

The increase of the monetary limit to \$150,000 will not affect proceedings that have already commenced. The changes will, however, apply to new proceedings, regardless of whether the cause of action arose before or after the passing of the Amendment Act.

### **EXECUTION OF NATIVE TITLE AGREEMENTS PURSUANT TO SECTION 31 OF THE *NATIVE TITLE ACT* FOR PETROLEUM EXPLORATION LICENCES TO BE ISSUED\***

Ground-breaking native title agreements were executed in South Australia in October 2001, between petroleum exploration companies, native title claimants and the State Government, in order to allow the grant of new petroleum exploration licences to proceed. The background to the negotiations and content of the agreements are summarised.

Section 31 of the *Native Title Act* 1993 (Cth) (NTA) requires the Government, native title parties and the applicant for a petroleum exploration licence (PEL) (the grant of a PEL constituting a future act under the NTA) to negotiate in good faith with a view to reaching an agreement in relation to the conduct of petroleum exploration operations under the PEL to be issued. A series of 16 such agreements were signed for the first time in South Australia on 22 October 2001, and PEL's issued shortly thereafter. This opened the way for exploration to be conducted in the Cooper Basin by a group of exploration companies who now have access to portions of the area for the first time since the Santos-led Cooper Basin joint venture took up their PEL's 5 & 6 over the area over three decades ago. Portions of these PEL's, not otherwise held under production licence, were relinquished in February 1999, and gazetted by the Government for open bidding in late 1998. There were 11 areas the subject of applications for PEL's in the 1998 bidding round, involving 4 registered native title claim areas, meaning that 4 claim groups were represented in the negotiations. None of these groups applications has been determined. The eight exploration companies were all represented by one negotiator.

#### **Key Provisions**

The negotiated agreements, which comprise two documents:

- a deed between the Government, the registered native title claimants (NTP) for the relevant area, the applicant for the PEL, and the relevant aboriginal corporation (representing the NTP); and
- an ancillary agreement to which the Government is not a party,

cover the entire period of exploration and production, and do not need to be renegotiated in the event of a discovery being made. As a separate agreement is required for each licence applied for, it is expected that the agreements entered into in October 2001 will become the template for each future licence application. Copies of the agreements have been made available publicly through the Licence Register of the Primary Industries and Resources SA (PIRSA) website.

---

\* Susan Robertson, Senior Associate, Minter Ellison.

## Payments

The Native Title Deed covers the more fundamental aspects of the arrangements, including:

- the unique 'sign on' payment to the NTP (a single payment funded by the Government (of \$9,091) and the explorers (of \$7,000) through the Association);
- the annual administration payments to be made to the NTP by the explorers (\$5,000 through the Association, capped at \$25,000 per PEL); and
- any production payments in the event of success (through the Government).

The sign on payment was made to recognise the input of the NTP's in completing two years of negotiations for an agreement which is the first of its kind, and which took place principally between representatives from the exploration companies working as one group, and the NTP's working as another group, effectively streamlining the already time-consuming process. The production payment is provided to compensate the NTP for disturbance to land due to production, and the level of the payment was set at 1 per cent of wellhead value on petroleum produced and sold.

## Clearances

The Ancillary Agreement covers the more detailed arrangements on the manner in which the explorer may access land and carry on petroleum operations, including the methodology for identification and protection of areas of cultural, social or spiritual significance for the NTP. These areas may include those areas already protected by the terms of Commonwealth and State heritage protection legislation. The detailed arrangements which are agreed in this document follow a carefully constructed timetable of events, with notices of intended operations being given to trigger the timetable, and meetings being held between the parties to facilitate arrangements. A scouting team is to be assembled and sent to the area to conduct the 'clearance', consisting of representatives from the explorer when required, up to two specialists (anthropologists or archaeologists) appointed by the Association with the explorer's concurrence, and generally four, but up to eight, representatives of the NTP in order to ensure the integrity of the clearance.

Once an area has been cleared for the purposes of an operation, and a report has been provided by the specialist the explorer may proceed to conduct exploration on the cleared land in accordance with the terms and conditions contained in the report without fear of future objections. The scouting team is required to suggest deviations where possible to avoid significant sites, or to advise the explorer's representative during the site visit if an area is not cleared in order to allow alternatives to be inspected and cleared whilst on site (provided the inspection can be completed within two further days). No specific provision is made for the case where an area is not cleared by the report, and such a circumstance would most likely constitute a dispute, which would fall within the alternative dispute resolution procedures which are required to be followed prior to recourse to the Courts. Budgets for clearances are agreed prior to commencement, and paid in a staggered fashion by the explorer. They include payments at a daily rate for the participants in the clearance, but the parties have been careful to ensure that the participants are stated not to act as employees or contractors of the explorers in undertaking the clearance.

In the event that the explorer finds it necessary following a clearance to modify the operations in a manner which is likely to have an adverse impact on native title rights, provision is made for

prompt consent of the Association to the change, or the commencement of clearance for the new area.

#### Instruction in Aboriginal Culture

The explorers are required by the terms of the Ancillary Agreement to educate their contractors and employees in relation to native title generally, and the culture of the relevant claim group and their obligations under both the agreement and heritage legislation in particular.

#### Clean Up

Arrangements are contained in the Ancillary Agreement for the removal of infrastructure at the end of the PEL or relevant licence, except where it is agreed between regulatory agencies, the lessee of the land, the Association and the explorers that it should remain.

#### Assignment

The regular transfer of interests in PEL's, which is so much a part of the petroleum industry, was contemplated by the parties, and resolved by the transferee being required to execute a deed of assumption undertaking to observe the terms of the Agreements to the extent of the transferred interest. From now on in the Cooper Basin where these agreements apply, a transfer of a PEL interest will entail one further deed of assumption along with any joint venture documentation.

#### Future Native Title Claims

The agreements do not contemplate the inclusion of further native title claimants. The reason for this is the protection accorded the explorers under the NTA. Section 26D(2)(c) of the NTA provides that if the parties to the Section 31 agreement so provide in the relevant agreement, the terms of Subdivision P (Right to Negotiate) will not apply to 'later acts' (eg grants of production licences). As mentioned above, such an agreement has been recorded in these documents, and accordingly, the class of native title claimants with whom the explorers must deal is closed.

#### Importance of the Agreements

Whether or not future agreements follow the exact wording of these documents (and negotiation of a further round has already been triggered – in March 2000), they have been ground breaking in many ways, not least of which being in establishing a practical solution to reconciling the needs of all parties. They have paved the way for future licence grants to be achieved by negotiation rather than determination by the Courts, which is an alternative available to the parties in the event that negotiations are not concluded within six months of the notification by the Government of its intention to grant the licence.