

Petroleum and Gas (Royalty) Regulation 2021

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, the Honourable Cameron Dick MP, Treasurer and Minister for Investment, provide this human rights certificate with respect to the *Petroleum and Gas (Royalty) Regulation 2021* (2021 Regulation) made under the *Petroleum and Gas (Production and Safety) Act 2004* (PG Act).

In my opinion, the 2021 Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The PG Act requires, amongst other things, a petroleum producer to pay the State petroleum royalty for petroleum that the producer produces in Queensland, and to lodge royalty returns in relation to such petroleum.

The *Petroleum and Gas (Royalty) Regulation 2004* (2004 Regulation) is subordinate legislation to the PG Act and contains provisions which are necessary to support the proper administration and determination of petroleum royalty under the PG Act. This includes the royalty rate, the way in which petroleum royalty is calculated, the time for payment of petroleum royalty and the form and lodgement frequency for royalty returns.

Under section 54(1) *Statutory Instruments Act 1992*, subordinate legislation expires on 1 September first occurring after the 10th anniversary of the day of its making, unless it is sooner repealed or expires, or a regulation is made exempting it from expiry. Under the *Statutory Instruments Regulation 2012*, the 2004 Regulation has been exempted from expiry on a number of occasions on the basis that the relevant PG Act provisions were being reviewed. Following an exemption from expiry being made in 2020, the 2004 Regulation is due to expire on 31 August 2021.

The 2004 Regulation contains provisions which are necessary to support the proper administration of the PG Act so far as it relates to petroleum royalty. Relevantly, the 2004 Regulation provides as follows:

- Petroleum royalty liability is determined for each royalty return period by applying the relevant royalty rate to the volume of petroleum produced by a petroleum producer in the period. Separate tiered royalty rates apply depending on the type of petroleum and its use, with petroleum being classified as domestic gas, supply gas, project gas or liquid petroleum.
- For each class of petroleum, the applicable royalty rate for a royalty return period is determined based on the average sales price for that class for the return period. The average sales price is either worked out with reference to a formula (the average sales price formula) which takes into account particular data from sales of petroleum of that class, or is equal to a benchmark reference price for the period.

- The average sales price formula for domestic gas, supply gas and liquid petroleum takes into account the volume and sales revenue from sales of petroleum of that class by a petroleum producer, either directly or through one or more resales by a related entity of the producer (a reseller), to an unrelated entity during a royalty return period. Where petroleum is sold to a related entity of the producer who does not resell the petroleum, the average sales price formula takes into account the volume of such sales but deems such sales to have been made at the benchmark reference price per gigajoule or barrel.
- In certain circumstances, including where a petroleum producer does not have information in relation to all sales made by a reseller during a royalty return period, the average sales price formula cannot be used and the average sales price for the class of petroleum for the royalty return period will be equal to the benchmark reference price.
- The Commissioner of State Revenue (the Commissioner) may make a determination that a particular joint venture or other arrangement involving the production of gas for the purpose of converting the gas into liquefied natural gas (LNG) and associated activities (a petroleum venture) is an LNG project for petroleum royalty purposes. The Commissioner may also determine who are the members of the LNG project (each, an LNG project member).
- Where a person who is an LNG project member purchases gas from a petroleum producer, or a reseller of the petroleum producer, who is not a member of the same LNG project, the person is required to give the petroleum producer or reseller a notice stating that the person is an LNG project member. The Commissioner is also able to tell the petroleum producer or reseller that the person is an LNG project member.
- Joint venture arrangements are common in the coal seam gas (CSG) industry and often involve situations where both parties separately commercialise the CSG but only one of the parties holds the petroleum tenure (a non-tenure holder arrangement). The other party, who does not hold any legal interest in the tenure (non-tenure holder), may contribute to the joint venture in some other fashion, such as by providing capital. For these joint venture arrangements, the holder of the petroleum tenure (tenure holder) is liable for petroleum royalty on all of the petroleum produced, while the non-tenure holder ordinarily has no royalty obligations under the PG Act and the 2004 Regulation. However, the 2004 Regulation allows a non-tenure holder to elect to be treated as a petroleum producer for royalty matters. These voluntary arrangements enable non-tenure holders to separately lodge returns and pay royalty for their share of the petroleum produced from the joint venture tenure. Despite such an election being made, the tenure holder remains ultimately liable for any unpaid royalty for petroleum produced from the tenure if the non-tenure holder defaults.

The objective of the regulation is to remake the 2004 Regulation as the 2021 Regulation, subject to expanding the ability of the Commissioner to make a determination as to how the 2021 Regulation will apply to particular arrangements where a reseller for a petroleum producer swaps petroleum with a petroleum producer or a reseller for that other petroleum producer, along with minor amendments necessary to facilitate the remake and to accord with current drafting practices.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human right under the *Human Rights Act 2019* (HR Act) that is relevant to the 2021 Regulation is the right to privacy (section 25) in respect of:

- the requirement for a person to disclose the person's status as an LNG project member (section 12(2) of the 2021 Regulation) (the member LNG project disclosure);
- disclosure by the Commissioner of a person's status as an LNG project member (sections 10(5)(b) and (c) and 12(4) of the 2021 Regulation) (the Commissioner LNG project disclosure);
- the requirement for a petroleum producer to disclose to the Commissioner when a person starts or ceases being involved in a petroleum venture that constitutes an LNG project (sections 13(2) and (4) of the 2021 Regulation) (the notification obligation);
- the provision of data by a reseller to a petroleum producer, to facilitate the petroleum producer using the average sales price formula to calculate its petroleum royalty liability for a royalty return period (sections 17, 21 and 31 of the 2021 Regulation) (the reseller information requirement); and
- disclosure by the Commissioner of a person's petroleum royalty affairs in relation to the administration of the non-tenure holder arrangements provisions (sections 48 and 49 of the 2021 Regulation) (the non-tenure holder disclosures).

For the reasons outlined below, I am of the view that the 2021 Regulation is compatible with this human right.

Further, section 11 of the HR Act provides that only individuals have human rights. When considering the impact that the 2021 Regulation will have on individuals, it is relevant that most entities liable for petroleum royalty are corporations rather than individuals. The 2021 Regulation will therefore have limited application to individuals, which minimises the potential for any limitation on human rights.

Consideration of reasonable limitations on human rights (section 13 HR Act)

(a) the nature of the right

Section 25 of the HR Act provides that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with, and not to have their reputation unlawfully attacked. The right protects privacy in the sense of personal information, data collection and correspondence, as well as an individual's private life more generally. An unlawful or arbitrary interference would be one not permitted by law or that would be capricious, unpredictable or unjust.

Provisions of the 2021 Regulation that require or contemplate the disclosure of certain information to or by petroleum producers for the purpose of determining the classification of petroleum, the petroleum royalty rate and the petroleum producer's petroleum royalty liability limit the right to privacy, or may limit that right in certain circumstances.

In relation to the member LNG project disclosure and the Commissioner LNG project disclosure (collectively, the LNG project disclosures), determination of the applicable royalty rate depends on whether petroleum is project gas, supply gas, domestic gas, or liquid petroleum. Supply gas is gas produced by a petroleum producer (other than as an LNG project member) and sold or otherwise transferred to an LNG project member. For petroleum royalty purposes, the 2021 Regulation provides that the Commissioner may decide that an arrangement is an LNG project and that there is a legislative obligation for an LNG project member to advise each producer from whom it purchases gas that it is an LNG project member. To ensure royalty can be properly paid where an LNG project member fails to comply with this obligation, the Commissioner may advise a person that is selling gas to a petroleum producer that the petroleum producer is an LNG project member. Status as an LNG project member for petroleum royalty purposes may potentially be information that is of a confidential nature for each LNG project member (depending on, for instance, disclosure requirements for a publicly-listed company). Accordingly, compelling disclosure of that status by the LNG project member, or authorising disclosure of that status by the Commissioner, would limit the LNG project member's right to privacy.

In relation to the notification obligation, the status of a person's involvement with a petroleum venture may potentially be information that is of a confidential nature for that person, such that compelling disclosure of that information by an LNG project member would limit the person's right to privacy.

In relation to the reseller information requirement, where a petroleum producer sells petroleum through a reseller, determination of the applicable royalty rate using the average sales price formula requires tracing through the sale made by the reseller to an arm's length purchaser. As this arm's length sales information may not be within the knowledge and possession of the petroleum producer, it would need to be obtained from the reseller for use in determining the petroleum producer's royalty liability using the average sales price formula. Although there is no legislative obligation for the reseller to disclose this information to the petroleum producer (that is, it is left to the parties to determine what information will be made available), this information would potentially be of a confidential nature for the reseller. Accordingly, making the availability of the average sales price formula contingent upon the petroleum producer obtaining the information from the reseller would limit the reseller's right to privacy if the petroleum producer sought to use that formula.

In relation to the non-tenure holder disclosures, there may be certain circumstances where the Commissioner needs to disclose particular information to both the non-tenure holder and the tenure holder in relation to a particular non-tenure holder arrangement. For example, a notice must be provided to the non-tenure holder and the tenure holder where the Commissioner makes particular decisions relating to an election by a non-tenure holder to be treated as a petroleum producer for royalty matters, such as where the Commissioner decides an application for an election, refuses a request to withdraw an election or makes a decision about bringing an election to an end. Depending on the circumstances, the provision of this notice may involve the disclosure of information about the affairs of either the non-tenure holder or the tenure holder. Further, where a non-tenure holder defaults on paying royalty, the Commissioner may need to disclose information relating to their affairs to the tenure holder to ensure payment of all outstanding royalty for the tenure. The disclosure by the Commissioner of information that is of a confidential nature for the non-tenure holder or the tenure holder would limit that person's right of privacy.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the LNG project member disclosures is to facilitate the proper calculation of petroleum royalty. As separate royalty rates apply to different classes of petroleum, it is critical that a petroleum producer knows whether the gas that it sells is being sold to an LNG project member so that the producer can determine which rate applies. As petroleum royalty is a payment to the State for the right to extract petroleum, the determination of the appropriate royalty rate is necessary to ensure the State is appropriately compensated for the extraction of this non-renewable resource, for the benefit of all Queenslanders.

The purpose of the notification obligation is to facilitate the Commissioner determining whether a particular person (the notified person) should start to, or cease to be, an LNG project member. This then has flow-on effects for the proper calculation of petroleum royalty to ensure that the State is appropriately compensated, both for the notified person (if the notified person is themselves a petroleum producer) and for a petroleum producer, or a reseller for a petroleum producer, who sells petroleum to the notified person.

In relation to the reseller information requirement, the purpose of requiring a petroleum producer to obtain information from a reseller in order to use the average sales price formula is to ensure the appropriate operation of the average sales price formula, which in turn facilitates calculation of petroleum royalty to ensure the State is appropriately compensated.

The purpose of the non-tenure holder disclosures is to ensure that non-tenure holder and the tenure holder have appropriate information as to their respective obligations under the PG Act and the 2021 Regulation (i.e. whether they both have obligations in relation to their respective share of petroleum, or whether the tenure holder alone is liable for petroleum royalty in respect of all of the petroleum produced). Therefore, information relating to decisions made by the Commissioner must necessarily be disclosed to both parties. Additionally, where a non-tenure holder defaults, the default needs to be disclosed to the tenure holder to ensure payment of all outstanding royalty by the tenure holder.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The LNG project member disclosures are required to facilitate the proper calculation of petroleum royalty by ensuring that petroleum producers that sell to LNG projects have the relevant information available to determine the applicable petroleum royalty rate.

The notification obligation is required to ensure that the Commissioner is in a position to make appropriate determinations as to whether a particular person should become, or cease to be, an LNG project member. As noted above, this will then impact on petroleum royalty calculations for that person and any other person who sells petroleum to that person.

The reseller information requirement is required to limit the use of the average sales price formula to circumstances where a petroleum producer has all necessary information in relation to all sales of petroleum of a particular type during the royalty return period. Allowing a petroleum producer to use the average sales price formula without having details of all sales would potentially lead to inappropriate petroleum royalty outcomes.

The non-tenure holder disclosures are required to ensure the proper operation of the non-tenure holder arrangements and enable transparency in decision-making, so that both non-tenure holders and tenure holders have the requisite information to enable them to comply with their royalty obligations, and seek to minimise any risk to the public revenue associated with implementation of the non-tenure holder arrangements.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive or reasonably available ways to achieve the purpose of the 2021 Regulation.

In relation to the LNG project disclosures, any potential impact is minimised by the fact the disclosure requirement only applies in specific circumstances, being where petroleum is being sold to an LNG project member. This also means the disclosure of information will generally occur between parties that have an existing commercial relationship, such as through a history of commercial dealings. Additionally, as members of LNG projects are typically companies, the persons affected by these provisions are very unlikely to be individuals.

In relation to the notification obligation, although the Commissioner undertakes compliance activity in relation to petroleum producers, the Commissioner may not become aware of changes in the membership of a petroleum venture until some time after the change occurs. Requiring a petroleum producer to notify the Commissioner of such changes allows the Commissioner to make any necessary changes to the determination of who is an LNG project member in a timely fashion.

In relation to the reseller information requirement, the 2021 Regulation does not compel a reseller to provide information to the petroleum producer. Rather, it is ultimately up to the petroleum producer and relevant entity reseller to reach their own agreement about whether this information will be shared and on what terms. The petroleum producer's royalty can be determined on the basis of a benchmark price if the information is not available.

In relation to the non-tenure holder disclosures, such disclosures will only potentially be required where the non-tenure holder has voluntarily elected to be treated as a tenure holder and to subject itself to the legislative rights and obligations that result. Additionally, an election by a non-tenure holder must be endorsed by the tenure holder, which ensures all parties are aware of and consent to the arrangements. Further, a person to whom the Commissioner has disclosed confidential information is only permitted to on-disclose that information in limited circumstances, as set out in the *Taxation Administration Act 2001* (which applies to the 2021 Regulation).

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

In relation to the LNG project disclosures, any potential impact on a person's right to privacy is considered to be outweighed by the administrative benefits to petroleum producers of having the necessary information available to them to enable them to properly calculate their petroleum royalty liability, and by the benefits to the State and maintaining the integrity of the public revenue.

In relation to the notification obligation, any potential impact on a person's right to privacy is considered to be outweighed by the benefits to the State and maintaining the integrity of the public revenue.

In relation to the reseller information requirement, any potential impact on a person's right to privacy is considered to be outweighed by the administrative benefits to petroleum producers of having the necessary information available to them to enable them to calculate their petroleum royalty liability using arm's length sales information (noting that the 2021 Regulation does not require a reseller to provide such information), and by the benefits to the State and maintaining the integrity of the public revenue.

In relation to the non-tenure holder disclosures, any potential impact on a person's right to privacy is considered to be outweighed by the flexibility afforded to petroleum producers that voluntarily elect to utilise these arrangements. By giving non-tenure holders the ability to make an election to be treated as a tenure holder, they are able to lodge their own royalty returns and maintain the confidentiality of their sales data. Additionally, any potential impact on a person's right to privacy is considered to be outweighed by the fact that limitations are necessary to ensure both the tenure holder and non-tenure holder have clarity and certainty regarding their obligations under the PG Act and the 2021 Regulation, enabling them to comply with their obligations and thus ultimately ensuring protection of the public revenue for the benefit of the State and all Queenslanders.

(f) any other relevant factors

The 2021 Regulation replaces the 2004 Regulation. The limitations on human rights contained in the 2021 Regulation are unchanged from those contained in the 2004 Regulation, which were introduced in 2020 by the *Royalty Legislation Amendment Act 2020*.

Conclusion

I consider that the 2021 Regulation is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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TREASURER
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