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“Legal Overview for Operators in the Timor Sea
‘Joint Petroleum Development Area’ ”

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"Joint Petroleum Development Area"**

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HWL Ebsworth

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- With more than 500 lawyers, including over 100 partners, working from offices in Melbourne, Sydney and Brisbane, we are a preeminent, National commercial law practice.
- The firm has the largest group of specialist maritime and trade lawyers of any firm in Australia.
- I head up the firm's Maritime & International Trade practice in Victoria, complementing the Firm's market leading teams in Sydney and Brisbane.

Disclaimer

The information provided in this presentation is in summary form and is designed to alert parties to developments of general interest. The information is not comprehensive, is not offered as advice and should not be used to formulate business or other fiscal decisions.

Introduction

- 1) Recap on Treaty Status and Legislative Structure
- 2) Significant Provisions of the Timor Sea Treaty
- 3) Anomalies with the Timor Sea Treaty
- 4) Regulation of the JPDA and Recent Developments
- 5) Comment on the Draft "Technical Regulations for the Exploration and Exploitation of Petroleum in the JPDA"
- 6) Limitation of Liability for owners of vessels engaged in the JPDA
- 7) Conclusion

1. Treaty Status and Legislative Structure

- A mine-field of interrelating and cross-referencing Commonwealth and State legislation and regulations, International treaties and regulations:- so this is only a snap-shot
- One of the difficulties that will be highlighted, is the frequency with which definitions from one instrument are adopted into another, often creating ambiguities in interpretation
- Neither the "Timor Sea Treaty", the "Treaty on Certain Maritime Arrangements in the Timor Sea", nor the "International Unitisation Agreement for Greater Sunrise", nor any boundary of the JPDA, are impacted by the recent United Nations decision accepting Australia's claim to an extension of various of its maritime boundaries

Timor Sea Treaty ("TST")

- Interim agreement signed by East Timor (now Timor-Leste) and Australia on 20 May 2002: entered into force 2 April 2003
- Applies:- entire JPDA
- Article 9(b):- need agreement for reservoirs straddling the JPDA boundary (eg "Greater Sunrise Unit Area")
- Enacted into Australian domestic law:- *Petroleum (Timor Sea Treaty) Act 2003*
- Duration (Article 22): initially, until seabed delimitation determined, or 30 years, whichever is sooner. Now changed:- same duration as CMAT

Treaty on Certain Maritime Arrangements in the Timor Sea ("CMAT")

- Interim agreement signed by Timor-Leste and Australia on 12 January 2006: entered into force 23 February 2007
- Applies:- JPDA, the Greater Sunrise Unit Area and any other maritime area the subject of a maritime boundary dispute between the two countries
- Duration (Article 12): 2057, or 5 years after exploitation of the "Unit Area" ceases, whichever is sooner
- Amends Article 22 of the TST to have the same duration as CMAT

International Unitisation Agreement for Greater Sunrise ("IUA")

- Signed by Timor-Leste and Australia on 6 March 2003: entered into force 23 February 2007
- Applies:- petroleum deposits of Sunrise and Troubadour (i.e. the "Greater Sunrise Unit Area")
- Article 1(n): "*Unit Area*" effectively defined to mean the "Greater Sunrise Unit Area"

2. Significant Provisions of the Timor Sea Treaty

- Various provisions in the TST deal with the law and jurisdiction applicable in the JPDA:
 - Art.7:- agree a Petroleum Mining Code ("PMC") for exploration, development, exploitation and export of petroleum within the JPDA
 - Art.9:- any reservoir of petroleum across a boundary treated as a single entity
 - Art.8(b):- pipeline landed in Timor-Leste subject Timor-Leste jurisdiction: pipeline landed in Australia subject Australian jurisdiction

- Art.10(d):- pollution of the environment – liability per contract, licence or permit issued under the TST, and law of the jurisdiction (Australia or Timor-Leste) where claim brought
- Art.13:- application of tax laws
- Art.14:- criminal jurisdiction
- Art.15:- customs, migration and quarantine
- Art.17:- safety and operating standards, and crewing regulations

3. Anomalies with the Timor Sea Treaty

Potential "Duration" Oversight

- CMAT:- covers JPDA, the Greater Sunrise Unit Area and any other maritime area the subject of a maritime boundary dispute, its duration is linked to the exploitation of the "*Unit Area*" in the IUA
- impacts on duration of the TST, which terminate when CMAT does, on the cessation of exploitation of the "Greater Sunrise Area"

Potential Conflict between Arts. 10 (Pollution) and 17 (Flag-state law)

- assume incident in JPDA involving a vessel under the flag of a country other than Timor-Leste or Australia, caused by negligence of the owner relating to safety and operating standards, causing damage to an Australian asset
- if claim commenced in Australia (Art. 10(d)(ii)), Australian law apply, which could conflict with Art.17. What relevant "*international standards*"? Conflict with flag state?

4. Regulation of the JPDA

- Article 6: three-tiered administrative structure for regulation: "Designated Authority", "Joint Commission", and a "Ministerial Council"
- "Designated Authority":- initially designated by and responsible to the "Joint Commission" (per Article 6(b)(i)), and responsible for the administration and authorisation of all petroleum related activities in the JPDA
- "Joint Commission":- responsible for policies and regulations. Refers disputes to the "Ministerial Council"
- The "Ministerial Council":- responsible for attempting to resolve disputes
- This hierarchy now changed

Post 30 June 2008 Regulation of the JPDA

- Article 6(b)(ii):- after initial three years the "Designated Authority" defers to Timor-Leste Ministry responsible for petroleum activities, or a Timor-Leste statutory authority if the Ministry declares
- 30 June 2008:- old "Designated Authority" ceased to exist
- 1 July 2008:- the Timor-Leste "National Petroleum Authority" ("NPA") became the new "Designated Authority"
- 16 June 2003:- "Joint Commission" approved Interim Regulations
- Late May 2008:- previous "Designated Authority" advertised for general comment as to the draft "Technical Regulations"
- Further consultation anticipated

5. Comment on the Draft "Technical Regulations"

Concerns:-

- Uncertainty whether regulations intended apply to all Petroleum Sharing Contracts ("PSC"), or whether some are exempt. What regulations for new contractors in the "Greater Sunrise Unit Area"?
- Some scepticism too complex: 17 pages, to 35 pages, to a suggested 146 pages
- Initial draft prepared by outgoing "Designated Authority", and now the responsibility of the Timor-Leste NPA, with possible differences in philosophy and agenda. For instance:
 - Timor-Leste harmonise the TRs with its own Petroleum Activities Act 2005, in respect of projects in its own sovereign territory?

- Remove cross-referencing to Australian legislation etc. For example:
 - S.4:- "Controlled Substance" defined per Australian regulations
 - S.4:- "Exposure Standard" defined per Australian published standards
 - S.4:- "Hazardous Substance" defined per Australian published standards
- What emphasis, if any, is there on harmonising the IPMC, the PMC and the TRs?
- Div.1(1)(1):- all definitions same as PMC or the IPMC as applicable. Uncertainty where the previous "Designated Authority" deemed one or the other of the IPMC or PMC should apply to any given PSC (plus s.26(1)(b) PMC stating that PMC repeal IPMC, but not with respect to some PSCs.

- Cross-referencing to definitions can lead to ambiguities and inconsistencies. For example:
 - "Petroleum Activities" changed to "Authorised Activities" in the IPMC, PMC and TRs (s.4). Arguably do not cover the breadth of activities originally contemplated in the TST.
 - "Authorised Activities" (s.4) are "activities authorised by an Authorisation", defined as an "Access Authorisation", defined as per the definition in the PMC (s.9.1)
 - However, "Access Authorisation" definition in s.9.1 of the PMC is flawed
 - "Petroleum Operations" used as a defined term in the definition of "Facility" (s.4), though it is not itself defined in the TRs, nor does it appear in the TST, IPMC or the PMC

- "Blocks" different in the PMC (s.2.2) and the IPMC (Art.2), with the latter not accounting for Blocks only partly within the JPDA
- No definition of "contractors representative"
- "Pipeline" in the PMC (s.1.1) is different to in IPMC (Art.1(h), with uncertainty whether the TRs cover "field gathering or flow lines"?
- "Petroleum" and "Good Oil Field Practices" defined in the PMC (s.1.1), but not in the IPMC
- "Well Operations Management Plan" is not a defined term under s.4, despite being referred to as a defined term

- Neither the IPMC, PMC or TRs address in any detail customs, quarantine and migration as in Art.15 of the TST.
- Per s.1(3):- Operator may apply for a waiver of any clause or regulation to it, provided no risk to persons or the environment. While NPA may grant such a waiver, per s.1(6), such waiver may be revoked "at any time without notice". Unsatisfactory
- That said, it is unclear how far such waivers should go. Unpublicised waivers contributes to uncertainty in the field
- Various of the powers provided to "Inspectors" under s.34 arguably against "Good Oil Field Practice" and common sense. Prudent notice periods for such inspections +24 hours
- Powers provided to "Inspectors" under s.34 extremely broad

- Per s.145 Operator give "Notice" of a "Reportable Incident" within two hours of its first occurrence. Impractical
- Per ss.238-246 "Applications for Development Plans" and the "Withdrawal of Development Plans" (ss.247-250):- no process contemplated for any appeal
- Significant "Contract Fees" (s.282), "Retention Fees" (s.283), "Development Fees" (s.284) and "Re-Assessment of Development Fees" proposed:- unclear who payment to be made to

Positives:-

- Provisions relating to "Entry into the JPDA" (ss.20-30): clearer than equivalent counterparts in the other earlier instruments
- Provisions relating to "Workplace Arrangements" (ss.46-62): generally well considered and bear some resemblance to some Australian OH&S laws
- Provisions relating to "Environment" (ss.117-152): generally an improvement
- Provisions relating to "Diving Safety" (ss.153-175): adopt standards of safety etc. that are generally in keeping with Australian standards
- Provisions relating to "Well Operations" (ss.195-237): improvement, with the addition of a requirement for a "Well Operations Management Plan" (s.221), and various obligations adopted not dissimilar to Australian law

6. Limitation of Liability

- Vessel owners operating vessels within the JPDA (either in “transit” or semi-permanently) should take care in reviewing contracts and incorporating conditions such as Terminal Conditions, as it is possible to inadvertently contract out of, or contractually waive one’s entitlement to otherwise available Limitation of Liability provisions
- A “choice of law” clause referring to, eg, English law will not necessarily have the desired effect, as an Australian court, for instance, would be seized of jurisdiction if a claim was brought there, and would likely ignore the English law clause
- Can impact on P&I cover and result in caps being applied

7. Conclusion

- The participants that engage in business within the JPDA must do so under an increasingly complex regime of laws
- As there is an immediate opportunity to comment on the draft Technical Regulations, it would be in the interests of such participants to do so, rather than miss the opportunity and then find the renewed regime unpalatable
- Extreme care should be taken when conducting any risk/compliance assessment, as there are both overlapping and gaps in the legal instruments that participants must comply with

Thank You

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