The Agribusiness Team Welcomes Back Angelique Tebbutt

The Agribusiness team bid farewell to Sonja Dickman earlier in the year as she set off on an exciting adventure to Canada. We wish Sonja all the best and hope she will return to Thynne + Macartney at some point in the future.

The team is pleased to welcome back Paralegal, Angelique Tebbutt. Angelique has worked with the Agribusiness team in the past and knows our clients very well. She brings the added skills of a paralegal to the position.

If you would like to book an appointment with a member of the Agribusiness team, please contact Angelique on 07 3231 8818.

Agribusiness Team

Bill Loughnan
Partner
P: + 61 7 3231 8839
E: bloughnan@thymac.com.au

Peter Kenny
Partner
P: +61 7 3231 8849
E: pkenny@thymac.com.au

Ari McCamley
Partner
P: +61 7 3231 8878
E: amccamley@thymac.com.au

Mark Boge
Consultant (Native Title)
P: + 61 427 037 340
E: mboge@thymac.com.au

Alex Ramsey
Associate
P: +61 7 3231 8833
E: aramsey@thymac.com.au

Hannah Byrne
Lawyer
P: +61 7 3231 8892
E: hbyrne@thymac.com.au

Veronica Stewart
Paralegal
P: +61 7 3231 8851
E: vstewart@thymac.com.au

Kathryn Larsen
Paralegal
P: +61 7 3231 8716
E: klarsen@thymac.com.au

Angelique Tebbutt
Paralegal
P: +61 7 3231 8818
E: atebbutt@thymac.com.au

LEVEL 19, CENTRAL PLAZA TWO, 66 EAGLE STREET, BRISBANE QLD 4000
GPO BOX 245, BRISBANE QLD 4001
P: +617 3231 8888 F: +617 3229 0855 www.thymac.com.au
LEVEL 3, 255 CASTLEREAGH STREET, SYDNEY NSW 2000
PO BOX 20074, WORLD SQUARE NSW 2002
P: +612 9119 2288 F: +612 9119 2285 mail@thymac.com.au

Thynne Macartney

Common Provisions Act

Currently in Queensland, the laws governing the resources industry are spread across a number of acts, each applying to different resource tenement types. Many concepts are replicated and yet there are inconsistencies. The Newman Government has rightly identified a need to move towards uniformity.

The *Mineral and Energy Resources (Common Provisions) Act 2014* (the 'Act') will reform the land access framework that governs the relationship between resource authority holders and landholders. The Government says the new laws will support "long term positive relationships" but, in reality, they are not all good news for primary producers.

The changes, expected to commence in early 2015, will implement a consistent but weakened restricted land framework across all resource authority types, restrict the making of objections to mining projects, provide for conduct and compensation agreements to be noted on property titles, allow the Land Court to examine the conduct of parties negotiating conduct and compensation agreements and introduce "opt out" agreements.

New restricted land regime

The new Act establishes a new "restricted land" regime that will apply to all types of resource authorities replacing existing laws designed to protect sensitive areas.

The weakest protection under the existing laws is the requirement for an authority holder to negotiate a conduct and compensation agreement where an activity is proposed within 600 metres of an occupied residence or other prescribed infrastructure, even if such activities would otherwise have only a minimal impact and therefore not require an agreement. However, the protection is weak, particularly because it does not give the landholder a right to say "no" to proposed activities.

The strongest existing "restricted land" regime applies to mining leases under the Mineral Resources Act. A mining lease can only be granted over the surface area of "restricted land", being land that is 100 metres from particular permanent buildings (such as a residence) or 50 metres from particular infrastructure including stockyards, dams, bores or water storages, if the landowner's consent is obtained during the mining lease application stage. As a result, miners seeking a mining lease over restricted land have a substantial incentive to reach agreement with the affected landowners to avoid the need to exclude the restricted areas from the mining lease.

The Act will replace the 600-metre rule for conduct and compensation agreements and the Mineral Resources Act "restricted land" provisions with a new "restricted land" regime that will apply only to areas within 200m of residences, areas used for intensive feedlotting, pig keeping or poultry farming and other buildings that cannot co-exist with resources activities or be easily relocated. The regime does not offer across-the-board protection for stockyards, dams, bores or water storages.

"If co-existence is the correct theme, it needs to be mutually beneficial"

The authority holder must obtain the landholder's consent prior to commencing certain activities on the restricted land or, for mining leases, have entered into a compensation agreement with the landholder before the grant of the mining lease.

The Government admits the reforms will "benefit the resources industry" and says landholders should not be able to exploit the restricted land regime to prevent resource developments where co-existence can occur and appropriate compensation is paid.

The new regime clearly erodes landholders' rights. If co-existence is the correct theme, it needs to be mutually beneficial, and to achieve it the bargaining power of landholders and authority holders has to be as close as possible to equal. The Government has taken a step backwards from this goal.

Objections

Once the new Act takes effect, the only landholders entitled to object to mining leases will be owners and occupiers of land the subject of the mining lease, adjoining land and land necessary for access to the mining lease.

Even then, the grounds of objection will be limited largely to the issue of appropriate "land use". Purportedly to remove "overlaps" between objections to mining leases and considerations under the Environmental Protection Act, the right to object to a mining lease based on its "adverse environmental impact" has been removed. Also deleted from the list are objections based on the "public interest test", the past performance of the applicant or "any good reason".

In some instances, landholders and the wider community will retain a right to object to the environmental authority that a mining company must obtain in conjunction with a mining lease. These rights will be limited to "high-risk" mining projects, except coordinated projects under the *State Development and Public Works Organisation Act* if the Coordinator-General's report for the project prohibits such objections. Because of these changes, we are likely to see more mining projects

LEVEL 19, CENTRAL PLAZA TWO, 66 EAGLE STREET, BRISBANE QLD 4000
GPO BOX 245, BRISBANE QLD 4001
P: +617 3231 8888 F: +617 3229 0855 www.thymac.com.au
LEVEL 3, 255 CASTLEREAGH STREET, SYDNEY NSW 2000
PO BOX 20074, WORLD SQUARE NSW 2002
P: +612 9119 2288 F: +612 9119 2285 mail@thymac.com.au

This information is intended to provide a general summary only and should not be relied on as a substitute for legal advice.
Thynne & Macartney ABN 79 763 953 991. Liability limited by a scheme approved under Professional Standards Legislation.

become coordinated projects under the stewardship of the Coordinator-General.

Objections can be expensive, blunt instruments. But they can sometimes encourage solutions to landholder concerns that resources companies might otherwise refuse to consider. With the changes to landholders' objection rights, the real concern is again the effect on landholders' bargaining power and the need for further, targeted reforms to improve the balance is clear.

Recording conduct and compensation agreements on title

Certain agreements, including conduct and compensation agreements, reached between authority holders and landowners are binding on successors in title.

However, because there is currently no independent register of these agreements, purchasers can be bound by agreements of which they are unaware. Purchasers are therefore forced to rely on the accuracy of pre-contractual disclosures and warranties given by vendors.

The new laws will require authority holders to give notice to the Registrar of Titles within 28 days of entering into a conduct and compensation agreement or opt-out agreement so that the existence of the agreement can be noted on title. The content of the agreements will not be recorded.

Increased powers for the Land Court

The Land Court will be provided with new express powers to decide how and when the resource authority holder may enter land and how authorised activities must be carried out. In other words, the Land Court will be empowered to impose conduct conditions in conjunction with an assessment of compensation. This is a major improvement.

As a general rule, landholders will continue to have only 20 business days to reach agreement with an authority holder after being given notice of the authority holder's intention to negotiate before either party can commence dispute resolution processes. However, if those processes fail, the Land Court can order the parties to go back and engage in a further conference or mediation. For the purpose of making such orders, the Land Court is now specifically empowered to take into account the behaviour of the landholder and the resource authority holder in the process that led to the Land Court's involvement.

Opt out agreements

Since 2010, an authority holder has been permitted to enter land to carry out advanced activities where each owner and occupier has entered into a conduct and compensation agreement, a deferral agreement (deferring the negotiation of a conduct and compensation agreement until after entry) or the matter has, following unsuccessful negotiations, been referred to the Land Court.

The new Act introduces another concept: an "opt out" agreement which negates the need for a conduct and compensation agreement or Land Court proceedings. The Government's theory is that opt out agreements could suit situations where authority holders and landholders have established working relationships and do not need a new conduct and compensation agreement to cover additional activities.

In our view, "opt out" agreements could be exploited by authority holders and used to deny landholders the benefit of conduct and compensation agreements. We cannot envisage a situation where signing an "opt out" agreement would be a landholder's best option.

Landholders should always seek legal advice before signing any document presented by a resource company and in almost all instances the resources company will be obliged to pay for that advice. Thynne + Macartney's Agribusiness team has assisted landholders to reach better agreements with over 200 different resource companies in recent times.

New Certainty With "Make Good" Obligations

The State Government has standardised the ground water "make good" obligations applying to mining and gas tenement holders.

Previously, there have been different approaches under the mining and gas legislation when a bore is adversely affected by a mining or gas project.

As the gas industry developed in Queensland, the *Water Act 2000* was amended to include:

- the need for an underground water impact report and baseline assessments to be carried out for landholders' bores;
- ongoing reporting requirements; and
- importantly, an obligation on a gas tenement holder to enter into "make good" agreements with landholders whose bores would be adversely affected.

Generally, "make good" agreements can be used to ensure that a landholder is provided with compensation from a tenement holder by way of a replacement bore, compensation or a mechanism to purchase the landholder's land if the volume or quality of water drawn from a landholder's bore diminishes. Such agreements can be used to ensure that the rights of landholders are established before the development of the project.

However, the obligations set out in the *Water Act 2000* only applied to tenements issued under the gas legislation and did not apply to mining projects. Under the mining legislation, tenement holders were instead required to obtain water licences for the use of water associated with the mine project and were not required to enter into "make good" agreements in advance.

Earlier this year in the case of *Hancock Coal Pty Ltd v Kelly and Department of Environment and Heritage Protection (No 4)*, the Land Court imposed additional "make good" obligations on a mining tenement holder by expanding the scope of the Environmental Authority to include additional bores which were not originally caught by it. This practice of "make good" agreements being included as a condition of an Environmental Authority had become commonplace and the Court's decision highlighted the inconsistency between the approaches seen in the gas industry and the mining industry on the same issue.

The new amendments to the *Water Act 2000* make both mining and gas tenement holders subject to the same "make good" requirements and provide the Land Court with clear jurisdiction upon which to deal with "make good" agreements between gas or mining tenement holders and landholders.

Thynne + Macartney welcomes the amendments which will commence early in 2015 and has significant experience in assisting landholders to negotiate "make good" agreements.

Family Discretionary Trusts and Succession Planning

Many family businesses are operated through family discretionary trusts. These trusts have usually been set up on the advice of accountants to provide a degree of "asset protection" and to provide tax-planning opportunities.

Clients with substantial assets in a family trust may want the trust to continue following their death for the benefit of the next generation.

Often, people are mistakenly of the view that they can leave assets held within a discretionary trust to whomever they choose.

However, assets of the trust do not form part of an individual's estate and therefore cannot be dealt with in a will.

When implementing an estate plan, the trust structure and documentation establishing the trust must be considered and relevant documents must be put in place to ensure control and management of the trust passes to the appropriate and intended people.

It is important to establish who is the "appointor" or "principal" of the trust as that person will usually have the power to remove and appoint a new trustee at any time. Mechanisms need to be considered to appoint a successor "appointor" or "principal" upon the death or incapacity of a will maker.

For corporate trustees, the process may require a review of the directorship and shareholding of the company.

Further, significant loan accounts owing to or by the trust may impact a will maker's intentions. For example, a significant beneficiary loan account owing by the trust to the will maker may be "called in" by his or her executors. This may not be appropriate if a will maker is attempting to limit or reduce the size of his or her personal estate to which potential family provisions applications can be made by disgruntled family members.

Thynne + Macartney can assist you with strategies to put in place to segregate trust assets and/or make arrangements to ensure equality of distributions of capital and income from the trust to the next generation.

Wills & Estate Planning Team

Margaret McNamara
Partner
Accredited Specialist
Succession Planning
P: +61 7 3231 8881
E: mmcnamara@thymac.com.au

Greg Mann
Special Counsel
P: +61 7 3231 8734
E: gmann@thymac.com.au

Sarah Ramsey
Associate
P: +61 7 3231 8743
E: sramsey@thymac.com.au

Jackie Knowlman
Special Counsel
Accredited Specialist
Succession Planning
P: +61 7 3231 8835
E: jknowlman@thymac.com.au

Thynne Macartney

Newsletter

www.thymac.com.au

This newsletter is intended to provide a general guideline only and should not be relied on as a substitute for legal advice.
Thynne & Macartney ABN 79 763 953 991. Liability limited by a scheme approved under Professional Standards Legislation.