Tenure Matters

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Welcome back. Over the next two months I want to explore some of the issues around linear infrastructure, including not just pipelines, but other linear infrastructure typically associated with resource projects. This month I am focussing on pipelines built under the petroleum legislation. Next month I plan to discuss mining leases for transportation under the *Mineral Resources Act 1989*, Private Infrastructure Facility (PIF) designation under the *State Development & Public Works Organisation Act 1971* and other issues related to infrastructure development in support of resources projects. Figure 1 below shows the pipelines granted by year since 1963. This graph clearly demonstrates the escalation in pipeline activity. As with any approval process, such escalation tends to highlight inefficiencies in both legislation and process, which ultimately lead to change.

First of all, what is a pipeline? Currently section 16 of the *Petroleum & Gas (Production & Safety) Act 2004* (P&G Act) defines a pipeline as a pipe, or system of pipes, for transporting:

a) Generally – petroleum, fuel gas, produced water or prescribed storage gases; and
b) GHG streams; and
c) Substances prescribed under section 402 (which includes GHG streams and substances prescribed under a regulation).

Schedule 2 of the Act contains a definition of a transmission pipeline and a distribution pipeline. A distribution pipeline, which cannot be licensed under the P&G Act (section 405), is defined as a pipeline that transports fuel gas as part of a reticulation system within a fuel gas market, or a single point-to-point licence to a specific commercial or industrial facility and is not a transmission pipeline. A transmission pipeline means a pipeline operated for the primary purpose of conveying petroleum directly to a market after it has been processed, whether or not it is subsequently processed or reprocessed. These definitions are also those in the *Gas Supply Act 2003*. A point-to-point licence can be issued for a transmission pipeline but an area pipeline licence cannot be (section 404 P&G Act).

Now the murky world of definitions gets murkier still with the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCP) changes (not yet commenced) – the definition of transmission pipelines is removed, and references to transmission pipelines in other sections will also be removed, although not apparently from section 404 (which states that an area pipeline licence cannot be issued for a transmission pipeline). A new section 16A inserts an expanded definition of a distribution licence. This is a particularly difficult definition to read referring to pipelines that connect to pipelines that connect to pipelines! (diagrams are definitely required!)

The Explanatory Notes states that the reading of this definition in conjunction with the definition of a pipeline (section 16, unchanged except to clearly include the pipeline end points as part of the pipeline) and a number of other provisions in the P&G Act, such as section 802, provides guidance for the types of pipelines that must be authorised under the P&G Act to be constructed and operated. The Explanatory Notes go on to list a number of exceptions to when pipelines or proposed pipelines will require a PPL under the P&G Act. These include:

- When it is a distribution pipeline;
- When the construction and operation is authorised elsewhere in the Act (e.g. as an incidental activity on an ATP or PL);
- When it is part of a Petroleum Facility Licence on petroleum facility land; or
- When the construction and operation to transport incidental coal seam gas is authorised under the *Mineral Resources Act 1989*.

Confused yet? It seems there must have been a clearer way to articulate which pipelines require a pipeline licence under the P&G Act. The increase in pipeline activity (*see Figure 1, Pipelines granted by year*) has probably complicated what was once a fairly simple decision – but ad hoc changes in response to one-off issues will rarely result in well-considered and well-constructed legislation.

Notwithstanding some confusion over the definitions of types of pipelines, the process for a pipeline application and grant under the P&G Act is reasonably well-defined, albeit one that has been tinkered with many times since the Act was first passed.

If we look back to the *Petroleum Act 1923*, the pipeline licence process was relatively robust and 83 of the currently granted PPLs (144) were originally granted under the 1923 Act. The process came across to the 2004 Act largely unchanged, and the administration of all the existing PPLs also moved to the 2004 Act in a painless transition. There were two main issues, however, which the 2004 Act attempted to address.

The first of these was that there was no mechanism to undertake route selection and environmental or other surveys (unless taking place on a PL for example) without having a PPL granted or voluntary landowner consent. This issue was addressed in the 2004 Act with the introduction of the Petroleum Survey Licence (PSL), which is probably one of the most successful of the new tenure types introduced in the new Act. It effectiveness was sometimes muted by the requirement to obtain an Environmental Authority under the *Environmental Protection Act 1994,* which could take an inordinate amount of time; but this has finally been resolved with the introduction in 2013 of a set of standard conditions for PSLs.

The second main issue was that although pipelines can be built within a Petroleum Lease (PL) or under a Petroleum Pipeline Licence (PPL), there were some problems experienced when pipelines had to cross contiguous tenure boundaries. In those circumstances, the pipeline could not be built under the PL, but had to be licensed as a PPL, just because it crossed an arbitrary line between two leases. This created some administrative headaches, and involved some additional paperwork, timeframes and approvals. Two approaches were taken in the 2004 Act. Section 110 allowed the pipeline to cross boundaries of contiguous petroleum leases held by the same holder, but when the parties holding the contiguous leases were not exactly the same, the section was not applied. The Act also introduced the concept of an Area Pipeline Licence. The Explanatory Notes states: *"An area license is to be granted in the case where the holder will have an ongoing need to construct pipelines. For example, the holder of several petroleum leases may apply for an area pipeline licence to allow for the construction of pipelines to connect on these leases, to enable petroleum to be transported to a central processing plant.*" The area pipeline licence has not been widely utilised: a clear sign that its introduction did not really address the issue or reduce the administrative burden. This was because each subsequent pipeline within the area licence had to also be approved.

Subsequent amendments to the P&G Act have continued to address issues related to the crossing of lease boundaries, transportation of produced water (treated and untreated), registering of easements and inclusion of stated pipeline licence incidental activities. These included:

- Amendments in 2012 (as part of the *Mines Legislation (Streamlining) Amendment Act 2012*) to section 110, allowing the crossing of lease boundaries where there is a coordination arrangement between the holders of the leases (this allowed that the entities did not have to be identical between the leases).
- Also in 2012 as part of the streamlining amendments, section 16 of the P&G Act was amended to include the transportation of produced water in the definition of a pipeline and a new section 15A inserted that defined "produced water". This allowed the building of water pipelines under the P&G Act, to facilitate the efficient transport and treatment of CSG water and brine between permit areas (previously there were issues involving being a water service provider).
- An issue related to the registration of an easement in gross for a pipeline (i.e. where the easement is not attached to "benefited" land) was addressed by the insertion of section 437A in the 2012 streamlining Act. For the purposes of the *Land Act 1994* and the *Land Title Act 1994*, such as easement is treated as if it were a public utility easement. The same insertion allowed the creation of an easement over land administered under the *Forestry Act 1959*, State Forest or Timber Reserves, by allowing that for the purposes of this section the forestry land would be treated as reserves under the *Land Act 1994*.
- The addition of a "stated pipeline licence incidental activity" in the definition of incidental activities (section 403), was inserted in the *Mining and Other Legislation Amendment Act 2013* to facilitate the use of pipeline licence corridors for activities, such as fibre-optic cables for example, not directly related to the pipeline operation itself. The need to stipulate any proposed "stated pipeline licence incidental activity" was included as a requirement of the pipeline licence application (section 409). This was to allow for greater efficiencies in utilising the existing corridors, and remove any doubt that such activities could occur.

The granting of the licence does not create in itself the easement for the construction and operation of the pipeline, but allows the negotiation to acquire the land or agreement to enter the land for the construction or operation of the pipeline. The fact that this negotiation can occur after the grant of the pipeline and is not required to be confirmed prior to the grant of the licence is fundamental to the efficiency of the pipeline licence process. This is an advantage over other linear infrastructure processes. The pipeline land can be land the licence holder owns, or land over which the holder has an appropriate easement, or other written permission, or holds a 'Part 5' permission. In practise most of the time, the licence holder has an easement, although for above-ground facilities, the land might be purchased. Where an agreement with a landholder cannot be reached, a 'Part 5' permission may be applied for. This permission has the effect of making the land in question pipeline land, but it is not, in itself, a resumption of land. It has replaced the previous section 75(5) in the 1923 Act, which allowed entry to begin construction, but required ongoing consultation to reach a compensation agreement. It has been sparingly used over the years.

It has become more common of late, for significant pipelines, such as those associated with the CSG-LNG projects, to seek designation as an 'Infrastructure Facility of Significance' (IFS) under the *State Development and Public Works Organisation Act 1977*, which from 21 December 2012 was replaced by a designation as a 'Private Infrastructure Facility' (PIF). This designation requires negotiation with registered owners of land and native title holders, in a particular manner as outlined in the statutory guideline before application is made; but if these negotiations are unsuccessful the Co-ordinator-General may, on behalf of the proponent, compulsorily acquire the land. More on this process next month.

There are some minor changes made in the recently passed *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCP), and some of these commenced by proclamation on 21 November but others have not yet commenced.

Changes relevant to pipelines that have commenced include:

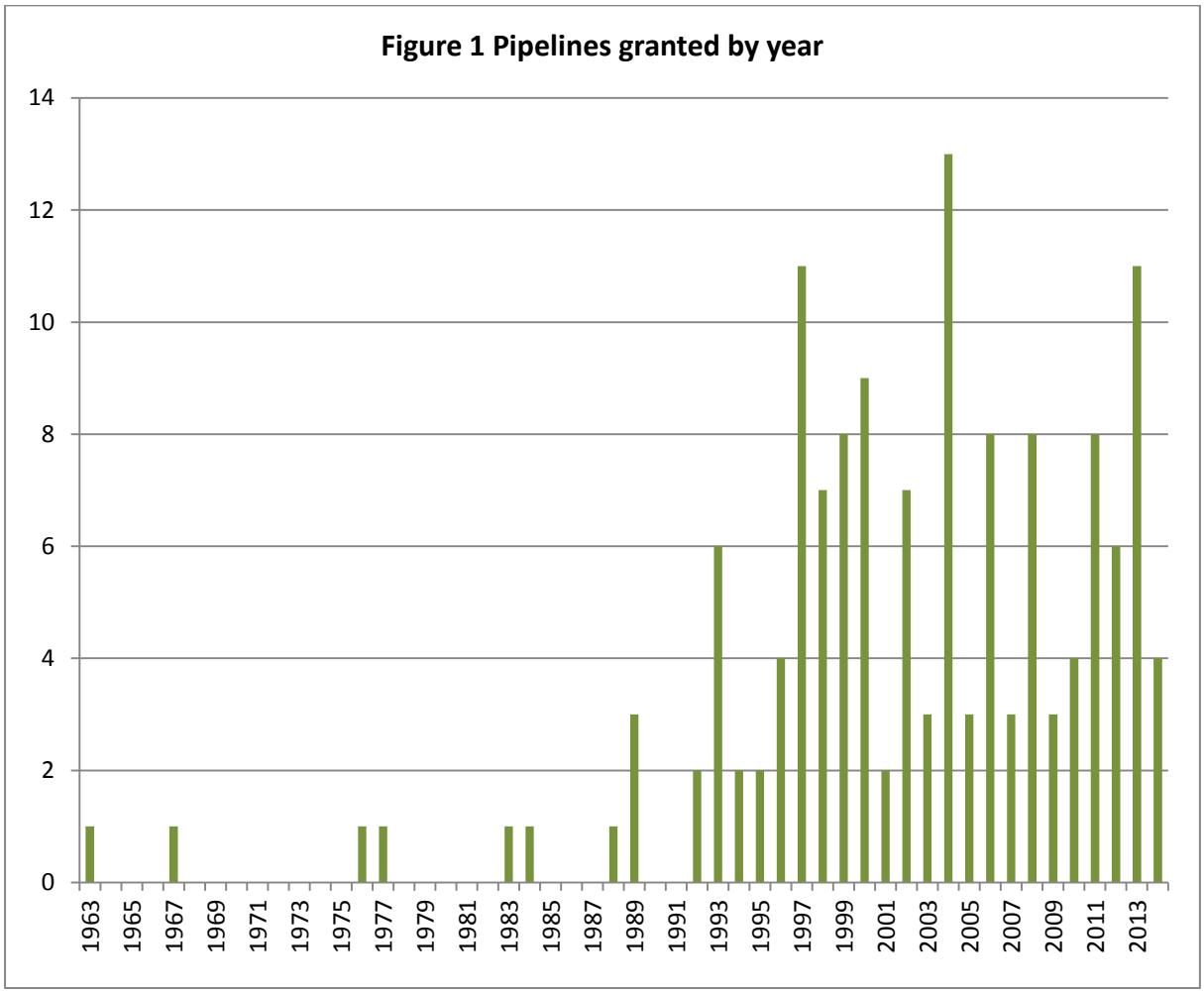
- The omission of section 418 (obligation to consult with particular owners and occupiers) (replaced by the Common Act provisions in Chapter 3, although interestingly these have not yet commenced); and
- Amendments to section 802 to clarify that pipelines are authorised to be constructed under PLs, PPLs, and Petroleum Facility Licences (PFLs).

Other relevant changes that have not yet commenced (and the expected commencement is unknown at time of writing) are those definition amendments discussed above:

- Section 3 of the P&G Act is amended to remove the reference to transmission pipelines;
- The definition of a pipeline in section 16 will include the pipeline's end points, which are identified as the points at which the relevant substance will, or does, enter or exit the pipeline;
- The insertion of a new section 16A will define a distribution pipeline;
- The reference to transmission pipelines in section 437 will be removed; and
- The definition of a transmission pipeline will also be removed from Schedule 2, Dictionary.

A word of caution when using MinesOnlineMaps – there is confusion, perhaps not surprisingly, in the legend between pipeline licence area for a point-to-point licence (i.e. the sub-blocks nominated with the point-to-point pipeline application that are required to be advertised, which may reduce upon construction of the pipeline) and an area pipeline licence (a specific form of licence).

Next month I will discuss some more linear infrastructure issues, particularly under other legislation.



I am happy to hear suggestions about topics you would like covered. Feel free to email me at sue.slater@rlms.com.au with the subject heading Tenure Matters.

In the meantime, remember "Tenures make the Project; the Project doesn't make the Tenures".

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