RECENT DEVELOPMENTS

COMMONWEALTH*

THE TIMOR GAP TREATY IN FURTHER TRANSITION

As noted in (1999) 18 AMPLJ 201, the Timor Gap Treaty between Australia and Indonesia (the Treaty) has functioned well in creating a workable legal framework for hydrocarbon exploration and exploitation in the seabed area between Australia and East Timor, and reference has been made to the need for an orderly and considered approach to how the emergence of an independent East Timor affects this situation.

The United Nations Transitional Administration in East Timor ("UNTAET") has been in a position to facilitate a smooth transition, and in February 2000 UNTAET and the Australian Minister for Industry, Science and Resources announced that approval had been given by the Joint Authority under the Treaty for the first phase of the Bayu-Undan hydrocarbon project in Area A of the Timor Gap Zone of Co-operation

A major predictable issue recently raised on the East Timorese side is that the formula in the Treaty for equal sharing as between Governments of the benefits of the exploration of hydrocarbons as provided under the Treaty be altered. One option referred to is that the East Timorese share of Timor Gap revenue should rise to 90% from the current 50/50 split. This could be offset by guarantees on trading and employment opportunities for East Timorese.

In this context contractors have called for an agreement in principle on a new Timor Gap Treaty by the end of the year to reduce risks of delay in the development of the emerging world-class oil and gas province. This recognises that the renegotiation of the Treaty itself will be a matter for the Governments of East Timor and Australia. A suggestion that has been aired is that the UN should take the revenue sharing issue to the International Court of Justice, but that would take much more than the end of the year to resolve, even assuming that this course were legally open.

NEW SOUTH WALES

EMISSIONS – ALLEGED PERSONAL INJURY – CLAIMS BASED ON NEGLIGENCE, NUISANCE, BREACHES OF *TRADE PRACTICES ACT* 1974 (CTH) – FAILURE TO SATISFY TPA CRITERIA – NO FEDERAL COURT JURISDICTION AT COMMON LAW**

***Cook v Pasminco Ltd* [2000] FCA 677**

(Federal Court of Australia, 12 May 2000)

The applicants sued the respondent, Pasminco Ltd, with respect to alleged noxious emissions from plants at Cockle Creek, near Newcastle, New South Wales and Port Pirie in South Australia. All four applicants alleged injury to their health wrongfully caused by the respondents, who permitted emissions of quantities

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of offensive, noxious and unwholesome smoke, fumes, vapours and gases, lead, sulfur dioxide and other pollutants from the lands.

Lindgren J of the Federal Court of Australia heard the matter. The applicants pleaded common law actions in negligence and nuisance and two statutory causes of action under the *Trade Practices Act* 1974 (Cth) ("TPA"). There was no dispute that the Federal Court had jurisdiction in respect of claims made under ss 75AD and 75AG of the TPA, however, it was submitted that on the basis that the TPA claims would not succeed, the Court lacked the jurisdiction to entertain the common law causes of action in negligence and nuisance.

In light of *Re Wakim,* it was clear that the applicants could not rely on the cross-vesting legislation of the states, to give the Federal Court jurisdiction to entertain their common law claims. The applicants failed to show that the claims formed part of the one "matter" or "single juridical controversy" as federal claims within the Court's jurisdiction. On the contrary, Lindgren J found that the federal claims were not genuine and were colourable and fabricated since they were obviously doomed to fail.

In relation to the TPA claims, Lindgren J found that the applicants would not be able to prove that the respondents had "supplied" the emissions in order to come within the provisions of s 75AD and s 75AG of the TPA. Secondly, the supply must have occurred "in trade or commerce" and no evidence supported that the emissions were in trade or commerce. The third matter related to the word "defect" in s 75AD and s 75AG. In order to succeed, the applicants had to show that the emissions were not as safe, because of a defect in them, as persons generally were entitled to expect them to be. However, according to the pleadings the emissions were unsafe because they were true to their nature, not because they had a defect.

The application was dismissed as incompetent.

BLOCKADE OF ACCESS TO MINING LEASES – CONDUCT WRONGFULLY AFFECTING INTEREST OF LESSEES – *MINING ACT* 1992 (NSW) S 312 – DISCRETION TO GRANT INJUNCTION – ORDERS MADE BY WARDEN*

Ross Mining NL and ors. v Alex Mark Barret and ors.

(Mining Warden, 26 February 1999)

This matter involved three complainant companies engaged in gold mining pursuant to Mining Leases 1386 and 1426 located near Tenterfield in NSW. They applied for injunctions under s 312 of the *Mining Act* 1992 (NSW) against 65 individuals. The injunctions, preventing the defendants from encroaching on the mining tenements and affecting improvements owned by the mining companies, were granted against each of the 65 defendants.

Section 312 gives discretion to the Warden's Court to grant an injunction restraining any specified person from affecting the legal or equitable interest of the applicant in land subject to an authority or mineral claim. The defendants attempted to prevent mining taking place on Mining Leases 1386 and 1426 and the complainants feared that if injunctions were not granted against each of the defendants, further disruptive and perhaps dangerous incidents would occur. Some of the incidents that had occurred included:

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