LAVAN NEWS

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The real cost of the carbon tax

The carbon tax is one of the most controversial topics in Australia at the moment, particularly as the short and long term financial impact of the carbon tax remains uncertain and many companies in the energy, manufacturing, resources and property sectors are likely to encounter contractual difficulties with the manner in which the costs of the carbon tax are passed on to their customers.

Overview

On 10 July 2011 the Federal government proposed to introduce a Carbon Tax Scheme, which is scheduled to take effect from 1 July 2012. The new legislation proposes to fix a price on carbon as an attempt to reduce Australia's carbon emissions. The carbon tax will be targeting the nation's top 500 polluters requiring them to pay a fixed price of $23 per tonne of carbon released into the atmosphere per annum, which will increase by 2.5% annually until 1 July 2015. After July 2015 the carbon tax will then transition into a market based Emissions Trading Scheme (**ETS**).

The cost of carbon for Australia and its economic impact on the population is intended to be constrained to certain products and industry, and is likely to have an impact similar to the introduction of the Goods and Services Tax (**GST**) regime. It is also likely that companies caught by the Carbon Tax Scheme will seek to recoup the associated carbon tax/ETS costs by passing them on through the supply chain and building the additional expense into the end product.

Although the Federal government has announced a series of measures to compensate the end consumer, no mechanism has been proposed to deal with the implications on other sections of the economy, and principally business.

Supply chain

Unlike GST where end customers started paying tax on goods and services from a set date, the carbon tax will primarily be implemented through the supply chain as and when the additional cost of energy raw materials will impact on the base cost of a product. Companies that have entered into supply contracts that are to run for a significant period of time may find themselves absorbing the additional costs associated with the carbon tax and having to find ways of passing on that cost themselves. It is accordingly important to review these contracts to ensure there is an ability to pass on that cost or to determine if the contract contains a so called 'change of law' clause, which allows contracts to be renegotiated if there are any major legislative or policy changes.

Change of law provision

Although a 'change in law' clause would permit the amendment of the contract to ensure that the direct costs of carbon tax are passed on, it is still unclear if the indirect costs associated with the carbon tax can be passed on, eg higher electricity prices. This issue is of particular to concern to the providers in the middle of the supply chain as they are likely to absorb most of the indirect costs in that they are unable to pass the cost on any further and are unlikely to meet eligibility criteria for compensation. For example, builders who have sold properties to customers for a set amount off the plan may experience significant financial hardship if there is a sudden increase in building materials as a result of the carbon tax and they are not in a contractual position to renegotiate the purchase price.

A potential means of overcoming the difficulties with passing on the carbon tax is for supply contracts to contain well drafted carbon tax pass through provisions that have regard to the indirect costs associated with the tax as well as a predictability formula.

Many companies are now engaging carbon consultants to advise them of long term potential financial impact that the carbon tax is likely to have on their goods or services, through the use of predictability models. Lawyers have been looking at such models, or the results from the models, for some time and are well equipped to conduct the relevant reviews and negotiate contract amendments that will specifically address the long term contractual implications of the carbon tax.

If you would like more information about the Carbon Tax Scheme or are interested in reviewing your current suite of supply contracts to ensure adequate protection from additional costs associated with the proposed carbon tax then please contact partner Paul McQueen on (08) 9288 6943 / paul.mcqueen@lavanlegal.com.au, senior associate Craig Wallace on (08) 9288 6828 / craig.wallace@lavanlegal.com.au or associate Shauna Mounsey on (08) 9288 6745 / shauna.mounsey@lavanlegal.com.au.

About Lavan Legal:

Lavan Legal is an independently owned law firm in Western Australia, comprising over 200 staff which includes 20 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. We offer a comprehensive range of services advising on all aspects of property transactions including acquisition, disposals, leasing and developments including syndications.

At Lavan Legal we believe in building long lasting relationships with our clients. We provide the best legal advice and service and continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through continuous innovation and process improvement.

Long overdue reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) **(EPBC Act)**

Almost two years after Dr Allan Hawke AC finalised his report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (**Hawke Review**), the Federal government has recently responded by commenting on the recommendations for the improvement and reform of Australia's management of environmental issues (**Response**).

The Response alludes to significant reform of the EPBC Act and outlines the following key themes upon which those reforms are built, including:

- a shift from individual project approvals to strategic approvals including new regional environment plans;
- streamlined assessment and approval processes;
- better identification of national environmental assets, including provisions to list 'ecosystems of national significance' as a matter of national environmental significance under the EPBC Act; and
- co-operative national standards and guidelines to harmonise approaches between jurisdictions and foster co-operation with all stakeholders.

The Response goes on to indicate that improvements and reforms are to be achieved through a '*new way of doing business, supported by systems that are designed to be efficient and effective for the people who use our environmental regulatory system'*. Inherent to achieving those ends are the adoption of flexible innovative management practices and the management of natural assets on a whole-of-ecosystem scale where they will be most effective.

The Response indciates that reform will require further investment into strategic approaches, such as regional environment plans and strategic assessments, and the understanding that identification and avoidance of environmental harm early in the process is more cost effective than rectifying the damage thereafter, and that better regulation will encourage development and growth to maintain Australia's international competitiveness.

In relation to the extent of the reforms anticipated, the Federal government has effectively accepted 56 of the 71 recommendations outlined in the Hawke Review, either wholly or in part, and will not be proceeding with the remaining 15 recommendations.

Key reforms

Key reform issues that are of a particular interest to our clients include:

- Recommendation 4 - recommends that the Commonwealth work with States and Territories, as appropriate, to improve the efficiency of the environmental impact assessment regime.

  The Response agrees that improvement of the efficiency of the environmental impact assessment regime is a top priority and, in particular, that the Government should be seeking to increase a strategic and early engagement for opponents, including working with States and Territories through strategic assessment and regional environmental planning.

- Recommendation 5 - recommends that Australian and State/Territory governments reach a single national list of threatened species. The Federal government agrees with the review finding that there are inconsistencies and inefficiencies between jurisdictions in the listing of threatened species and ecological communities.

  This circumstance is particularly evident in a WA context in relation to endangered species, including the Graceful Sun Moth. As many will be aware, the listing and protection status of this species is subject to considerable doubt and criticism. Nevertheless, many developments in the Swan Coastal Plain continue to be severely constrained despite the uncertainty and will continue to be so constrained until such time as the listing status for the species is resolved.

- Recommendation 6 - recommends that the Australian Government expands the role of strategic assessments and bio-regional plans.

  In a WA context, a consolidated approach along these lines would be of significant assistance to the development of land on the Swan Coastal Plain. It is also important to note that on 18 August 2011, the WA Ministers for Planning and Environment and the Commonwealth Minister for Environment announced that a strategic assessment of the Perth and Peel regions of WA would be undertaken in accordance with S.146 of the EPBC Act.

- Recommendation 26 - recommends that the EPBC Act be amended to confer power to the Federal Minister to request information on alternatives for projects referred for approval under the Act. The Response supports this clarification of the Minister's powers to request prudent and feasible alternatives to projects referred under the EPBC Act. Please note that the Minister already has existing powers under the EPBC Act to require and consider alternatives where such a requirement is included in impact assessment guidelines. There is also an existing option for proponents to include alternatives to their proposed actions in referral documentation. However, the current provisions for consideration of alternatives does not address the difficulties experienced by some proponents where they have significantly invested in a particular project designed before engaging with the Federal department.

  The current EPBC Act allows the Minister the option to reject a proposal as 'clearly unacceptable' or to allow assessment to proceed in the knowledge that his final decision may not be to approve the project, or to impose conditions that may be burdensome or even unacceptable to the proponent. As a consequence of this recommendation, the Government have indicated that they will seek to amend the EPBC Act so that where the Minister forms

a view at the end of the referral stage that a proposed action may have a potentially unacceptable impact on the protected matter, he may require further information or alternatives to be provided and for the proponents to submit an amended referral.

- Recommendation 27 - recommends the operation of the environmental impact assessment process be clarified by either amending the EPBC Act (as appropriate) or developing policy guidelines to better identify and manage impacts on protected matters.

  This particular amendment is of considerable importance in a WA context in as much as it provides for the development of significant impact guidelines to provide clarity for proponents in deciding whether or not an action has had, is having, or is likely to have a significant impact on matters of national environmental significance. To this end, the Government has effectively agreed to produce more guidelines and policy statements including:

  - guidelines on what constitutes a significant impact for each matter of national environmental significance;
  - industry-specific guidelines on significant impact;
  - guidelines specific to species and ecological communities on significant impact, including consideration of habitat where appropriate; and
  - guidelines on continuing use and prior authorisation.

  Lavan Legal considers this to be a significant improvement on the situation that currently prevails in relation to the Black Cockatoo species and the Graceful Sun Moth and the impact it has on development and, more particularly, the constraint to such development in the Swan Coastal Plain. The clarification of the significant impact guidelines will assist proponents and decision makers alike in relation to the self-assessment or whether or not to refer to the Federal department for assessment.

- Unfortunately, Recommendations 49 and 50, which recommend the amendment of the EPBC Act to include provision for controlled action and/or assessment approached decisions to be subject to a merits review in the Federal Court, have not been agreed. The Government have indicated that such a change would slow down the process significantly.

  This is a disappointing outcome in as much as the existing mechanism for appeal of controlled action and assessment approached decisions are limited to the inherent jurisdiction of the Federal Court and, in particular, to errors of law.

In order to achieve the suite of reforms outlined in the review, the Federal government will be introducing cost recovery mechanisms under the EPBC Act. The purpose of doing so is to increase certainty and the efficiency of the decision making process, thus reducing the overall cost to proponents. A comprehensive consultation process on the potential cost recovery arrangements in accordance with the Australian Government cost recovery guidelines will commence in due course.

For further information on any aspect of the Hawke Review and how it affects your proposal, please contact partner Paul McQueen on (08)92886943/paul.mcqueen@lavanlegal.com.au or senior associate Craig Wallace on (08) 9288 6828 / craig.wallace@lavanlegal.com.au.

For more information about the Federal government's response to the Hawke Review, please see the following link: http://www.environment.gov.au/epbc/publications/pubs/epbc-review-govt-response.pdf.

The Federal government releases draft Biodiversity and Offset Policies for comment

The Federal government have recently released a draft Biodiversity Policy and a draft Offset Policy for public comment (deadline expiring on 21 October 2011).

The release of the draft policies coincides with the Federal government's response to the Hawke Review and is intended to provide clarity and certainty in relation to matters of national environmental significance and the use of environmental offsets under the *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

Biodiversity Policy

The purpose of this policy is to provide for the delivery of an integrated approach to tackling the challenge of biodiversity conservation in a changing climate. The Federal government indicate that the policy is to reflect Australia's international obligations under the Convention on Biodiversity and to underpin the Australian Government's role in delivering Australia's Biodiversity Conservation Strategy 2010 – 2030 with State and Territory governments.

This document is available at http://www.environment.gov.au/epbc/publications/pubs/consultation-draft-biodiversity-policy.pdf.

Offsets Policy

The Offset Policy outlines the Federal government's framework on the use of environmental offsets under the EPBC Act, including:

- when they are required;
- how they are to be determined; and
- the framework under which they are to operate.

The Offset Policy is general in nature and its stated purpose is to ensure the efficient, effective, transparent, proportionate, scientific, robust and reasonable use of offsets under the EPBC Act; and to provide proponents, the community and other jurisdictions with greater certainty and guidance on how offsets are to be determined and applied under the EPBC Act.

This document is available at http://www.environment.gov.au/epbc/publications/pubs/consultation-draft-environmental-offsets-policy.pdf.

Lavan Legal comment

The release for comment of the draft Offset Policy is a significant development and represents the outcome of long running negotiations and discussion in this regard between the Federal department for the environment, their State counterparts and peak industry bodies.

In as much as the intent of the Offset Policy is to clarify the range of issues imperative in considering offsets as part of a project, and more importantly the nature and scale of those offsets, all proponents should carefully consider the nature and the intent of the draft wording.

In particular, in light of past experience in relation to the lack of science behind the setting of threshold requirements for environmental offsets, particularly in relation to Carnaby's Black Cockatoo, proponents should ensure that the manner in which offsets are to be required, calculated and provided, is carefully scrutinised and based on the most up to date scientific information.

If you have any comments or queries in relation to any aspect of the draft policies outlined above, or in relation to the requirement to provide environmental offsets that will affect your proposal, please contact partner Paul McQueen on (08) 9288 6943 / paul.mcqueen@lavanlegal.com.au or senior associate Craig Wallace on (08) 9288 6828 / craig.wallace@lavanlegal.com.au.

Local government subdivisional engineering guidelines out for comment

The Institute of Public Works Engineering Australia has released an updated set of Local Government Guidelines for Subdivisional Development, 2011 (***Edition 2.1***). The guidelines are prepared in conjunction with the Western Australian Planning Commission (**WAPC**) and are intended to provide greater clarity and certainty in relation to the Department for Planning engineering requirements.

The guidelines encompass current legislation and best practice minimum engineering standards and are intended to guide local government and the development industry through engineering specification, construction and post-construction subdivisional approval.

The WAPC has resolved to advertise *Edition 2.1* to key stakeholders, following which the guidelines are intended to be adopted and referred to in advice notices attached to subdivision approvals (as being the current minimum standard). The public submission period expires on 26 September 2011.

Lavan Legal comment

Developers and landowners are encouraged to review the draft guidelines with a view to understanding the best practice engineering for the provision of subdivision infrastructure and to understand potential cost implications for developers in regions where developer cost contribution provisions apply.

If you have any queries in relation to the draft guidelines or the implications of the prescribed standard for developer cost contribution provisions affecting your development, please contact partner Paul McQueen on (08) 9288 6943 / paul.mcqueen@lavanlegal.com.au or senior associate Craig Wallace on (08) 9288 6828 / craig.wallace@lavanlegal.com.au.

We want your feedback

If you have topics or issues that you would like the team to write about please let us know. Suggestions can be sent to Laura Fischer at laura.fischer@lavanlegal.com.au.

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