

CENTRE FOR MINING, ENERGY AND NATURAL RESOURCES LAW
THE UNIVERSITY OF WESTERN AUSTRALIA

END OF YEAR UPDATE 2016

This has been another busy year for the Centre, and the purpose of this update is to overview briefly some of our activities, including upcoming events, and research being undertaken by members of the Centre.

The principal aim of the Centre is to promote, encourage and publish research in mining, energy and natural resources law, with collaborative projects being undertaken between the Centre and professional and industry groups. We seek areas of value to industry and the broader community so we welcome your feedback and questions. Please feel free to contact any of the researchers mentioned.

We would also like to express our thanks to the many people who have supported the Centre during the year. These include the many guest presenters at our workshops drawn from industry, government, law, accounting and other professional service firms and environmental and other non-government organisations and those who have supported our research. We would particularly like to mention both AMPLA Ltd and the AIPN with whom we have long-standing relationships.

Richard Bartlett
John Chandler, Co-Directors

1 Seminar and Conference Programme- Upcoming for 2017

The Centre ran a successful programme in 2016, which saw workshops like Mining Law, Corporate Governance for Resources Companies, Climate Change and Emissions Trading and Oil and Gas Agreements well attended as usual. New workshops were run for Resource

Taxation and Construction Law. Resource Taxation was led by Jared Clements and Ian Murray. Construction Law was led by Chris Ryder from Corrs Chambers Westgarth and Adjunct Associate Professor Phil Loots. Both these workshops will be run again in 2017. We hope that these important new areas for the Centre will be very useful for industry.

The workshop programme for 2017 starts with Australian Oil and Gas from 20 to 22nd March, led by John Chandler, and International Oil and Gas from 3rd to 8th April. We are very pleased to welcome Professor Jacqueline Weaver from the University of Houston to teach International Oil and Gas. She is an internationally-renowned expert in the upstream exploration and production sector. The workshop reflects the current conditions of petroleum exploration and exploitation internationally and focuses on the legal forms of state petroleum regimes oil and gas. This workshop will try out a new format which we hope will work for practitioners: it runs over 6 days from 9am to 1pm each day, leaving the afternoons free.

The 2017 programme is available at <http://www.law.uwa.edu.au/executive/short-courses/natural-resources>. Enquiries- please contact the Associate Director Joe Fardin by email joe.fardin@uwa.edu.au.

2 Research Update

Richard Bartlett

Richard Bartlett has continued his research in the areas of native title, mining law and water resources law. In the area of native title he has examined compensation for loss of native title under the Native Title Act in a paper shortly to be published, and is continuing to study the regional native title settlement agreement in south-west Western Australia, by far the largest settlement and the first regional settlement in Australia. Richard continues to consider approaches to ideal mining law regimes and in particular has sought to examine the desirability of changes to the Mining Act of Western Australia. As to water resources law he has completed changes to his jointly authored treatise on Water Resources Law in Australia published by Lexis-Nexis.

Alex Gardner

Alex Gardner has continued as Editor of the Australian Resources and Energy Law Journal. In 2016, the ARELJ has made the transition to e-publication. In his role as Editor, Alex chaired the Recent Developments session of the Australian Mining and Petroleum Law Conference in Brisbane on 14 October. Alex has published a book chapter, Waschka and A Gardner, “Diffuse Source Pollution and Water Quality Law for the Great Barrier Reef: Why the reticence to regulate?”, chapter 11 in J Gray, C Holley & R Rayfuse (eds), *Trans-jurisdictional Water Law and Governance*, Routledge Earthscan, UK, 2016. Alex’s PhD and SJD students have been progressing their research: Michael Bennett is working on the design and implementation of environmental caps or limits, presenting a paper titled “Environmental Limits and the Law” at the Australian Earth Laws Alliance conference in Brisbane on 20-21 October; Natalie Brown is progressing her thesis on Pilbara iron ore mining and dewatering; Natalie and Alex published, “Still Waters Run Deep: The 1963-64 Pilbara Iron Ore State Agreements and Rights to Mine Dewatering” in (2016) 35(1) ARELJ 12; Shane Hart (part time SJD student) has progressed his thesis on Shale Gas and the regulation of its access to and use of water. Jeanette Jensen has worked as a research assistant to Alex in 2016 on completion of projects in the Co-operative Research Centre for Water Sensitive Cities. In 2016, as well as an industry report they published A Gardner and J Jensen, “Legal Duties for Restoration of Waterways and Wetlands”, (2016) 2(2) New Water Policy and Practice Journal 10-20. Alex has also dedicated a lot of his time in 2016 (including periods of annual leave) to his role as Convener of the Management Committee of the Environmental Defender’s Office Western Australia, which is a community legal centre that provides free legal advice and representation, legal education and advocacy for law reform in the public interest. Since July 2015, the EDOWA has survived on private funding.

Erika Techera

Professor Erika Techera has continued her research on marine species, protected areas and oceans governance. She has completed a three year ARC Discovery Project research with her co-investigator (Professor Natalie Klein, Macquarie University) on the international

governance of sharks. Their research monograph is a key output of the project and will be available next year (E J Techera & N Klein, *International Law of Sharks: Options, Opportunities and Obstacles*, Brill, USA, forthcoming 2017). In addition to this research Professor Techera has continued to work with Professor John Chandler, together with colleagues from the Faculty of Engineering, Computing and Mathematics, on the technical and legal issues involved with in situ decommissioning of offshore infrastructure. They have published on this topic and Professor Techera recently presented at the *Society of Underwater Technology* on the legal aspects. Professor Techera has also been collaborating with Dr Jade Lindley (a criminologist in the UWA Law School) on maritime crimes including illegal, unregulated and unreported (IUU) fishing and its facilitation with forced labour, as well as the use of remote sensing technology to monitor and enforce fisheries laws. The results of this research have been presented this year at a series of conferences including the *International Bar Association* annual conference in Washington DC, the *Australia and New Zealand Society of Criminology*, and the *Queen Mary-Renmin University Criminal Justice Conference* on 'Transnational Crime'. In 2017 Professor Techera will take up a position as Director of the multi-disciplinary UWA Oceans Institute and continue her work on marine research including the conservation and utilisation of living and non-living resources. She will remain a Professor in the Law School and a member of the Centre.

John Chandler

Professor John Chandler has worked with Professor Techera on decommissioning of offshore infrastructure, Professor Daintith on offshore petroleum regulation and Jared Clements on corporate governance practices of energy and resources companies. He is currently working on a project researching current issues in offshore petroleum resource management, for which he is writing a research monograph (*Petroleum Resource Management: Regulation, Policy and Practice*, Edward Elgar Publishing Limited, forthcoming 2018).

John Chandler – Offshore petroleum resource management project

In the mature producing countries (such as Australia, Norway, United Kingdom) the licensing system was introduced several decades ago, and is therefore not necessarily relevant to the current complex, diverse and crowded exploration landscape; where, for example, several small fields with different ownership need to share common infrastructure to be economic.

The objective of this research is to review how selected countries are dealing with these challenges, to examine what new approaches have been developed, to review barriers or obstacles to new approaches, or their implementation and to make recommendations for possible change. This research has been funded by AMPLA Limited. John has produced an initial research paper and in 2017 will produce a final research paper. **Contact:** john.chandler@uwa.edu.au

Terence Daintith

Professor Terence Daintith taught International Oil and Gas Law as usual in 2016 but will hand over teaching of this course in 2017 to Professor Jacqueline Weaver of the University of Houston. He continued his joint research with John Chandler on regulatory institutions for upstream petroleum activities: an article comparing institutional arrangements in Australia, the United Kingdom and Norway will appear in the Houston Journal of International Law in 2017. He continued to teach on the Master's course in Regulatory Theory and Ethics with Joe Fardin. With Yee-Fui Ng he contributed – as the only non-Australian author – the chapter on Executives to Cheryl Saunders and Adrienne Stone, eds., *The Oxford Handbook of the Australian Constitution* (forthcoming 2017).

John Southalan

John Southalan continued his work in the increasingly important area of human rights. This saw him publish an article in 90(12) Australian Law Journal 889-907 article summarising the current human rights standards and procedures relevant to commercial lawyers in Australia, both in advising their clients and also in conducting their own practice. The critical point is that post 2011 international human rights standards apply to companies' decisions and actions. Even where a business has fully complied with all domestic law, if that law is inconsistent with international human rights standards, there are increasing legal implications for the business. In Australia, this includes a mediation process overseen by a Commonwealth Government official, through the *OECD Guidelines for Multi-national Enterprises*. This also featured significantly in his presentation at the "Future of Minerals Exploration" Workshop (Centre for Exploration Targeting, 15 June 2016), which looked at compliance with international standards where local law does not match them. John also contributed to the Encyclopedia of Mineral and Energy Policy (Springer) a summary

regarding contracts between an executive government and a company which has been subsequently approved by the legislature.

Camilla Andersen

Throughout 2016, Professor Andersen has continued to work on a variety of projects related to commercial trade. In the dispute resolution space, her work has centred on addressing the problems of judicialization in commercial arbitration, and conflict literacy in management to avoid disputes. She has also continued publishing on pro-active law initiatives and visualization of contracts; her "Comic Book Contracts" designed with UWA Engineering were aired on the ABC Law Reports

(<http://www.abc.net.au/radionational/programs/lawreport/comic-contracts/7898330>), and

many new initiatives have sprung from that - including a project to design contract simplification for construction law contracts and State Government. Other publications (some with Prof Bruno Zeller of UWA) have focussed on international trade policy, including the effects which Trump's policies on "Fair Trade not Free Trade" will have on Australia. She has attended trade law forums in the UN and contributed to trade law negotiations (RCEP). An updated list of her publications is available at:

<http://www.web.uwa.edu.au/people/camilla.andersen>

Joe Fardin and Ian Murray – Design of benefit management systems

Ian Murray and Joe Fardin have commenced a pilot study investigating the legal structures used to receive, manage and distribute benefits for Indigenous groups (BMSs) arising from land access agreements with resource proponents and state governments. Such structures receive several hundred million dollars annually in the Pilbara region of WA alone and have been identified in multiple Commonwealth government reports as potential catalysts for closing the gap in socio-economic outcomes between Indigenous and non-Indigenous Australians. Ian and Joe have produced a draft research report setting out the findings of an extensive literature review they have conducted to identify design principles for BMSs and identifying beneficial features and common problems with BMSs, and are now in the process of seeking stakeholder feedback on the report. Ian and Joe have also presented their preliminary findings at the Indigenous Business, Enterprise and Corporations Conference 2016. The project is being conducted with funding support from BHP Billiton and the Centre for Mining, Energy and Natural Resources Law, with additional UWA support in the form of a UWA Research Impact Grant. Ian and Joe are also in discussions with other resource

companies and professional trustee companies about additional collaboration and funding support. **Contact: joe.fardin@uwa.edu.au**

Joe Fardin

Joe Fardin is progressing research into ‘native title agreement making and regulatory theory’ following a successful UWA research grant application, with a view to producing two journal articles exploring what is proving to be a new area of research. Joe joined two boards this year: the World Initiative of Mining Lawyers and the Western Desert Lands Aboriginal Corporation (Jamurkurnu Yapalikunu), the latter as Independent Specialist Director. He is also progressing PhD research on global legal trends in mining agreements with Indigenous groups.

Jared Clements

Jared Clements is continuing his research in the resource taxation area. This year he published an article on the stamp duty consequences associated with farm-in arrangements, co-authored an article with Professor Chandler on the corporate governance practices of energy and resources companies and had a third article published in the Australian Tax Review. Jared has been focused on strengthening the Centre’s external relationships in 2017 as a State Committee Member of the Australian Mining and Petroleum Law Association. He was also quoted as an expert in Mining Chronicle magazine in relation to the Ellendale mine closure. As part of his external engagement, he has secured an ongoing scholarship for students undertaking a research thesis in mining and energy law for the Advanced Legal Research unit as well as a commitment from AMPLA to sponsor a prize in Mining and Energy Law.