

CARBON CAPTURE AND STORAGE

Legal Framework

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Carbon Capture and Storage – the Emerging Industry

The Legal Framework

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Content of Presentation

- Key legal issues –
 - access to land
 - third party access to infrastructure
 - competing land uses
 - long term liability
 - CO₂ ownership
- Developments in Australia
- Developments elsewhere



Key legal issues - overview

- No existing statutory regime fully allows for CCS
- Possibly petroleum legislation - but:
 - differing jurisdictional regimes
 - limited rights to store CO₂
 - doesn't allow long term storage
 - doesn't deal with long term liability
- CO₂ capture and transportation – nothing much new
- CO₂ injection and storage – several tricky issues



Key legal issues - access to land

- Need a right of access to:
 - explore for sites
 - test for suitability of sites
 - conduct injection activities
 - monitor site post-injection



Key legal issues - third party access

- Could apply to:
 - transportation infrastructure
 - injection infrastructure
 - storage reservoir
- Legislative scheme -v- *Trade Practices Act 1974* (Cth) Part IIIA



Key legal issues - competing land uses

- Competition between:
 - landowner
 - mining/petroleum
 - geothermal
 - other commercial users
- Priority of entitlement?
- Dispute resolution?
- Over-riding issues?



Key legal issues – long term liability

- The usual suspects – negligence, nuisance, trespass and waste
 - Liability to the underlying or adjacent landholder, or parties with other interests (e.g. petroleum, mineral or water)
- Liability under tenement conditions
- Statutory liability – environmental, planning, water, occupational health and safety, industrial, native title and Aboriginal cultural heritage, trade practices



Key legal issues – long term liability

- Why is liability such a big deal for geosequestration:
 - new activity – uncertain risk – no industry standard
 - no insurance cover available
 - long term storage/disposal
 - potential for ‘orphan’ sites
 - don’t want a James Hardie scenario



Key legal issues – long term liability

Options to manage liability:

- status quo approach
- legislate to limit liability
- government assumes risk of liability
- insurance:
 - private
 - statutory scheme
- industry compensation funds



Key legal issues – CO₂ ownership

- Attachment of CO₂ to the substratum => doctrine of fixtures unless express legislative provision to the contrary or contractual arrangements
- Subject to depth limitations on title
- All other ownership claims are superseded
- Relevant to future use of resource and possibly liability (although not definitively determinative)



Developments in Australia - overview

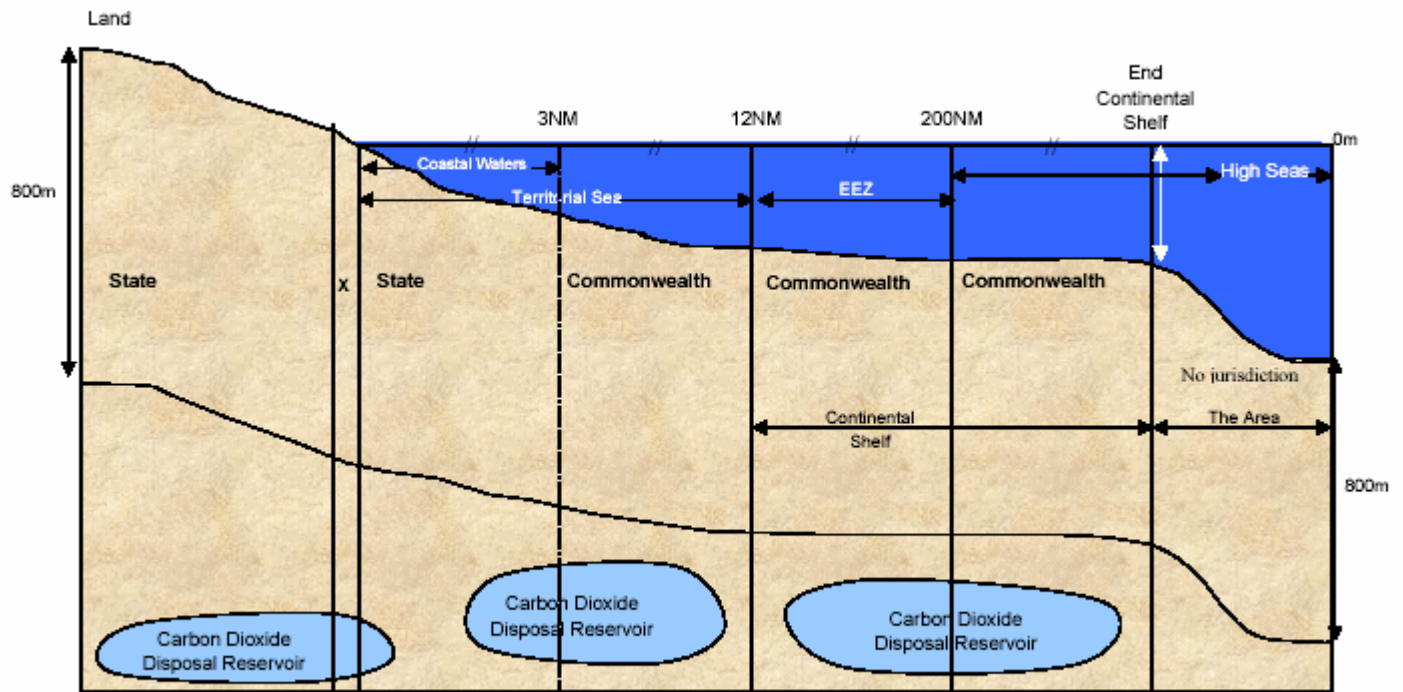
- Significant developments underway at the Commonwealth level and also in Queensland
- Work also being undertaken in South Australia and Western Australia (and existing WA *Barrow Island Act 2003*)
- Victorian pilot projects able to proceed under a research, development and demonstration permit under the *Environment Protection Act 1970* (Vic)



Developments in Australia - MCMPR Regulatory Guiding Principles

- Released 25 November 2005
- They say:
 - geosequestration does need regulation
 - nationally consistent approach (but not uniform legislation)
 - use existing legislation and augment it
 - existing legal liability principles should apply – no special treatment

State and Commonwealth jurisdiction over storage sites



* Exclusive Economic Zone

X Foreshore land is not addressed in this diagram.



Developments in Australia - Commonwealth

- Amendments to *Offshore Petroleum Act 2006* (Cth)
- DITR leading – discussion paper
- New tenements:
 - CCS Exploration Permit
 - CCS Retention Lease
 - CCS Injection Licence
- Legislation – tenure and transport
- Regulations/Guidelines – approvals, monitoring, post-closure, financial



Developments in Australia - Commonwealth

- Competitive acreage release for Exploration Permits
- Competing bids - overall national significance criteria
- Regime for the protection of existing rights – no grant of CCS [petroleum] tenement unless no significant detrimental impact on existing petroleum [CCS] activity
- Commercial negotiations between overlapping interests



Developments in Australia - Commonwealth

- Exploration Permit gives exclusive CCS exploration rights but not to petroleum or minerals identified
- Grant of Injection Licence subject to approval of injection and storage plan – including predictive modelling of CO₂ plume and adequacy of monitoring
- Remediation plans required for unpredicted migration of CO₂ from storage reservoir
- Specific monitoring and verification negotiated with regulator on case-by-case basis



Developments in Australia - Commonwealth

- Relinquishment subject to regulator satisfaction that undesirable risks reduced as low as reasonably practicable – final closure once plume, reservoir and site are secure
- No royalty payments proposed
- No Commonwealth assumption of liability
- Draft legislation imminent, subject to political process



Developments in Australia - Queensland

- Proposed new chapter in *Petroleum & Gas (Production & Safety) Act 2004* (Qld)
- New tenements –
 - CCS Exploration Permit
 - CCS Exploration Permit for Retention – Potential Commercial Area
 - CCS Storage Lease
- Also floated registrable land interests



Developments in Australia - Queensland

- Eligibility for grant of exploration permit:
 - Over the counter for Greenfield
 - Otherwise competitive tender
- Priority only if petroleum tenement holders conducting enhanced oil recovery, and must also hold CCS lease (no need for exploration permit) if not intending to withdraw => seamless operation
- Third party overlaps to be resolved by commercial negotiation and possibly arbitration



Developments in Australia - Queensland

- CCS Stream - overwhelmingly CO₂, incidental associated substances, prescribed detection agents, and subject to regulator approval
- Same exemptions as 'petroleum activity' under the *Environmental Protection Act 1994* (Qld)
- Other exemptions not yet clear
- No royalties payments proposed



Developments in Australia - Queensland

- Monitoring requirements not to be prescriptive – case-by-case proposals, and extent determined by success criteria, not strict timeframes
- Remedial work to be required based on behaviour of the plume as against predictive models
- No State commitment on liabilities
- Other P&G Act provisions expanded to cover CCS
- Proposed introduction of legislation April/May 2008



Developments in Australia - interface with Emissions Trading

- NETT Discussion Paper proposes that CCS activities be treated as an offset.
- Emitters attract permit liability for sequestered emissions and acquire associated offsets credits through commercial arrangements with the sequestration provider
- Thereby ETS risk is allocated to sequestration provider should sequestration not be maintained



Developments elsewhere

- Norway – the Sleipner project
- The Netherlands
- Texas and Illinois - FutureGen
- European Union



Questions?





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