Landholders’ Right to Refuse (Gas and Coal) Bill 2015

No.  , 2015

(Senator Waters)

A Bill for an Act to provide Australian landholders the right to refuse the undertaking of gas and coal mining activities on their land without prior written authorisation, to ban hydraulic fracturing, and for related purposes
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A Bill for an Act to provide Australian landholders the right to refuse the undertaking of gas and coal mining activities on their land without prior written authorisation, to ban hydraulic fracturing, and for related purposes

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the Landholders’ Right to Refuse (Gas and Coal) Act 2015.
Part 1  Preliminary

Section 2

2  Commencement

This Act commences on the day after this Act receives the Royal Assent.

3  Simplified outline of this Act

This Act:
(a) gives Australian landholders the right to refuse mining companies access to their land to engage in gas or coal mining activity; and
(b) bans hydraulic fracturing operations by constitutional corporations.

It is an offence for a constitutional corporation to conduct gas or coal mining operations, or enter or remain on land to do so, without the prior written authorisation of each person with an ownership interest in the land. The prior authorisation must contain certain information and is invalid if the corporation does not advise the person of their right to refuse authorisation.

A person with an ownership interest in the land may also take action against the corporation if they fail to obtain their authorisation.

It is a contravention of a civil penalty provision if a constitutional corporation engages in hydraulic fracturing operations.

Persons with an interest affected by any hydraulic fracturing operations may apply for an injunction to stop a constitutional corporation from engaging in the operations, or the Environment Minister may apply to the Federal Court for an order that the corporation pay a pecuniary penalty.

4  Definitions

In this Act:
Section 4

civil penalty provision: a subsection of this Act (or a section of this Act that is not divided into subsections) is a civil penalty provision if:

(a) the subsection (or section) sets out at its foot a pecuniary penalty, or penalties, indicated by the words “Civil penalty”; or

(b) another provision of this Act provides that the subsection (or section) is a civil penalty provision.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

court means the Federal Court of Australia.

Environment Minister means the Minister who administers the Environment Protection and Biodiversity Conservation Act 1999.

gas or coal means:

(a) coal; or

(b) coal seam gas; or

(c) shale gas; or

(d) tight gas.

gas or coal mining activity includes any activity undertaken for the purpose of:

(a) exploring for gas or coal; or

(b) mining or producing gas or coal (including underground coal gasification).

hydraulic fracturing operations means any operations that involve the recovery (or the potential or enhanced recovery) of coal seam gas, shale gas or tight gas by the high-pressure injection of fluid into a wellbore to create fractures, or enlarge existing fractures, in geological formations.

land includes:

(a) land within the beds and banks of streams, watercourses and inundated land; and

(b) waters in, upon and above land; and

(c) subterranean land.
Part 1  Preliminary

Section 5

ownership interest has the meaning given by section 5.

prior written authorisation means an authorisation given under section 12 that has not expired.

5 Meaning of ownership interest

(1) A person has an ownership interest in land if the person has a legal or equitable interest in it or a right to occupy it.

(2) Despite subsection (1), a person does not have an ownership interest in land if the interest or right in the land arises as a result of a right granted under a law of the Commonwealth, a State or a Territory to engage in gas or coal mining activities.

6 Act binds the Crown

This Act binds the Crown in each of its capacities.

7 Extension to external Territories

This Act extends to every external Territory.

8 Relationship to State and Territory laws

This Act is not intended to exclude or limit the operation of any law of a State or Territory, to the extent that that law is capable of operating concurrently with this Act.
Part 2—Gas or coal mining

Division 1—Gas or coal mining without prior written authorisation from landholders is unlawful

9 Application of this Division

(1) This Division applies in relation to any gas or coal mining activity engaged in by a constitutional corporation on, or in relation to, land on or after the day this section commences.

(2) Despite subsection (1), this Division does not apply in relation to a gas or coal mining activity engaged in by a constitutional corporation on, or in relation to, particular land after the day this section commences if:

(a) the activity is for the purpose of exploring for gas or coal; and

(b) the constitutional corporation commenced exploring for gas or coal on, or in relation to, the land before the day this section commences.

(3) Despite subsection (1), this Division does not apply in relation to a gas or coal mining activity engaged in by a constitutional corporation on, or in relation to, particular land after the day this section commences if:

(a) the activity is for the purpose of mining or producing gas or coal; and

(b) the constitutional corporation commenced mining or producing gas or coal on, or in relation to, the land before the day this section commences.

10 Gas or coal mining without prior written authorisation from landholders is unlawful

(1) A constitutional corporation commits an offence if:

(a) the corporation:
**Part 2** Gas or coal mining  
**Division 1** Gas or coal mining without prior written authorisation from landholders is unlawful

Section 11

(i) enters, or remains on, land for the purposes of engaging in a gas or coal mining activity; or

(ii) engages in a gas or coal mining activity on, or in relation to, land; and

(b) the corporation does not have an ownership interest in the land.

Penalty: 5,000 penalty units.

(2) A constitutional corporation that contravenes subsection (1) commits a separate offence in relation to each day (including a day of conviction for the offence or any later day) during which the contravention continues.

(3) Subsection (1) does not apply if the corporation has a prior written authorisation from each person with an ownership interest in the land to engage in the gas or coal mining activity on, or in relation to, the land.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the Criminal Code.

11 Action for gas or coal mining without prior written authorisation from landholders

(1) A person (a *landholder*) with an ownership interest in land may bring an action against another person if:

(a) the other person is a constitutional corporation; and

(b) the other person:

(i) enters, or remains on, the land for the purpose of engaging in a gas or coal mining activity; or

(ii) engages in a gas or coal mining activity on, or in relation to, the land; and

(c) the other person does not have a prior written authorisation from the landholder to engage in the gas or coal mining activity on, or in relation to, the land.

(2) An action under subsection (1) may be commenced by the landholder at any time within 6 years after the day on which the cause of action accrued.
Division 2—Prior written authorisations for gas or coal mining

12 Obtaining prior written authorisation

(1) A constitutional corporation wishing to enter, or remain on, land to engage in a gas or coal mining activity may apply to a person with an ownership interest in the land for an authorisation (a prior written authorisation) to engage in that activity on that land.

Note: If more than one person has an ownership interest in the land, the constitutional corporation must obtain a prior written authorisation from each of them to avoid an action under section 11.

(2) A prior written authorisation must contain the following information:

(a) the names and details of the parties to the authorisation;
(b) the land to which the authorisation relates;
(c) the gas or coal mining activity proposed to be undertaken by the constitutional corporation in relation to the land;
(d) when and where the activity is proposed to be engaged in;
(e) an independent assessment of the current and future risks associated with the proposed gas or coal mining activity on, or affecting, the land and any associated groundwater systems;
(f) the date the authorisation has effect and its expiry date;
(g) any other information prescribed by the regulations.

(3) A prior written authorisation is invalid unless:

(a) the authorisation contains the information required by subsection (2); and
(b) the authorisation is in writing; and
(c) the person with the ownership interest in the land (the landholder) has been advised, in writing, by the constitutional corporation that is a party to the authorisation, that the landholder:
(i) may refuse to sign the authorisation; and
Part 2  Gas or coal mining
Division 2  Prior written authorisations for gas or coal mining

Section 12

1 (ii) should seek independent advice about the authorisation before signing it; and
2 (d) the authorisation is signed and dated by the landholder.
Division 3—Remedies

13 Remedies in actions for gas or coal mining on without prior written authorisation

(1) Without limiting the relief that a court may grant to a person (the plaintiff) in an action under section 11 (gas or coal mining without a prior written authorisation), the relief may include an injunction (including an interim injunction).

(2) The court must order that all costs incurred by a person commencing an action under this Part are to be paid by the defendant to the action unless the court considers that:

(a) the person instituted the action vexatiously or without reasonable cause; or

(b) it would be unreasonable, in all the circumstances, to do so.

(3) The court may discharge or vary an injunction or other order made under this section.
Part 3—Hydraulic fracturing operations ban

Division 1—Hydraulic fracturing operations ban

14 Hydraulic fracturing operations by constitutional corporation is unlawful

A constitutional corporation must not engage in hydraulic fracturing operations.

Civil penalty: 50,000 penalty units.
Division 2—Injunctions

15 Injunctions for contravention of hydraulic fracturing ban

Applications for injunctions

(1) If a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes a contravention of section 14:
   (a) the Environment Minister; or
   (b) an interested person (other than an unincorporated organisation); or
   (c) a person acting on behalf of an unincorporated organisation that is an interested person;
      may apply to the Federal Court for an injunction.

Prohibitory injunctions

(2) If a person has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of section 14, the Court may grant an injunction restraining the person from engaging in the conduct.

Additional orders with prohibitory injunctions

(3) If the court grants an injunction restraining a person from engaging in conduct and in the Court’s opinion it is desirable to do so, the Court may make an order requiring the person to do something (including repair or mitigate damage to the environment).

Mandatory injunctions

(4) If a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail to do an act, and the refusal or failure did, does or would constitute an offence or other contravention of section 14, the Court may grant an injunction requiring the person to do the act.
Part 3 Hydraulic fracturing operations ban
Division 2 Injunctions

Section 15

Interim injunctions

(5) Before deciding an application for an injunction under this section, the Court may grant an interim injunction:

(a) restraining a person from engaging in conduct; or

(b) requiring a person to do an act.

Meaning of interested person—individuals

(6) For the purposes of an application for an injunction relating to conduct or proposed conduct, an individual is an interested person if the individual is an Australian citizen or ordinarily resident in Australia or an external Territory, and:

(a) the individual’s interests have been, are or would be affected by the conduct or proposed conduct; or

(b) the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before:

(i) the conduct; or

(ii) in the case of proposed conduct—making the application for the injunction.

Meaning of interested person—organisations

(7) For the purposes of an application for an injunction relating to conduct or proposed conduct, an organisation (whether incorporated or not) is an interested person if it is incorporated (or was otherwise established) in Australia or an external Territory and one or more of the following conditions are met:

(a) the organisation’s interests have been, are or would be affected by the conduct or proposed conduct;

(b) if the application relates to conduct—at any time during the 2 years immediately before the conduct:

(i) the organisation’s objects or purposes included the protection or conservation of, or research into, the environment; and

(ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment;
Hydraulic fracturing operations ban

Part 3

Injunctions

Division 2

Section 16

(c) if the application relates to proposed conduct—at any time during the 2 years immediately before the making of the application:

(i) the organisation’s objects or purposes included the protection or conservation of, or research into, the environment; and

(ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment.

16 Discharge of injunctions

On application, the Federal Court may discharge or vary an injunction.

17 Certain considerations for granting injunctions not relevant

Prohibitory injunctions

(1) The Federal Court may grant an injunction restraining a person from engaging in conduct:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is a significant risk of injury or damage to human beings or the environment if the person engages, or continues to engage, in conduct of that kind.

Mandatory injunctions

(2) The Federal Court may grant an injunction requiring a person to do a particular act or thing:

(a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do the act or thing; and

(b) whether or not the person has previously refused or failed to do the act or thing; and
Part 3 Hydraulic fracturing operations ban
Division 2 Injunctions

Section 18

1 (c) whether or not there is a significant risk of injury or damage
to human beings or the environment if the person refuses or
fails, or continues to refuse or fail, to do the act or thing.

18 Powers conferred are in addition to other powers of the Court

The powers conferred on the Federal Court by this Division are in
addition to (and do not limit) any other powers of the Court.
Division 3—Civil penalties

Subdivision A—Obtaining an order for a civil penalty

19 Federal Court may order person to pay pecuniary penalty for contravening civil penalty provision

Application for order

(1) Within 6 years of a person (the **wrongdoer**) contravening a civil penalty provision, the Environment Minister may apply on behalf of the Commonwealth to the Federal Court for an order that the wrongdoer pay the Commonwealth a pecuniary penalty.

Court may order wrongdoer to pay pecuniary penalty

(2) If the Court is satisfied that the wrongdoer has contravened a civil penalty provision, the Court may order the wrongdoer to pay to the Commonwealth for each contravention the pecuniary penalty that the Court determines is appropriate (but not more than the relevant amount specified for the provision).

Determining amount of pecuniary penalty

(3) In determining the pecuniary penalty, the Court must have regard to all relevant matters, including:

(a) the nature and extent of the contravention; and

(b) the nature and extent of any loss or damage suffered as a result of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

20 Contravening a civil penalty provision is not an offence

A contravention of a civil penalty provision is not an offence.
21 Recovery of a pecuniary penalty

If the Federal Court orders a person to pay a pecuniary penalty:
(a) the penalty is payable to the Commonwealth; and
(b) the Commonwealth may enforce the order as if it were a
judgment of the Court.

Subdivision B—Civil penalty proceedings and criminal
proceedings

22 Civil proceedings after criminal proceedings

The Federal Court must not make a pecuniary penalty order against
a person for a contravention of a civil penalty provision if the
person has been convicted of an offence constituted by conduct
that is substantially the same as the conduct constituting the
contravention.

23 Criminal proceedings during civil proceedings

(1) Proceedings for a pecuniary penalty order against a person for a
contravention of a civil penalty provision are stayed if:
(a) criminal proceedings are started or have already been started
against the person for an offence; and
(b) the offence is constituted by conduct that is substantially the
same as the conduct alleged to constitute the contravention.

(2) The proceedings for the order may be resumed if the person is not
convicted of the offence. Otherwise, the proceedings for the order
are dismissed.

24 Criminal proceedings after civil proceedings

Criminal proceedings may be started against a person for conduct
that is substantially the same as conduct constituting a
contravention of a civil penalty provision regardless of whether a
pecuniary penalty order has been made against the person.
25 Evidence given in proceedings for penalty not admissible in
criminal proceedings

(1) Evidence of information given or evidence of production of
documents by an individual is not admissible in criminal
proceedings against the individual if:
   (a) the individual previously gave the evidence or produced the
documents in proceedings for a pecuniary penalty order
   against the individual for a contravention of a civil penalty
   provision (whether or not the order was made); and
   (b) the conduct alleged to constitute the offence is substantially
   the same as the conduct that was claimed to constitute the
   contravention.

(2) However, subsection (1) does not apply to a criminal proceeding in
respect of the falsity of the evidence given by the individual in the
proceedings for the pecuniary penalty order.

Subdivision C—Miscellaneous

26 Persons involved in contravening civil penalty provision

(1) A person must not:
   (a) aid, abet, counsel or procure a contravention of a civil
       penalty provision; or
   (b) induce (by threats, promises or otherwise) a contravention of
       a civil penalty provision; or
   (c) be in any way directly or indirectly knowingly concerned in,
       or party to, a contravention of a civil penalty provision; or
   (d) conspire to contravene a civil penalty provision.

(2) This Division applies to a person who contravenes subsection (1)
in relation to a civil penalty provision as if the person had
contravened the provision.
Part 3 Hydraulic fracturing operations ban
Division 3 Civil penalties

Section 27

27 Civil penalty provisions contravened by employees, agents or officers

If an element of a civil penalty provision is done by an employee, agent or officer of a constitutional corporation acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the element must also be attributed to the corporation.
Part 4—Miscellaneous

28 Application of this Act to joint ventures and partnerships

(1) This section sets out the way this Act applies to a partnership or joint venture (an **entity**) that consists of 2 or more constitutional corporations. Those corporations are referred to in this section as **the participants**.

(2) If this Act requires or permits something to be done by a constitutional corporation, the thing may be done by one or more of the participants on behalf of the entity.

(3) If a provision of this Act refers to a constitutional corporation bearing any costs, the provision applies as if the provision referred to any of the participants bearing any costs.

(4) If a provision of this Act refers to a constitutional corporation doing something, the provision applies as if the provision referred to one or more of the participants doing that thing on behalf of the entity.

(5) If a provision of this Act requires a constitutional corporation to do something, or prohibits a constitutional corporation doing something, the provision applies as if the reference to the constitutional corporation were a reference to each participant.

29 Regulations

The Governor-General may make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.