Resource development and landholders’ rights: a quick guide

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Introduction

The debate over the development of coal seam gas (CSG) in Australia has frequently visited the issue of whether landholders can (or should) control the access of resource developers to the CSG that sits under their land. In Australia, CSG resources of commercial potential are frequently co-located with productive agricultural land, in a thin band along the eastern coast. This co-location can lead to land-use conflict between pastoral and resource interests. On 9 December 2013, Senator Larissa Waters introduced the Landholders’ Right to Refuse (Gas and Coal) Bill 2013, which would give landholders an absolute veto over exploration or production of coal or unconventional gas on their land. (The Bill is substantially similar to Senator Waters’ previous private member’s Bill that lapsed in the 43rd Parliament, except that the previous Bill was restricted to coal seam gas mining activity.) This Quick Guide will examine the current Bill and provide information on the status quo.

Background

In Australia, coal, petroleum and mineral resources are generally the property of the Crown, rather than the landholder. In the case of onshore underground resources, the power to licence and regulate their development lies with the states. Elements of regulatory regimes often include:

- schemes for the licencing of applicants to explore for, and to produce, the state’s resources
- environmental, planning and occupational health and safety regulation and
- taxation of the resource development.

Commonly, the state grants licence to an entity (a person or corporation) to explore for, or to develop, underground energy and mineral resources – in effect transferring the property rights in the resources from the state to the licence holder. However, the property rights to the surface land are frequently vested in a different entity. Licence to explore for, or develop underground resources does not necessarily give the licence holder a right to enter the land that overlies that resource. For a resource rights holder to realise their property rights, a mechanism is required for the licence holder to lawfully enter and/or occupy the land above their resource.

Negotiated land-access agreements are the most common method of acquiring a right of entry or occupation, whereby a landholder allows the resource rights holder to access and occupy their land, and is compensated for any disruption caused by exploration or development activities. In some cases, rights of entry may be granted by law – for example, Queensland legislation allows for resource rights holders to enter private land to conduct preliminary, low-impact exploration activities, after providing notice to the landholder. In other cases, land access rights may be ordered by a court.

1. An exploration or mining licence (a tenement) awards exclusive licence to an entity to explore for, or to develop, a resource in a nominated area. The licence itself does not necessarily allow exploration activities like drilling wells or conducting seismic surveys, but prohibits any other person from exploring in the same area. This allows for the orderly development of resources by preventing many people developing the same resource. Exploration or mining activities normally require further approvals (such as planning or environmental approvals).
Land access and coal seam gas

Although land access agreements (example) have been in use for onshore petroleum activities since well before the advent of coal seam gas in the late 1990s, CSG presents some new challenges. The development of CSG requires a greater density of wells compared to conventional natural gas – the latter may be exploited with only a few wells, but a CSG field will typically require dozens or hundreds of wells to develop. These wells must be linked by pipelines and access roads, which means that the land requirements for a CSG development are considerably greater than for a conventional oil or gas development.

In addition, some CSG developments require the withdrawal of considerable volumes of underground water – in the order of 20,000 litres per well per day. In some cases, this water can contain significant levels of salt or other naturally occurring contaminants, which can present an environmental hazard if not properly managed. There has also been some serious scientific concern about the cumulative impact of CSG production on underground water resources.

These aspects of CSG can have a greater impact on the activities of landholders than conventional onshore petroleum extraction. Some landholders concerned about these issues have formed and joined community groups such as the Lock the Gate alliance, which are trying to stop the expansion of CSG into agricultural land. ‘Lock the gate’ refers to refusing CSG developers access to land for the purposes of CSG exploration or development.

The basic purpose of the Landholders’ Right to Refuse (Gas and Coal) Bill 2013 is to provide landholders with an absolute veto over the exploration and development of unconventional gas and coal mining on food-producing land, should a landholder wish to exercise it.

Landholders’ Right to Refuse (Gas and Coal) Bill 2013

The purpose of the Bill is to require that developers of coal or unconventional gas (CSG, shale and tight gas) have written authorisation from a landholder prior to conducting exploration or development of resources on food-producing land. The Bill also provides penalties for developers who fail to comply with this requirement.

As described earlier, the regulation of onshore mineral and petroleum resources is within the jurisdiction of the states. In order to impose Commonwealth authority on these activities, the Bill relies on the corporations power. This means that, in order to stay within Constitutional limitations, the Bill can only require constitutional corporations to have written authorisation before entering land, rather than individuals or non-constitutional corporations. (‘Constitutional corporations’ are corporations referred to in paragraph 51(xx) of the Constitution, that is, foreign corporations and trading or financial corporations formed within the Commonwealth.) In practice, gas and coal activities require considerable capital and technical expertise, normally requiring the resources of a corporation.

Key provisions of the Bill:

Part 2 of the Bill prohibits any new exploration or mining of coal or gas on food-producing land without the prior written authorisation of ‘each person with an ownership interest in the land’, and creates offences for contravention (clause 9). It also provides for landholders to take civil action against corporations engaging in exploration activities without prior authorisation (clause 10).

Part 3 of the Bill sets out information that must be included in a written authorisation, including independent assessments of ‘current and future risks associated with the proposed … activity … on, or affecting, the food producing land and any associated groundwater systems’ (clause 11). The part also provides that landholders must be informed that they are not required to sign the agreement, and that they are encouraged to seek independent advice on the agreement.

Part 4 provides for remedies that may be provided by the Federal Court to landholders. Primarily, it allows for injunctions to be issued against corporations contravening clause 10, and for costs to normally be awarded in favour of the landholder, whether or not the action against the corporation succeeds.

Key issues

Scope of proposed law

As introduced, the Bill applies to ‘land that has produced food at any time in the previous 10 years from the day the first gas or coal mining activity has been, or is proposed to be, undertaken on the land’ (clause 3). ‘Food’ is not more clearly defined in the Bill, and its interpretation could prove problematic. For example:
if ‘food-producing land’ was construed to mean land that produced plant or animal products for human consumption, then the equine industry clusters in the Hunter region of New South Wales might reasonably be excluded from the Bill’s protection.

if food was considered to mean things to be eaten, rather than things to be drunk, then well-established vineyards could fall outside the operation of the Bill.

if ‘food-producing land’ was considered to include land that produced food for animals which were not then consumed by humans, this could also be ambiguous. Would all land that produced food for animals be included, or would only that land which produced animal food as its primary purpose be included? If all land that produced food for animals (even incidentally) was included, this could put a vast portion of the landscape within the scope of the Bill.

In addition, it should be noted that the Bill protects any person with an ‘ownership interest’ in land, which is defined to include those with a right to occupy the land. This would include tenants, holders of Crown pastoral leases (but not mining leases) and potentially holders of Native Title.

Negotiating position of landholders

Land-access regimes for resource rights holders vary around Australia. The Productivity Commission has undertaken an inquiry into mineral and energy resource exploration; chapter four of the Commission’s draft report examines land access issues, and provides a useful summary of the current land-access regime in each state. Rights to access land for the purposes of resource exploration vary by jurisdiction, and also by type of land tenure. For example, private freehold land holders have greater protections than some occupiers of Crown land.

In the current regime, several models exist for gaining access to occupied land for exploration purposes. In some jurisdictions (Queensland, South Australia and Tasmania) a resource rights holder must only provide proper notice to the landholder before entering land for low-impact exploration purposes and does not require the landholder’s specific consent. Victoria requires landholders to give ‘informed verbal consent’, whereas New South Wales requires a negotiated land-access agreement. For more invasive exploration programs or production or mining leases, all jurisdictions require a land-access agreement, although this appears to not be formally stipulated in Tasmania.

In all jurisdictions, should a land-owner refuse access to land, or to negotiate a land-access agreement, the resource rights holder has rights to appeal to a mining warden, administrative tribunal, land court or Supreme Court. A notable exception to this general approach is Western Australia, where owners of private land may refuse permission for a mining tenement to be created over their land if it is under cultivation, contains a bore, dam or spring, or is a small parcel of land. This power of veto extends only to mineral activities under the Mining Act 1978 (WA), not those carried out under the Petroleum and Geothermal Resources Act 1967 (WA). In contrast, most other jurisdictions only allow landholders to veto activity in the immediate vicinity of a dwelling, building or bore. (South Australia allows for veto over mining activities on cultivated land, but still allows a mining tenement to be created.)

The implication of this is that landholders may feel pressured to negotiate to avoid potential legal action, as has been reported in the media. Although landholders are entitled to compensation for significant mining or petroleum activities that occur on their land, this compensation forms part of the land-access agreement negotiated between resource rights holders and landholders. It is very difficult to determine whether landholders are appropriately compensated, as the agreements are often concluded on confidential terms.

This paper, which examines the issue of compensation for landholders affected by CSG activity in New South Wales, reports from a range of sources that NSW landholders receive between $1,500 to $3,000 per year per CSG well on their property, with one-off payments for exploration wells ($3,000–$5,000) and in some cases an upfront payment of up to $30,000. Santos, a large producer of CSG, has publically outlined its compensation regime for NSW. However, less information is available about current compensation matters in Queensland.

Presumably, if landholders were afforded an absolute veto over the exploration or production of gas or coal on their land, they would acquire a significant advantage in negotiations with resource rights holders. It is unclear how this would practically affect the negotiating process, as there are no relevant jurisdictions that afford such a veto. (Santos has already voluntarily ruled out resorting to legal means to compel access, although this is not binding in any way.) In some ways, a veto could provide landholders with effective control over the development of resources under their land. This is closer to the United States model, where private landowners also own mineral and petroleum resources under their land in some cases.
Implications for supply of gas

Gas prices in eastern Australia are expected to rise significantly as liquefied natural gas export plants at Gladstone in Queensland come online. Previously, eastern Australia’s gas market was isolated from the export gas market, meaning that gas prices were significantly less than global export prices. Once these plants come fully online, demand for gas in the eastern states will almost triple. Although it is difficult to accurately predict future gas prices, modelling carried out for the Commonwealth’s *Eastern Australia domestic gas market study* suggested that prices could rise to more than $11 per gigajoule in Brisbane after 2020. This is in contrast with historical eastern gas market norms of between $2–$6 per gigajoule.

Gas producers, represented by their lobby group, the Australian Petroleum Production and Exploration Association (APPEA), have *strongly criticised* policy decisions that restrict gas developers from accessing land, such as New South Wales’ CSG exclusion zones. APPEA has also argued that restrictive land-use policies will send New South Wales towards a gas supply ‘crunch’, and that the *only answer to rising gas prices is more supply*. The chief executive officer of the Australian Industry Group, Mr Innes Willox, has gone further, *saying that* restrictions on extraction would lift gas prices.

To some degree, these claims are supported by the Australian Energy Market Operator’s (AEMO) 2013 *Gas statement of opportunities 2013*, and the Eastern Australia domestic gas market study. These studies predict that Queensland and New South Wales may experience shortfalls in the supply of gas in the short-medium term if domestic supplies are prioritised to the export market. The AEMO suggests that expansion of CSG supply in New South Wales may defer these shortfalls.

It is conceivable that a legislated right to refuse for landholders could present an additional barrier to increasing gas supply, or possibly raise the cost of extracting gas through higher compensation for landholders. However, the exact impact of tightening land-access restrictions on gas supply and prices is not clear.

Although it is beyond the scope of this guide to examine, a key consideration in this debate is whether the potential diminution of individual landholders’ property rights or the utility of agricultural land is justified in exchange for the possible community benefit of continued gas supply. This question is likely to be debated further in the future, as resource extraction in agricultural areas increases.

**Additional resources:**

- J Bodenmann, M Cameron, K O’Hare and ER Solomon, *A comparative study into the rights of landholders to prevent access to land by mining companies*, produced for the Queensland Council for Civil Liberties, Research note, T.C. Beirne School of Law, University of Queensland, n.d.
- M Fibbens, MY Mak, and AP Williams, *‘Coal seam gas extraction: does landholder compensation match the mischief?’*, 19th Pacific Rim Real Estate Society Conference, Melbourne, 13–16 January 2013.

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