



# MINERALS COUNCIL OF AUSTRALIA

## SUBMISSION TO SENATE COMMITTEE ON ENVIRONMENT AND COMMUNICATIONS INQUIRY INTO LANDHOLDERS' RIGHT TO REFUSE (GAS AND COAL) BILL 2015

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## EXECUTIVE SUMMARY

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The Minerals Council of Australia (MCA) strongly opposes the Bill. It is unwarranted, unreasonable and unworkable. The case for action has not been made and the proposed legislative response is inappropriate. The Bill will act to undermine the rights of state governments to develop mineral resources. The complexity and uncertainty created by the Bill will put at risk existing minerals operations and act as a strong disincentive for future investment.

The Australian coal industry recognises the importance of landholder relationships to the success of their activities. There is little to be gained through an adversarial approach. Instead industry coexistence is most effectively achieved through honest, open and respectful engagement with directly affected landholders and the broader community. Furthermore, obtaining and maintaining a 'social licence to operate' is critical to the long term prospects for any project, including future access to land.

The Bill significantly increases the Commonwealth's ability to regulate land access. Despite this, a compelling case for action has not been established. It is not clear that the current state-based systems are 'broken'. Furthermore, there is no indication the COAG Principles of Best Practice Regulation have been considered.

State access to minerals is an important right that enables each jurisdiction to realise the economic potential of its resource endowment. An absolute right of veto for any person or group with an ownership interest will impact on the right of the state to facilitate economic development and garner flow on benefits for the broader community.

Mining legislation in major coal jurisdictions already provides a range of safeguards for landholders. Cooperation and/or compensation agreements must be in place before land can be accessed. Where mining leases are granted, landholders can refuse consent to access land where sensitive or restricted land uses may be impacted.

Exploration and mining approvals are contingent on a range of other authorisations, including planning, environmental approvals and state government policies (e.g. strategic agricultural land). Commonwealth approval is also required in most cases.

The Bill would also be unreasonable and unworkable in any practical sense. Specific issues include:

- The definition of an 'ownership interest' extends protection to a broad group of persons, well beyond the occupier of the land, all of whom would be difficult to identify. This may undermine the right of the primary landholder to enter into a compensation agreement with a coal company.
- The blanket approach provided in the Bill does not take into account the nature of the interest held in the land and therefore whether the level of protection is proportionate.
- The process will be open to abuse. It provides all persons with an ownership interest with an absolute power of veto over potentially economically significant projects. This enables all parties to seek any level of compensation, reasonable or otherwise, in exchange for written authorisation. The cost of cumulative compensation could be large enough to stop a project.
- The conditions for obtaining prior written authorisation are highly prescriptive, and are likely to result in unnecessary additional costs.

The transitional arrangements provide little certainty for existing coal operations or those under development. Prior written authorisation is not binding leading to re-triggering of the process each time there is a change in ownership interests or the mining proponent. This would be unacceptable for any economic activity, let alone the mining industry which is highly capital intensive and which relies upon a stable operational environment to secure returns on what are long-term investments.

## 1 INTRODUCTION

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The Minerals Council of Australia (MCA) welcomes the opportunity to provide a submission to the Senate Standing Committee on Environment and Communications Inquiry into the Landholders' Right to Refuse (Gas and Coal) Bill 2015 (the Bill).

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, and environmentally and socially responsible attuned to its communities' needs and expectations.

MCA members commit to continuous improvement in their performance, beyond regulatory requirements, as signatories to *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development*. A key element in this Framework is the commitment to 'Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities' and 'to engage and respond to stakeholders through open consultation processes'.

As articulated in the MCA Land Stewardship Policy, the Australian minerals industry strongly supports the development of diverse regional economies enabled through the coexistence of different land uses.<sup>1</sup> Mining, agriculture and conservation can be complementary as neighbouring or sequential activities.

The Australian coal industry recognises the importance of landholder relationships to the success of their activities. There is little to be gained through an adversarial approach. Instead industry coexistence is most effectively achieved through honest, open and respectful engagement with both the landholders directly affected by a proposed activity and the broader community. Furthermore, obtaining and maintaining a 'social licence to operate' is critical to the long term prospects for any project, including future access to land.

The MCA opposes the Bill as it is both unwarranted and unworkable. It imposes Commonwealth restrictions over states' rights to access resources owned by the Crown. The proposal pays no regard to existing state legislative regimes which provide for access and compensation agreements with landholders. Furthermore, the Bill provides little certainty for the proponent, the state or the landholder.

Specific comment on the Bill is provided in the following sections. It is important to note that while the Bill covers both gas and coal mining activities, these comments reflect upon its implications to the coal industry which the MCA represents nationally, and the coal seam gas industry as represented by the Victorian Division of the MCA.<sup>2</sup>

## 2 IS THE BILL NECESSARY AND APPROPRIATE?

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### COAG Principles of Best Practice Regulation

The Bill significantly increases the Commonwealth's ability to regulate land access. The MCA considers that any significant expansion of Commonwealth jurisdiction requires a strong and compelling case for action. However, in this instance, such a case has not been made.

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<sup>1</sup> [MCA Land Stewardship Policy](#)

<sup>2</sup> Note: MCA Victorian Division represents Coal Seam Gas as defined under the *Minerals Resource (Sustainable Development) Act 1990* (Vic)

In 2007, the Council of Australian Governments (COAG) established a set of agreed principles for best practice regulation.<sup>3</sup> It was intended that these principles would inform the development of new laws/regulations to ensure they are necessary, efficient, proportionate and effective.

Of the eight principles, the MCA considers the following are particularly relevant to this review:

Principle 1 – A case for action must first be established before addressing the problem

Principle 2 – A range of feasible options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed

Principle 3 – Adopting the option that generates the greatest net benefit for the community

Principle 8 – Government action should be effective and proportional to the issue being addressed

The MCA would question whether these or any of the COAG principles were considered in the development of the Bill. Indeed, the explanatory material provides no indication that any analysis, using these important principles, has been undertaken.

### Failure to Articulate the Problem

The MCA questions the presumption that there is a problem which requires fixing. It is not clear that the current state-based system of legislative oversight and land access arrangements is 'broken'. Indeed, there are many examples of positive co-existence between landholders and coal companies, including areas with a concentrated industry presence (for example, mining and Beyond Broke Vineyard in NSW and the Upper Hunter Mining Dialogue).<sup>45</sup>

With respect to exploration, across NSW and Qld, there are thousands of exploration leases linked to thousands more successfully negotiated land access agreements:

- In NSW there are 1,034 mineral and coal exploration licences, each requiring one if not several land access agreements (resulting in potentially thousands of successfully negotiated agreements).<sup>6</sup>
- In Qld, there are 2,582 mineral and coal exploration licences. Each of these licences requires the proponent to enter into Conduct and Compensation Agreements (CCA) with landholders for which there can be many for an individual licence. Indicative of the success of this process, since October 2010, there have been more than 2,096 intentions to negotiate notices lodged by minerals and coal proponents (a further 3,537 for petroleum and gas).<sup>7</sup> There were 16 applications for arbitration by the Qld Land Court over the same period.

With respect to coal mining activities, by-and-large companies purchase the land prior to the commencement of mining.

States are continuing to improve the way land access operates. For example, in 2012 Qld introduced the Land Access Laws in 2012 which provided a process for landholders and mining companies to negotiate conduct and compensation matters and reach agreement. Furthermore, in the Darling Downs region a Gasfields Commission was established to provide facts to landholders regarding negotiating with mining and gas companies and the realistic impacts to their land. The process promotes coexistence by focussing on funded infrastructure to compensate for impacts as opposed to lump sum payments.

In 2013, the COAG Standing Council on Energy and Resources endorsed a Multiple Land Use Framework.<sup>8</sup> The framework provides a series of guiding principles to promote the best use of

<sup>3</sup> Council of Australian Governments, 2007; *Best Practice Regulation, A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007

<sup>4</sup> NSW Minerals Council, 2013; [Vineyards producing top notch wines above mines](#), 14 July 2013

<sup>5</sup> NSW Minerals Council; [The Upper Hunter Mining Dialogue](#)

<sup>6</sup> NSW Division Resources and Energy, 9 May 2014

<sup>7</sup> Qld Government, Department of Natural Resources and Mines, 5 May 2015

<sup>8</sup> COAG Standing Council on Energy and Resources, [Multiple Land Use Framework](#), December 2013

Australia's resources and coexistence, not exclusion, of different land uses for the benefit of broader society. The objectives of the Bill are contrary to these commitments.

As provided above, there is little indication of systemic failure within relevant state-based systems. Accordingly, the MCA considered the Bill to be unwarranted. Furthermore, the Bill fosters an adversarial approach to land access which may undermine the significant efforts by the states to promote land use coexistence and relationships between landholders and resource companies.

## 4 STATE AND TERRITORY RIGHTS

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The Bill would unacceptably impact on the rights of the states to access mineral resources.

Mineral resources are generally the property of the Crown (in right of the State). State access of minerals is an important right that enables each jurisdiction to realise the economic potential of its resource endowment for the benefit of the broader community. This is reflected in state mining legislation, where regard is given to landholder interests, but primacy given to the right of the state.

An absolute right of veto for any person or group with an ownership interest will impact on the right of the state to facilitate economic development and garner flow on benefits to the broader community. The ability to block access to these resources would effectively act in much the same way as a transfer in ownership of the minerals from the state to the landholder. This would be an unacceptable outcome for the state and set a dangerous precedence for broader rights of the state to pursue economic development (e.g. through infrastructure).

It is important that mining legislation strikes an appropriate balance between mineral (coal) extraction, existing land use and protection of the environment. However, it also needs to provide the states with the ability to extract mineral resources where it is critical for economic development.

## 5 EXISTING SAFEGUARDS

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There are a range of safeguards already in place which afford protection to the landholder.

Mining legislation in major coal jurisdictions (NSW and Qld) does not provide a carte blanche for coal companies to access land. Instead, a range of strict conditions must be met before authorisation can be granted for exploration or mining, specifically:<sup>9</sup>

- Cooperation/access agreements with the landholder must be entered into before land can be accessed for exploration. Under the *Mineral Resources Act 1989* (Qld) a person cannot enter 'private land' unless a Conduct and Compensation Agreement (CCA) is in place. In NSW under the *Mining Act 1992* (NSW), 'the holder of a prospecting title must not carry out prospecting operations on any particular area of land except in accordance with an access arrangement or arrangements applying to that area of land'
- Landholders can refuse consent to access land where sensitive or restricted land uses may be impacted by mining activities. These include dwellings, dams, stockyards, orchards, cultivated land, water wells and other land improvements. Furthermore, in both NSW and Qld, an access and compensation agreement must be entered into before the Mining Lease (ML) holder is able to exercise rights under the ML.
- Compensation is payable to the landholder prior to the exercise of rights under a Mining Lease (ML). Landholders can seek recourse to mediation then arbitration/specialist Court if they are not satisfied and agreement is not reached.

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<sup>9</sup> *Queensland Mineral Resources Act 1989 (Qld) and New South Wales Mining Act 1992 (NSW)*

Importantly, exploration and mining approval processes are not undertaken in isolation from other legislative requirements. Instead, such authorisations are generally contingent on a range of other development assessment approvals. These can include:

- State-based environmental legislation, including the *Environmental Protection Act 1994* (Qld) and *Environmental Planning and Assessment Act 1979* (NSW)
- Specific conditions for projects which may influence strategic agricultural land and/or critical industry clusters under the *Regional Planning Interest Act 2014* (Qld) and under the NSW Strategic Regional Land Use and Mining State Environment Planning policies<sup>10</sup>
- The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), which includes the 'water trigger' for coal seam gas and large coal mining developments
- Provisions of the Commonwealth *Native Title Act 1993*, where appropriate

The above legislative mechanisms provide additional safeguards for the landholder. They also provide landholders and the broader community with opportunities to raise concerns or object to proposed developments.

In addition to these legislative protections, the key coal resource states of NSW and Qld have codes/guidance which set out the approach for landholder and resource authority holder interaction. Examples include the Qld Government Land Access Code and the NSW Land Access Arrangement and the land access agreement template developed between the NSW Minerals Council, NSW Farmers and the NSW Government.<sup>11 12</sup>

## 6 OPERATION OF THE BILL

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The operation of the Bill is both unreasonable and unworkable. It empowers a broad range of persons with an 'ownership interest' with an absolute veto and the capacity to seek any level of compensation from the mining proponent. The process will be open to abuse, enabling industry opponents to seek derivative rights over land to stop projects and impact on the rights of the primary landholder to enter into an agreement with a mining company. These are significant risks which would be unacceptable for any economic activity. These issues are further explored below.

### Definition of an 'Ownership Interest'

The Bill makes it an offence for a Constitutional corporation to enter or remain upon the land for the purposes of engaging in a coal mining activity. This is unless it has an 'ownership interest in the land' (excluding exploration/mining approvals) or has 'prior written authorisation' from each person with an ownership interest in the land.

Under the Bill, protection is afforded to those who have an 'ownership interest' in the land. Section 5 of the Bill defines a person with an ownership interest as 'a person who has a legal or equitable interest in the land or a right to occupy it'. This does not align with state definitions of 'ownership' or 'landholder'. Using this definition, those with an 'ownership interest' could include:

- Holders of freehold land
- Holders of Crown leasehold
- A beneficiary's interest in land under a fixed trust
- The interest a purchaser has after a valid contract of sale of land is entered into but before the land is transferred
- Mortgagees of property

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<sup>10</sup> NSW strategic [Land Use Policy](#)

<sup>11</sup> Queensland Government, 2010; [Land Access Code](#), November 2010

<sup>12</sup> New South Wales Government, [Land access arrangements for mineral resources](#), Department of Trade and Investment

- An easement which is agreed in a registrable form but is not registered
- An interest in land where an errant fiduciary purchases property with money obtained in breach of their fiduciary obligation
- Where a person contributes to the purchase of land, if they are not a registered proprietor, equity will recognise their interest in the form of a constructive trust

As provided above, the definition of ownership interest is highly problematic as it extends protection to a broad group of persons, well beyond the occupier of the land. This would create an impossible situation for companies, as these other interest holders are not listed in mainstream land ownership registers and would therefore be very difficult to identify.

### **Negotiation and Compensation**

Existing state-based mining legislation seeks to balance the status of the landholder and nature of the land use with the level of protection afforded. Importantly, under these state regimes, where land improvements have been made or land use is intensive, greater protections are afforded and it is more difficult for a mining activity to proceed.

The blanket approach provided in the Bill does not take into account the nature of the interest and therefore whether the level of protection is proportionate. This raises a number of serious issues:

- Unlike state-based legislation, the Bill provides no dispute resolution process, including recourse to an arbitrator or specialist Court. Furthermore, there is no statutory timeframe for reaching agreement on prior written authorisation. Accordingly, protection under the Bill operates as an absolute veto for any person with an 'ownership interest'.
- A wide range of persons, regardless of the nature of the interest, will have a veto right over potentially economically significant projects. Both improved land and land with no significant competing use would be treated the same.
- The Bill is silent on the matter of compensation. In order to receive written authorisations, it is likely companies will be required to negotiate compensation with each and every person with an 'ownership interest' (veto). This would not only consume company time and resources, but the cost of cumulative compensation would in many cases be significant enough to stop a project.
- Under state-based arrangements, a coal company may enter into an access agreement where the landholder is satisfied with the both the conditions and the level of compensation. In some circumstances, this compensation may provide much needed income to the landholder (e.g. to support agricultural activities during times of drought). Giving multiple parties absolute veto and therefore ultimate influence over whether a project will or will not proceed, effectively undermines the right of the primary landholder to enter into a compensation agreement with a coal company and the rights of Native Title holders. This would be the case even where the landholder is the only party directly affected by a proposed development.
- The process will be open to abuse. An absolute veto will enable parties to seek any level of compensation, reasonable or otherwise, in exchange for written authorisation. In other circumstances, parties who object to the coal industry could seek derivative rights over land and use their veto to ensure projects do not proceed.

### **Obtaining Prior Written Authorisation**

The conditions for obtaining prior written authorisation provide little certainty for a coal proponent and are likely to result unnecessary additional costs.

Section 12 of the Bill prescribes the process for obtaining written authorisation. It provides that an authorisation is invalid where there are procedural irregularities, which most notably include the prescribed information requirements.

Among other information, a prior written authorisation requires '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'.

What constitutes an 'independent assessment' is a matter of concern. Companies already invest significant time and resources in assessing and addressing land and water impacts when securing state-based environmental approvals. Furthermore, coal developments often require federal approval under the EPBC Act. This includes assessment by the Independent Expert Scientific Committee (IESC) under the 'water trigger'.

Despite the wide range of studies undertaken, regulatory oversight and IESC review, this may not be sufficient to satisfy each person with an 'ownership interest'. Moreover, an independent assessment will have a different meaning for different people. Accordingly, environmental assessment information may require differing levels of verification to satisfy different groups which, if contestable, may cause the authorisation to be invalid.

Even where there is good agreement with all those with an 'ownership interest', companies would likely be required to reproduce environmental assessment data many times to suit different audiences. This would come at considerable cost to the proponent.

## **7 IMPLICATIONS FOR FUTURE INVESTMENT**

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The Bill creates an environment of extreme uncertainty which would impact on existing projects and deter future investment.

### **Existing Operations**

Section 9 of the Bill provides that prior authorisation is not required, where the exploration or mining of coal 'on the land, or in relation to, land' has commenced before the day the proposed Act commences (upon Royal Assent).

These transitional arrangements provide little certainty for existing coal operations. Specifically, there is no regard for the progressive nature of mining. While mining may be taking place on land in a particular place, an existing, fully approved mine plan may include surrounding areas within a mining lease which will not be mined for many years or even decades. As worded, this section may operate to provide veto over operations expanding into pre-determined areas.

### **Projects Under Development**

The Bill may impact new projects/expansions, including those at a late stage of development.

The exemption provided in the Bill only applies if the mining of coal has already commenced. However, it takes significant investment over several years before coal is mined. Time is required to secure capital, and obtain the necessary regulatory approvals. Furthermore, significant on-ground preparation is required before a mine is operational.

As mining has not commenced, it is unlikely these mature projects will be exempted under the provisions of the Bill. Clearly the uncertainty this would create would be unacceptable to the coal industry as it would be to any significant development activity.

### **Rolling Authorisations**

Unlike state-based agreements, the Bill does not make a prior written authorisation binding on a successor in title to the land or more broadly an 'ownership interest'. Accordingly, a change in landholder or legal interest would likely re-trigger the authorisation process. These rolling

authorisations would create enormous uncertainty for both the coal company and other interest holders.

A change in mining proponent (for example, through acquisition of the mine asset), would also re-trigger the re-authorisation process with all interest holders. Coal mining activities are capital intensive and a return on investment is often realised over many years. A stable operational environment is needed to attract the levels of investment required. Accordingly, the extreme uncertainty created by the Bill would do nothing more than act as a strong disincentive to future industry investment.

## 7 BAN ON HYDRAULIC FRACTURING

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Unrelated to landholder rights, the Bill also includes a specific ban on the use of hydraulic fracturing (as part of coal seam gas exploitation). The MCA considers there is little merit in this blanket approach.

The Victorian regulatory regime considers coal seam gas a product of coal and is therefore classified as a mineral under the *Minerals Resource (Sustainable Development) Act 1990*. A coal seam gas proposal will therefore go through the same licencing process as a coal project.

The recently released productivity commission report: 'Examining Barriers to More Efficient Gas Markets' has questioned some of the fears associated with the development of a coal seam gas industry, including the science in arguments against the development of an industry in Victoria.<sup>13</sup> The report noted that evidence used by opponents of the coal seam gas industry lacked scientifically methodological rigour. It also questioned the fear campaigns associated with coal seam gas development, noting that coal seam gas does not pose an unacceptable risk to the community.

Hydraulic fracturing should be permitted wherever necessary to support Australia's coal seam gas industry. The management of hydraulic fracturing must be consistent with the management of all risks to the environment and the community to ensure safe and environmentally responsible outcomes are achieved. Accordingly, the approval of these activities should be both risk based and founded in sound science.

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<sup>13</sup> Australian Productivity Commission, [Examining Barriers to More Efficient Gas Markets](#), March 2015