Ltd, op cit, page 8

<sup>9</sup> Ibid.

## Resources Exploration Investment – Industry Has Its Say

Act. NOPSEMA's view is that "duplication of assessment effort under the two pieces of legislation imposes an unnecessary regulatory burden on the Commonwealth and industry and does not afford any additional environmental protection"<sup>10</sup>.

A further example of environmental approvals being duplicated across state and Commonwealth jurisdictions is the recent amendments to the EPBC Act to insert an additional review trigger relating to water, associated with certain mining activities, including those associated with coal seam gas operations which are already extensively regulated by the states<sup>11</sup>.

5. **Reactive rather than proactive** – there are submissions about the competing land use issues affecting agricultural, coal and coal seam gas activities in NSW and QLD that have been the subject of haphazard and inconsistent regulation across all levels of government<sup>12</sup>. The use of exclusion zones (urban exclusion zones in QLD and NSW and critical industry clusters in NSW) is considered by certain industry associations to be politically driven or based on anecdotal or non-scientific grounds as opposed to an objective, evidence-based analysis of the social and economic merits of such regulation<sup>13</sup>.

Further, mining industry associations pointed out that resource activities have co-existed with other land uses, including agriculture, for many decades and in many cases are complementary rather than competing. For example, there is a growing body of examples of coal seam gas operations actually increasing agricultural productivity and commercial viability of a given area. This can occur through the provision of a new source of clean treated water or by virtue of new sources of cash flow for agricultural enterprises as a result of compensation payments made by petroleum and mining explorers under relevant land access regimes<sup>14</sup>.

6. **Overemphasis on exploration-stage regulation** – there is a perception that regulatory requirements are more relevant to production processes and should not be unnecessarily brought forward and placed on exploration activities. For example, "offshore exploration operators are asked to consider the worst case scenario of an oil spill in the marine environment. This focuses regulatory processes on extremely remote events which are not credible or even remotely likely at the exploration stage".<sup>15</sup>
7. **"Flow through" tax deductions** – despite the scope of the Productivity Commission's review not including consideration of governments' tax and fiscal policies, a number of industry submissions<sup>16</sup> have supported the idea of the introduction of a "flow through share scheme". This means tax deductions are generated by an exploration company "flow through" to the shareholder and are deductible in calculating the shareholder's income. This would avoid the current problem of junior exploration companies having no opportunity to deduct exploration expenses as they typically generate operating losses rather than assessable income. This distorts exploration investment towards those larger companies who have assessable income against which such exploration expenditure can be deducted at the expense of the junior end of the market.

<sup>10</sup> Submission by National Offshore Petroleum Safety and Environmental Management Authority dated 28 March 2013, page 2.

<sup>11</sup> Submission by Australian Petroleum Production and Exploration Association Limited, op cit, page 6.

<sup>12</sup> Submission by the Minerals Council of Australia, op cit, page 27 and Australian Petroleum Productions and Exploration Association Limited, op cit, page 17

<sup>13</sup> Submission by Australian Petroleum Production and Exploration Association Limited, op cit, page 17.

<sup>14</sup> Ibid, pages 17 – 18.

<sup>15</sup> Submission by Australian Petroleum Production and Exploration Association Limited, op cit, page 19

<sup>16</sup> Submission by the New South Wales Mineral Council, op cit, page 9, Submission by the Minerals Council of Australia, op cit, page 25

## Resources Exploration Investment – Industry Has Its Say

Industry has noted that a similar scheme in Canada has been very successful. Of the AUD220 billion in mining equity capital raised between 2007 and 2011, 35% was raised in Toronto, 24% in London and only 14% in Australia. The ASX itself sees merit in developing such a scheme in Australia as an effective way to support long term investment in the current environment<sup>17</sup>.

We will keep you updated with the Productivity Commission's draft report when it is released in the next few weeks.

---

### Authors:

**Clive Cachia**

Clive.Cachia@klgates.com

+61 2 9513 2515

---

<sup>17</sup> Elmer Funke Kupper, ASX Managing Director and CEO, Address to the QRC Queensland Exploration Breakfast, 2 November 2012, as cited in the Submission by the Minerals Council of Australia, op cit, page 25

## Resources Exploration Investment – Industry Has Its Say

# K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg Hong Kong London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane Sydney Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of 46 fully integrated offices located in North America, Europe, Asia, South America, Australia, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit [www.klgates.com](http://www.klgates.com).

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2013 K&L Gates LLP. All Rights Reserved. [K&LG1]