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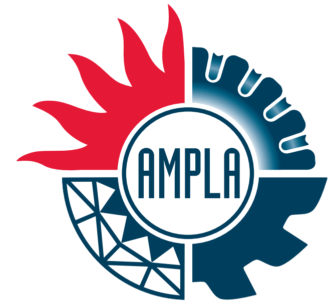


Aboriginal Cultural Heritage on the Eastern Seaboard

Dr Jonathan Fulcher

An exposure draft of new Victorian Aboriginal Cultural Heritage legislation (the Bill) demonstrates that Victoria has done more than glance over the fence at its northern neighbours in developing its approach. Key points of comparison include:

• *defining 'Aboriginal tradition'*: Victoria, unlike Queensland, includes traditions, practices, observances incorporated into contemporary Aboriginal traditions, observances, customs or beliefs.

• *protection of cultural heritage*: the Bill does not, as in Queensland, establish a cultural heritage duty of care. Instead, it creates an offence of *knowingly causing harm* to Aboriginal objects and places. The Bill acknowledges NSW Court of Appeal decisions which have narrowed the meaning of 'knowingly' to actual positive knowledge of specific objects and places being an essential element of the offence. The Bill adds 'recklessly' to the offence created by section 23, like Queensland, and penalties have increased substantially. So, the offence of harming Aboriginal heritage has a broader ambit than in NSW, but creates a different risk management framework to that of Queensland's duty of care.

• *native title claims:* These have become the main, but not the only (as in Queensland) basis for indigenous involvement in cultural heritage protection and management in Victoria.

• *continued use of the surface and cultural heritage plans:* Section 20 and Division 3 of Part 4, are almost identical to the equivalent Queensland provisions (section 21 and Part 7 respectively).

• *excavation of land for development:* Victoria retains permits to allow such excavation. The secretary of the department administering the Act has no discretion to grant the permit if the relevant registered Aboriginal party objects to the grant of the permit within 30 days of receiving a copy of the application.

• *Cultural Heritage Management Agreements:* CHMAs in Victoria must be in a prescribed form (section 61) whereas Queensland has provided gazetted guidelines only. In a novel development, CHMAs in Victoria may contain a provision for the registration of the CHMA. The effect is to ensure the Registrar of Titles records the burden of any covenant in the CHMA runs with the land in the Land Title Register; the covenant can then be enforced against subsequent owners by the Secretary of the Department or the relevant registered Aboriginal party.

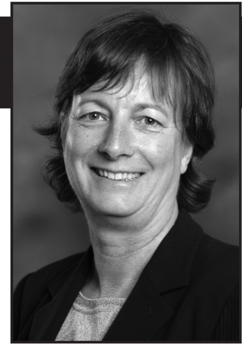
• *dispute resolution:* Victoria's Civil and Administrative Tribunal has the dispute resolution functions under the Bill.

• *Cultural Heritage Register*: Established by the Bill to protect cultural heritage assessment work, access to the Register is restricted to archaeologists, relevant indigenous parties, land owners, Crown authorities and local government. Under the current regime in Victoria, situations can arise where non-traditional owners in the sense of common law holders of native title may lawfully engage in cultural heritage assessment work. The Bill does not change this (see section 134). The Bill also places a Council appointed by the Minister in charge of deciding who may be involved in cultural heritage assessment work and any related agreement making (see section 118(2)(a)). This may in some circumstances create rather than prevent development delays.

These proposed changes have reshaped rather than fundamentally altered the regulation of indigenous cultural heritage protection and management in Victoria. In at least one respect the Bill replicates the current regime which has been in place for many years.

News for this edition of the AMPLA NEWS has been researched and written by **Minter Ellison**.
Opinions expressed in this NEWS do not necessarily reflect those of AMPLA members nor are they Association policy.

From the President



During April, the AMPLA model mining services contract (version one), published some months ago via the AMPLA web site, was the subject of a half day session at a Conference held in Rome by the IBA's Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL).

The model contract was introduced by John Grace and examined in detail by speakers from Chile, South Africa and the USA. All commentators endorsed the model contract as an appropriate model for their jurisdictions subject to relatively minor adjustments to comply with local legislation. The only significant demur was the model contract's treatment of latent conditions for deep underground mining in South Africa. Subject to full disclosure by the principal, the model contract places most risk for unexpected ground conditions on the contractor. The South African commentator's view was that, for deep mining, this risk should be borne by the principal. Alternative clauses to address this issue will be considered by AMPLA in preparing version two of the contract.

The favourable response in Rome to the model contract is a tribute to the effort and quality of work contributed to this project by John Grace and the reference group.

When we set out in early 2004 to produce what became the model contract, Rick Crabb of Blakiston & Crabb had some wise advice for the Board. He reminded us that when AMPLA had tried to produce a standard joint venture agreement ten years earlier, the project quickly became bogged down by debate over how the agreement would deal with the many scenarios that could arise in joint ventures; for instance, would it deal with exploration or extend to production and shut down? In Rick's view there was considerable benefit in staging the development of the document with the first draft being as simple and straightforward as possible and avoiding multiple alternate clauses.

We took Rick's advice and two years later produced our first standard form document, the model mining services contract (which is available free to members on the AMPLA web site).

Flushed with (now international) success the Board, at its next meeting, will be considering new project proposals, among them the possibility of further standard forms – perhaps even that elusive joint venture agreement!

April has seen each of our state branches hold its annual general meeting and it is pleasing to note the number of new members joining state branch committees. Most members join AMPLA to meet others with similar interests and to keep up to date with legal developments. The best way to achieve both ambitions is to join, and thereby influence, your Branch committee. You may have missed the Branch AGM but it is never too late to join the committee – just contact the Branch secretary.

Planning is underway to ensure that the Annual Conference business program is interesting, relevant and comprehensive. Our opening session on uranium will address legal issues associated with the dramatic shift of focus in world energy needs while programs of interest to environment, mining, petroleum and energy lawyers will follow. The conference has been scheduled for October when the Melbourne weather is more clement and the Spring Racing Carnival is in full swing. As promised, we have arranged a post conference 'study tour' to the Caulfield Cup – so mark the dates, 18 to 21 October, in your diary now.

Gail Owen
President

PEOPLE GOING PLACES

Melissa Holzberger, Counsel BHP Billiton, has been seconded from the Melbourne office of BHP Billiton to the Adelaide office. After nearly 25 years as a partner at Chapman Tripp in New Zealand, **Paul O'Regan** has taken up a position with Clifford Chance in Tokyo. **Doug Young** has retired from Blake Dawson Waldron and is now sole proprietor of 'Young Law'. **Greg Munyard** has left Woodside to join Rialto Energy Limited as managing director. **Colin Roberts** has returned to Australia after five years as the Deputy Director and Commercial Director of the highly regarded Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) at Dundee University in Scotland. He has taken the position to head up and develop the RSG Global Centre for International Dispute Resolution and Management in Perth. He is continuing his role as Director of the LLM Program in Dispute Resolution and Management at the CEPMLP, University of Dundee. UK law firm Holman Fenwick & Willan have opened offices in Melbourne and have been on a raiding exercise to fill out the ranks, recruiting **Gavin Vallely**, **Robert Springall**, **David Roylance** and **Maurice Thompson** from Middletons, **Chris Quennell** and **Hazel Brasington** from Blake Dawson Waldron and finally, **Peter Glover** from industry.

Small holders exposed - LNG project participation equity issues

Duncan McLean and Clare Pope

Small participating interest holders (small holders) in LNG projects are exposed to a number of risks in addition to those shared by all participants. These risks need to be addressed in the project documents in order to enable more favourable business cases to be submitted for Board approval for entry into LNG joint ventures.

Some of the risks and difficulties faced by small holders include:

- exposure to either drag-along expenses for expansion of the LNG Project (or a dilution of interest)
- lack of power to influence decisions of the operating committee
- potential difficulty in selling the participating interest to a third party for fair market value. Prospective purchasers may not be interested in a small participating interest, and conditions may prevent further dilution of the interest or impose restrictive pre-emptive rights
- impediments to offtake agreements as prospective purchasers will only be able to purchase small amounts of LNG from the small holder
- ensuring that the wording of the pre-emptive document which is submitted to the other participants addresses the waiver of pre-emptive rights and of the minimum participating interest article, and acknowledges consent to assignment.

The timing of the small holder's entry to the LNG Project affects their ability to put in place any special arrangements and manage project risks. Entry prior to the finalisation of project documents may give the small holder a greater chance to mitigate project risks, for example, by including a provision for small holders to aggregate their voting power in operating committee matters. Once project documents are finalised however, they are difficult to amend.

The above risks and difficulties may be lessened if the other participants are large entities or the country holding the LNG permit is politically stable. Nonetheless, all remain real risks and the other participants should be monitored to assess their flexibility and attitudes towards the requests of the small participant during the negotiation stages.

Chinese active in WA iron ore sector

Duncan McLean and Ann Soh

Chinese companies remain active in Western Australia's iron ore sector, investing in new projects and negotiating lucrative equity stakes and off-take arrangements.

Sinom (Hong Kong) Ltd. Sinom has substantial shareholdings in Resource Mining Corporation, operator of the Argyle Iron Ore Project in the Kimberley, and in Aztec Resources Ltd (AZR), owner of the Koolan Island Project. AZR has further arrangements with China Minmetals Corporation, securing the sale of more than 33 million tonnes of iron ore to China and Japan over the life of the mine.

Wuhan Iron & Steel Corp. This company reportedly signed an MOU with Mineralogy Pty Ltd for the sale of $20 billion of iron ore concentrate and pellets from the Balmoral Iron Ore Project over 25 years. In late 2005 Mineralogy announced that the project had the financial backing of the Industrial Commercial Bank of China.

Mount Gibson Iron Ltd (MGIL). MGIL is negotiating a participation agreement with Shougang Group to develop the Extension Hill Magnetite Project and has an alliance with Nanjing Iron & Steel to purchase pellets from its mines. MGIL, a major shareholder of Asia Iron Holdings Ltd (AIH), is also involved in the Nanjing Joint Venture Project – a joint development with Shougang Group – to develop a new mine at Extension Hill and build a pellet plant at Longtan near Nanjing.

Murchison Metals Ltd. The Jack Hills Project owned by MML has attracted significant Chinese interest with MML signing 25 year off-take contracts with several Chinese steel companies and trading houses including Tangshan Danyang (Group) Co. Ltd, Nanchang Iron & Steel Co. Ltd, Xinyang Iron & Steel Co. Ltd of Angang Group and Liangang Import & Export Co. Ltd.

Fortescue Metals Group Ltd. This company has long term contracts for 8 million tonnes per annum from its Pilbara Iron Ore and Infrastructure Project with Hebei Wenfeng Iron & Steel Co. Ltd, Jiangsu Fengli Group Co. Ltd and Ping Xiang Iron & Steel Co. Ltd, which include a $66 million prepayment obligation on the part of the Chinese Steel Mills. China Metallurgical Construction Group Corporation has the contract for the design, construction and financing of the beneficiation plant.

Beijing's recent price cap on iron ore imports underscores the country's insatiable demand for iron ore and its attempt to influence price setting. Market analysts predict that China will account for 45 per cent of global imports of iron ore in 2006.

Declaration of metropolitan Sydney's sewerage network an Australian first

Carolyn Vigar

Mandated third party rights of access to water and sewerage services has always been a possibility. The December 2005 declaration of transportation and connection services provided by Sydney Water Corporation's metropolitan sewerage network, under Part IIIA of the *Trade Practices Act 1974* (Cth) (TPA), has made it a reality in Australia for the first time.

As a result, the commercial context in which water and sewerage infrastructure owners and their customers negotiate has been fundamentally altered.

Part IIIA of the TPA establishes a generic negotiate – arbitrate access regime which may be declared to apply to services which satisfy the criteria set out in Part IIIA of the TPA.

The Australian Competition Tribunal (ACT) determined on 21 December 2005 that these criteria were satisfied in respect of an application by Services Sydney Pty Limited (Services Sydney) for declaration of transportation and connection services provided by Sydney Water's metropolitan sewerage network.

Interesting aspects of the declaration include:

• *regional sewerage networks can satisfy the criteria of national significance*. Access was sought to three separate sewerage networks. Despite the comparatively small size of the Bondi sewerage network, the ACT was satisfied that the application met the 'national significance' criteria

• *period of declaration.* In this case an unprecedented 50 years was granted because it is unlikely that the sewerage transportation and connection services offered by Sydney Water would be duplicated within this time frame

• *interaction with state-based regimes:* The ACT declared the sewerage services even though the New South Wales government had accepted a recommendation from the Independent Pricing and Regulatory Tribunal of NSW (IPART) to establish a state-based access regime for greater-Sydney's water and sewerage networks.

Different regimes for Sydney Water

Water and sewerage services provided by Sydney Water are now covered by different legal regimes.

Sewerage transportation and connection services are subject to declaration under Part IIIA of the TPA. Any person (i.e. not just the applicant for declaration) seeking access has a legal right to ACCC arbitration if the access conditions cannot be agreed with the service provider.

Access to Sydney Water's other sewerage services and water services are currently unregulated but may, following IPART's recommendations, become subject to a future state-based regime.

A consistent access regime for water and sewerage services in metropolitan Sydney requires the Part IIIA declaration of sewerage services to be displaced by a state-based access regime. To do so the state-based regime must be certified as effective for the purposes of Part IIIA by meeting the criteria (see clause 6 of the Competition Principles Agreement (CPA)).

Implications for infrastructure owners

Aside from the mooted NSW state-based access regime, the Services Sydney declaration may provide impetus for other State and Territory governments to establish state-based access regimes.

Infrastructure owners should monitor these jurisdictional developments and where possible participate in the structuring of those regimes. They should also be prepared for applications for access to their services where negotiations have not been successful.

Innovators in the water sector should view mandated third party access to water and sewerage services as supporting opportunities for service delivery via existing reticulation networks.

In both cases, there are advantages in understanding the commercial impacts and opportunities that could result from mandated third party access to water and sewerage services.

International investors discover 'where the bloody hell' we are

Kent Grey and Diarmid Lee

Australia's tourism industry may well be asking international visitors 'where the bloody hell are you?', but it seems international oil and gas companies have had no trouble finding Australia.

International players, predominantly from the US, have increasingly focused on the Australian oil and gas industry over the last few years, looking to capitalise on the available acreage and the relative ease of raising funds.

Factors contributing to Australia being in favour include the comparative size of resources pools in key areas in the US, continuing Middle East instability, the comparative absence of sovereign risk in Australia, a bullish market and record oil prices.

In South Australia, a steady wave of foreign investment has flowed into the Cooper Basin region and other resources fields within the state. For instance, the ASX listing of Sundance Energy Australia Limited in 2005, which saw US-based promoters invest in acreage in the South Australian sector of the Cooper Basin, adding diversity to its already established US asset base. The IPO was voted one of the top ten floats of 2005 by *The Australian Financial Review*.

Many companies have realised the benefits of diversifying tenement portfolios. The mix of 'higher risk/higher return' plays in relatively unexplored or under-developed Australian tenements, and the lower risk (and potentially lower returns) of established US fields, has proved an attractive investment opportunity, judging by the success of the Sundance Energy IPO. Companies such as Tomahawk Energy, on the other hand, have raised capital in Australia's buoyant market to support investment in operations elsewhere, such as the USA.

The wave of investment in Australian tenements is not limited to US companies, nor is it restricted just to oil and gas plays. China, India and South Africa are investing in Australian oil and gas ventures, as well as in traditional hard rock mining, which in turn is creating exciting reciprocal opportunities for Australian companies in those countries.