

Senate Environment and Communication Legislation Committee's Inquiry Submission: *Landholder's Right to Refuse (Gas and Coal) Bill 2015*

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The bill: provides that Australian landholders have the right to refuse the undertaking of gas and coal mining activities by corporations on their land without prior written authorisation; sets out the requirements of a prior written authorisation; provides for relief which a court may grant a land owner when prior written authorisation is not provided; prohibits hydraulic fracturing for coal seam gas, shale gas and tight gas by corporations; and provides for civil penalties.

1. General Comments

The *Landholder's Right to Refuse (Gas and Coal) 2015* Bill works from the underlying assumption that a right to refuse access for gas and coal mining activities may be statutorily conferred upon private landholders. In this submission I argue that this does not cohere with the core principles underpinning land and resource ownership in Australia.

Private land-owners retain a common law estate in the land. A full fee simple estate confers upon the private owner corporeal rights to use and enjoy the land exclusively. Under common law, this includes rights to use the sub-surface stratum that extend down to a reasonable degree including all minerals and petroleum resources.

The common law scope of private land ownership has been modified by legislation enacted in each state and territory which purports to vest the ownership of minerals and resources back to the state. Indeed, all Australian states and the Northern Territory have legislatively declared that petroleum *in situ* is owned, without exception, by the Crown regardless of when the land containing the petroleum passed into private ownership. For example, section 6 of the *Petroleum (Onshore) Act* 1991 states:

- 1) All petroleum, helium and carbon dioxide existing in a natural state on or below the surface of any land in the State is the property of the Crown, and is taken to have been so always. No compensation is payable by the Crown for any such petroleum, helium or carbon dioxide that was at any time vested in any person other than the Crown.
- (2) All Crown grants and leases and every licence and other instrument of title or tenure under any Act relating to lands of the Crown whether granted before or after the commencement of this section, are to be regarded as containing a reservation to the Crown of all petroleum, helium and carbon dioxide existing in a natural state on or below the surface of the land comprised in the instrument concerned.

The vesting provisions accord with a public ownership framework for resources. The public ownership of resources is grounded in the core assumption that the state is the appropriate owner of the resources because it has the capacity to ensure that those resources are properly utilized for the common benefit of all citizens.

The statutory vesting of minerals and resources in the state creates inevitable tensions with surface estate ownership. This is because the resource resides within the land and the landholder retains rights of exclusivity and control over that land. This necessarily means that

the exact nature of any entitlement to access the resource by the state or an authorized proponent of the state remains unclear. The division between the control rights held by the surface land owner (a common law ownership concept) and the control rights held by the resource owner (a statutory ownership concept) are unknown. In circumstances where access entitlements are not explicitly conferred by legislation, it may be assumed that the ownership bundle of the land owner will take priority given the fact that their rights relate to the land.

The Bill assumes, perhaps as a consequence of this uncertainty, that a private landholder is entitled to veto the right of a mining/petroleum licensee to enter the land and access the resource. In this respect, the bill assumes that the ownership rights of the landholder include a right to prevent the licensee from accessing the resource. This assumption misconceives the disaggregation between land and resource ownership and does not align with the core principles that underpin Australian land law.

2. The Tenure Framework

Land ownership in Australia is subject to an inherited feudal tenure framework. This means that the State, in right of the Crown, is the ultimate owner of all land and may exercise sovereign power over all of its inhabitants. Within a tenure framework, private ownership is derived from the state in right of the Crown and the grantee holds that land pursuant to a Crown grant (an estate).

A fee simple estate is the highest form of tenurial grant that may be issued by the state to the landholder. The conferral of this estate does not, however, mean that the grantee acquires full and absolute ownership. Rather, grantee acquires is a title that gives it full rights to use, enjoy and control the land subject to any specific tenurial incidents *and* subject to the underlying assumption that the state in right of the Crown remains the ultimate owner. This means that the state has the capacity to reclaim the land, subject to specific constitutional and statutory protections. State Constitutions do not mandate just compensation for the acquisition of land in the same way that it is articulated under the Commonwealth Constitution. Where land is not the subject of a private grant, and remains unalienated, the state in right of the Crown will retain radical title over that land.

This core framework is the fundamental reason why resources residing within private land were able to be re-vested back to the state without the need to provide compensation. The state vesting legislation provides the means for the re-vesting process however the ultimate source of power is the underlying title the state retains pursuant to the tenure framework.

When the state issues a resource title to a mining or petroleum proponent, it authorizes the holder to exercise ownership rights it has statutorily reclaimed. The issuance of such titles necessarily diminishes the scope of the ownership entitlements of a private landholder in a number of ways. First and foremost the resource in the substratum is no longer the subject of ownership rights by the

landholder. Second, the rights of the resource title holder may be accompanied by an express or implied access entitlement to access the resource by crossing the land. The private landholder is bound to uphold this entitlement and cannot deny the rights of the State in this context. The state is the absolute owner of the land. The state has reclaimed ownership of the resource. The tenure framework gives the State the power to disaggregate those resources and reclaim them. Access to the resource is a necessary consequence of resource ownership. Access entitlements may be constructed as a express requirement of the resource title or, pursuant to expressly conferred ancillary rights or, as a right which is implied and necessary.

3. Express Statutory Provisions

The express provisions of the mining or petroleum legislation may confer upon the licensee ancillary rights that authorize the licensee to conduct all activities necessary to carry out the operations authorized by the license. Such a provision exists in the *Petroleum and Gas (Production and Safety) Act 2004*. Section 112 explicitly entitles the holder of a lease to carry out an activity if it is reasonably necessary for or incidental to another authorized activity for the lease. The right of a lease-holder to access land in order to obtain the resource constitutes a 'reasonably necessary' activity.

Similarly, s 38(2)(c) of the *Petroleum and Geothermal Energy Resources Act 1967* (WA) authorizes the holder of a petroleum exploration permit to carry out such operations and execute such works in the permit area as are necessary for those purposes. The right of a permit holder to access land in order to gain access to the

resource is a 'operation' that is 'necessary' to the purpose for which the exploration permit was issued.

When state resource legislation explicitly includes provisions authorizing the exercise of ancillary or reasonably necessary rights, the right to exercise access over the surface estate is authorized by legislation. It is sometimes claimed that legislation may also support the right of a private landholder to veto access. For example, it is often claimed that section 16 of the *Petroleum and Geothermal Energy Resources Act 1967 (WA)* confers upon private landholders the right to veto access by petroleum title holders. This is not accurate.

This provision imposes a qualified obligation to obtain consent from landholders where the land fits particular exemption requirements. It does not constitute a generalized right to veto. Section 16 sets out that the holder of a petroleum title shall not enter the land for the purpose of exploration or recovery of petroleum or geothermal energy resources unless the consent in writing of the owner has first been obtained. This is *only* applicable, however, to private land not exceeding 2000 m² or, land used as a cemetery or burial place or, land less than 150 metres from a cemetery, burial place, reservoir or substantial improvement (which is to be determined at the Minister's discretion).

The *Landholder's Right to Refuse (Gas and Coal) Bill 2015* assumes that landholders have the capacity to deny access to mining and petroleum title holders. This assumption is contrary to the operative scope of express ancillary provisions. The Bill also assumes that the

Federal government has the constitutional mandate to support such an Act. State governments retain control over resources within their jurisdiction because the vesting provisions give them ownership of the resource. Consequently, state governments retain the power to regulate resources that belong to them. It would appear to be beyond the constitutional mandate of the Federal government to expressly override state legislation that confers access entitlements upon the holders of resource titles.

4. Implied Rights

The statutory vesting of the resources in the state may also generate an implied right to access the resource, irrespective of the existence or otherwise of express ancillary provisions. Implied rights to access landlocked land commonly arise under general law. By parity of reasoning, it may be argued that an implied right to access landlocked resources should automatically complement the statutory vesting provisions. This means that ownership of the resource necessarily carries an implied entitlement to access the resource given its location within the sub-stratum of the land.

An implied right to access may be rationalized as a necessary consequence of the fragmentation of land and resource and the disaggregation of common law and statutory ownership. Ownership rights cannot exist unless properly supported by core rights. This is an important consideration for the propertisation of natural resources. As Elinor Ostrom has noted, property rights in natural resources cannot simply emerge spontaneously, particularly where they overlap. State ownership depends upon the existence and

enforcement of a set of rules that define the right to undertake activities and the way in which returns from that activity will be allocated.¹ The vesting of natural resources in the state necessitates the implication of critical rules delineating access. This is particularly important in circumstances where conflicting ownership interests exist. All ownership rights are supported by unassailable rights of access and usage; without them the relationship cannot be properly defined as coming within the boundaries of ownership.

5. Conflict with State Laws for Access and Compensation

Private landholders may gain legislative protection for supporting access arrangements with mining and petroleum title holders. In some states this occurs via access and compensation agreements which are conditional upon the exercise of an access entitlement by a resource title holder. If a private landholder disagrees with the nature and form of the access that is sought, the matter may be resolved in a court or tribunal. Given the overlay of the ownership entitlements, the landholder is entitled to be involved in the nature and form of the access arrangement that will support the resource title holder. This core assumption is articulated within the onshore mining and petroleum legislation in each state.

Different states have adopted varying measures of landholder engagement. In Queensland, for example, a conduct and compensation agreement must be entered into between resource title holders and private landholders. The agreement sets out the terms and conditions of any

¹ E. Ostrom and C. Hess, 'Private and Common Property Rights' 2007, Workshop in Political Theory and Policy Analysis, Indiana University at p4

compensation which the private landholder is to obtain as a consequence of the mining or petroleum operations. Such compensation can include:

- deprivation of possession of land surface
- reduction in land value
- reduction in land use including reduced use that could be made through any improvements to it
- severance of any land from other parts of the land owned by the landholders
- any cost, damage or loss arising from activities carried out under the land surface
- accounting, legal or valuation costs reasonably incurred by the landholder to negotiate or prepare a Standard Conduct and Compensation Agreement, other than costs involved to resolve disputes via independent alternative dispute resolution
- damages incurred by the landholder as a consequence of matters mentioned above.

The terms and conditions of an access entitlement may also be regulated by additional state regulations. In Queensland for example, the Land Access Code 2010 prescribes mandatory and aspirational codes of behaviour for all access entitlements exercised by the holders of resource titles.

The *Landholder's Right to Refuse (Gas and Coal) Bill 2015* undermines the operative scope of these state based provisions. If a private landholder has the capacity to veto access to the land, it is difficult to see how state laws that seek to regulate the terms and conditions of access entitlements are to function.

Clause 8 of the Bill sets out that the Bill is not intended to exclude or limit the operation of any law of a State or Territory, to the extent that the law is capable of operating concurrently with the Bill. The difficulty is that the Bill cannot function concurrently with other state laws because of its underlying assumption that landholders retain a right to veto. This effectively means that the detailed regimes implemented in states such as Queensland that articulate notification, compensation, and conduct obligations upon resource title holders will become redundant.

6. Conflict with State Licensing Laws

Onshore state mining and petroleum laws authorise the state government, as owner of the resource, to issue titles to approved applicants for the exploration, retention and production of coal and gas resources. The nature of the activities authorised by these titles depends upon the character of the title issued. An exploration title issued to an authorised holder will confer upon that holder rights to explore for resources within the authorised area; activities may include geological surveys as well as small, exploratory drills.

The ability to access land contained within the authorised area is fundamental to the performance of authorised activities. The licensing framework prescribed within each of the onshore state petroleum and mining acts assumes an entitlement to access, subject to negotiation, compensation and behaviour obligations. To the extent that the Bill confers upon private landholders a right to veto access, it directly conflicts with the underlying assumptions of entire state licensing framework. The implementation of such a regime at

the Federal level would create an unworkable environment. It is simply not possible for a state department to approve authorised activities within a license and then have those activities overruled by a landholder refusing to authorise access and/or subject to a civil penalty should the resource title holder ignore this refusal. This would create licensing chaos and generate unfair differences between licences issued pre the implementation of the Bill (which would not be subject to a right of veto) and licences issued after the implementation of the Bill (which would be).

7. Authorisation and Offence

Pursuant to clause 10(1) of the proposed Bill, a constitutional corporation (defined under s51(xx) as trading or financial corporations formed within the limits of the Commonwealth or foreign corporations) will commit an offence if it enters or remains on land for the purpose of conducting gas or coal activities where it does not have an ownership interest in land. An ownership interest is defined as a legal or equitable interest in the land and it expressly excludes a right granted to engage in gas or coal activities. Clause 10(3) does not apply if the constitutional corporation has written authorisation from each person with an ownership interest in the land. This provision will effectively prevent states, henceforth, from issuing coal or gas licences to a constitutional corporation that authorises exploration or production activities in the absence of written authorisation by the landholder. The Bill further requires an independent review of the current and future risks of the coal or gas mining activity to be included within the written authorisation.

Private landholder authorisation cannot be constructed so as to constitute an impediment to resource development as this undermines the disaggregation of the resource from the land and depletes the statutory ownership rights retained by the state (see above). It is best to avoid the language of 'offence' and 'authorisation.' This is because both words connote a level of control over the resource that landowners no longer had.

It is more consistent and appropriate with the existing land and resource ownership framework in Australia to refer to 'controlled access'. This is the appropriate interface concept. Access to a resource that exists in the subsurface of private land is a critical property assumption. If access is denied then *all* of the remaining bundle of rights connected to the ownership interest (control and use) cannot be exercised. In light of this, it is preferable to implement clear provisions outlining the means by which access may be exercised instead of trying to implement provisions that purport to confer authorisation rights grounded in a non-existent entitlement to refuse.

Provisions that regulate the means by which access is exercised may be constructed to include a disclosure of the risks associated with particularised access activities. This is an onerous requirement particularly in the context of exploration permits because the exact nature and scope of the reserves may be unclear making it extremely difficult to accurately predict the nature and scope of the risk which is more likely to be connected with the subsequent process of

commercial production. In this respect, risk disclosure may be more appropriate once a production licence is issued.

The requirement in the Bill that current and future risks of the coal and gas mining activity be included within the written authorisation fails to properly calibrate the authorisation of the landholder with the nature of the permit and the different stages of project development. Hence, a written authorisation for the conferral of an exploration licence should only require a risk assessment relevant to exploratory activities. It may be that the feasibility of commercialising the resource, if it exists in sufficient quantity, is not commercial. This means that the holder of an exploration licence may decide not to proceed to production. This would make the obligation to provide a risk assessment relevant to full commercial production unnecessary and irrelevant.

Further, it must be clear that disclosure requirements do not authorise a private landholder to deny access. Risk disclosure must be articulated as a transparency requirement for those holding an interest in the land, rather than the basis for a private landholder to refuse to authorise access. To this extent, it may be preferable to incorporate risk disclosure obligations within broader community consultation requirements as the 'risks' which may be relevant to commercial production will not be restricted to those holding land interests.

8. Banned Activities

Clause 14 of the proposed Bill imposes a blanket ban on hydraulic fracturing activities. Hydraulic fracturing is defined to mean any operation involving 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. This ban would appear to apply to all gas and coal activities – whether conventional or unconventional in nature.

The ban ignores the fact that in some areas (the Cooper Basin for example) hydraulic fracturing for the extraction of conventional gas is well established. A blanket ban of this nature will impose significant barriers to the progression of the onshore natural gas industry as it prevents the utilisation of innovative extraction technology. Given the findings of many reports, the Chief Scientist Report on CSG Extraction in NSW in 2014 being a good example, that hydraulic fracturing is a manageable risk provided it is complemented by a robust regulatory framework, an absolute ban appears excessive.

9. Remedies

Should a constitutional corporation (i) engage in gas or coal activities without written authorisation of the holder of an ownership interest in land or (ii) engage in hydraulic fracturing activities, they will commit a civil offence. The Bill purports to allow for the imposition of interim, prohibitory and mandatory injunctions either preventing the activity from going ahead or, should it have been carried out,

ordering a constitutional corporation who has refused or failed to comply with the requirements of the Bill, to do so.

Significantly, the clause 17 of the Bill sets out that certain considerations for granting injunctions will not be relevant. For prohibitory injunctions these include:

- 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
- whether or not the person has previously engaged in conduct of that kind; and
- 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.

For mandatory injunctions these include:

- 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
- whether or not the person has previously refused or failed to do the act or thing; and
- 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.

These statutory remedies appear to go well beyond their equitable counterparts. An interim injunction may only be granted in the

equity jurisdiction where it can be established that there is a serious question to be tried. It is difficult to determine exactly what the question to be tried would amount to in this context - other than constituting a breach of the Bill itself.

In this context, the purpose underlying injunctive relief is to issue a personal order against a party who is either (i) suspected of being about to carry out a wrong or who (ii) has carried out a wrong and it is suspected that a further wrong will be carried out. The injunction is derived from the equitable jurisdiction where the courts have strong and broad discretion to determine its suitability. Its incorporation as a statutory remedy in this context appears to significantly exceed its equitable origin.

The explicit removal from consideration of a range of discretionary factors relevant to a circumstantial assessment of the nature, scope and risk of the alleged wrong, means that the relief incorporated within the Bill is more akin to a directive than an orthodox injunction.