

Episode 68: Summary

Episode name: Rip, Reap... and Bury? The (Temporary) Resurgence of Carbon Intensive Fuels

Guest(s): Tina Soliman Hunter

What area(s) of law does this episode consider?

The future of energy production and regulation in Australia. Touching on; market conditions for oil and gas, renewables, and *that* National Electricity Market (**NEM**) suspension.

Why is this topic relevant?

Australia is one of the world's largest exporters of coal, with that controversial fuel also our dominant energy source. According to the September 2021 edition of the *Australian Energy Statistics 2021 Energy Update Report*, 54% of our electricity is generated from the so-called "*black diamond*".

In July of 2022, the International Energy Agency found that demand is set to return to an all time high off the back of complex gas market conditions following Russia's invasion of Ukraine. Australia is not immune to these global market conditions - as the suspension of Australia's NEM showed. Understanding the way electricity is generated, priced, and regulated is a key skill for legal advisors working on the front-line of energy.

What legislation is considered in this episode?

Offshore Electricity Infrastructure Act 2021 (Cth)

Climate Change Act 2022 (Cth) (**CCA**)

National Electricity (South Australia) Act 1996 (SA)

What cases are considered in this episode?

[Re Fortescue Metals Group Ltd \[2010\] ACompT 2](#) (Jade link)

[Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal](#) [2010] FCA 1118 (Jade link)

[Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal](#) [2011] FCAFC 58 (Jade link)

[Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal](#) [2012] HCA 36; 246 CLR 379 (Jade link)

- Fortescue and certain of its subsidiaries (together, **Fortescue**) sought to have four heavy haulage railways in the Pilbara owned and operated variously by Rio Tinto (**Rio**) or BHP Billiton (**BHP**) declared under the national access regime to enable it to run its iron ore on the lines.

Fortescue argued that the private rail lines were the only "*viable means of transporting iron ore for most junior miners in the Pilbara*". Many miners could not afford to build additional lines and, even if they could, it was argued that to do so would be wasteful because parallel lines already existed. Rio and BHP also argued that "*the way they use rail as part of an integrated mine-rail-port*

production system requires absolute flexibility and exclusive use of the line”.

Eventually, the convoluted and protracted proceedings reached the High Court. Fortescue was not able to secure access to its most desired rail line, with the commercial result of forcing the construction of its own parallel rail line at a cost of \$2.5 billion.

What are the main points?

- The Russian invasion of Ukraine has had drastic effects on the supply of gas to Europe with flow on impacts for the rest of the world. Gas is often described as the bridging fuel for countries transitioning from fossil fuels to renewables.
- Australia is one of the most complex energy markets in the world. With an abundance of gas in the west and a supply shortage in the east.
- Centralised energy systems have been built around the idea of concentrated supplies of electricity for example from coal and gas. Decentralised generation systems, such as renewables, require the rethinking of coordination and distribution - a NEM 2.0.
- Australia’s NEM and its market rules - which covers only part of Australia’s energy generation - was designed on the assumption of a centralised system.
- How Australia manages the transition from a NEM with market rules for a centralised system to a NEM responsive to a decentralised generation system will determine whether another market suspension occurs.
- In renewables development and regulation, there are leaders and laggards among Australian states and territories. Recent policy and regulations in Queensland have moved that state from a laggard to a leader.
- In policy terms, Australia is moving towards Australian Carbon Credit Units, or **ACCU**s, which are included in the CCA and are awarded when a company removes carbon from the atmosphere.

What are the practical takeaways?

- It’s not an easy fix to plug new forms of generation into a system designed for old forms of generation. This applies both on a technical, but also regulatory, level.
- The NEM needs rethinking to take advantage of decentralised forms of generation.
- In Tina’s view, ACCUs under the are looking good as an incentive which will drive Australia to net zero. Australia is well positioned to take advantage of its stable geology for carbon capture and storage.

Show notes

[Australian Energy Update 2021, Department of Climate Change, Energy, the Environment and Water \(2021\)](#)

[Resources and Energy Quarterly - June 2022, Department of Industry, Science and Resources \(2022\)](#)

[Electricity Market Report - July 2022, International Energy Agency \(2022\)](#)

[*A paradox of plenty: the Australian domestic gas supply regulatory dilemma*, Tina Solaman Hunter & Madeline Taylor \(2018\)](#)

[*GenCost 2020-21 Final Report*, CSIRO 2021](#)

[*The Superpower Transformation*, Ross Garnaut \(2022\)](#)

[*The Prize: The Epic Quest for Oil, Money and Power*, Daniel Yergin \(2009\)](#)

[*The Commanding Heights: The Battle for the World Economy*, Daniel Yergin & Joseph Stanislaw \(1998\)](#)