

Geothermal Energy Regulation

McKenzie, G.C.

Finlaysons, Lawyers, 81 Flinders Street, Adelaide SA 5000

Email: george.mckenzie@finlaysons.com.au

INTRODUCTION

The paper will examine regulation which affects the geothermal industry on a national basis.

The examination will cover 5 primary fields:

- the capacity to regulate the geothermal industry nationally;
- the lack of consistency in current State based geothermal legislation;
- the regulation of simultaneous geothermal and mining or petroleum operations
- the lack of a consistent approach across jurisdictions to application of other legislation to the geothermal sector
- the adequacy of other legislation which affects the geothermal sector.

Each of these fields will be considered by reference to actual examples.

In relation to the 4th area of focus, particular attention will be given to the question of land access and the application of the right to negotiate procedure under the Native Title Act to geothermal operations.

NATIONAL REGULATION

There is a natural desire from the sector for consistency of legislation nationally.

The paper will consider the constitutional capacity for the Commonwealth to legislate for the sector, a voluntary referral of powers to do so by the States or a co-operative legislative scheme.

It will be argued that this is a remote possibility even in an environment where the Labor Party is in power federally and in all States and the Northern Territory.

It will be concluded that the sector would better use its energies on seeking greater consistency between State based legislation than seeking a national legislative scheme.

STATE BASED LEGISLATION

The legislative picture is characterised by different approaches in each jurisdiction.

There is a significant lack of consistency in approach.

Three primary examples of this will be noted:

- the legislative framework within which geothermal regulation has been placed
- the definition of geothermal energy
- the degree to which geothermal sector activities are regulated in each jurisdiction

It will be argued that inter-jurisdictional consistency is unlikely to be achieved.

The analogy of other resources industry legislation will be applied to support this proposition.

Nevertheless it will be submitted that the AGEA should lobby for a greater level of consistency in key concepts in the legislation of each jurisdiction.

SIMULTANEOUS OBLIGATIONS

Geothermal operations run the risk that they are conducted or proposed to be conducted in the same area as already existing or subsequently commenced activities by other resources sectors – minerals or gas/petroleum exploratory or production operations.

The paper will examine the inadequacies of current geothermal and related resources legislation in dealing with this issue.

The paper will also propose more adequate means by which this issue can be more effectively regulated.

INCONSISTENT APPLICATION OF OTHER LEGISLATION

The most topical area in this regard is the application of Sub-Division P of Part 2 of the *Native Title Act* to geothermal operations.

The paper will note the different approach in this regard of the various State geothermal regulators.

The paper will examine the requirements of this Sub-Division and, in particular, the definition in section 253 of the *Native Title Act* of “mine” and consider whether “mine” applies to geothermal operations.

The paper will also consider the various definitions of geothermal energy in State geothermal legislation and assess whether there are any differences in these definitions which give rise to these different regulatory approaches.

The paper will examine the circumstances in which the “right to negotiate” process was introduced when the *Native Title Act* was enacted in 1994, will argue that it would be a retrogressive step to extend the application of the process to the geothermal sector and that this should be opposed by the sector.

The paper will note that, even if the “right to negotiate” process were not to apply, the sector still needs to deal with native title issues, particularly at the production stage. The implications of these requirements will be examined and the conclusion drawn that ultimately the geothermal sector will need to deal with native title even if the “right to negotiate” process does not apply.

ADEQUACY OF OTHER LEGISLATION

In a number of areas legislation which affects the geothermal industry does not adequately take account of the requirements of the industry.

Whilst mention will be made of other areas, water resources legislation will be used as an example to illustrate this issue.

The paper will argue that this is an area of primary focus for AGEA in lobbying for legislative change affecting the geothermal sector.