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Committee Secretary
Senate Standing Committees on Environment and Communications
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Dear Committee Secretary

Submission in response to Landholders' Rights to Refuse (Gas and Coal) Bill 2015

Thank you for the opportunity to make submissions on the Landholders' Rights to Refuse (Gas and Coal) Bill 2015 (**Bill**).

Who we are

Creevey Russell Lawyers is a full service law firm with offices in Brisbane, Toowoomba and Roma, to provide superior legal services to clients across Queensland. Our Resources and Energy Team specialise in advising and supporting landholders in relation to negotiations with resources and energy companies for gas and coal activities (including hydraulic fracturing) on private land.

Creevey Russell Lawyers welcome this Bill in so far as it may reignite public debate regarding mandatory negotiations for mining and petroleum activities on private land. We have witnessed over and over again the serious distress of landholders trying to negotiate terms and compensation while the threat of court proceedings hangs over their heads. A right to refuse would dramatically alter the balance of power and allow for free and fair commercial negotiations.

However, in some aspects the Bill falls short, and in others it overreaches. Our submissions, clause by clause, are as follows. We have also commented on the contents of the explanatory notes and other materials commonly cited to explain the Bill to the public.

Positive outcomes for co-existence

The introduction of the 'right to refuse' would make negotiations between tenement holders voluntary, and therefore commercial, for the first time in Queensland. This may result in improved compensation for landholders, more environmentally sustainable practices in the resources industry and improved co-existence between competing land uses, to optimise outcomes for the economy in the long-term (subject to our comments below regarding limited application).

However, these positive outcomes are not the stated objectives of the Bill. The stated objective is to bring the fossil fuel age to an end, in response to the threat of climate change. It is unclear how the Bill proposes to achieve this end, as it does not propose any limit on production or consumption of resources and energy, and it does not support alternative fuels or renewable energy sources.

Application to limited activities

Clause 10(1) restricts gas or coal (defined as 'coal, coal seam gas, shale gas or tight gas') mining activities, including underground coal gasification activities. The provision apparently does not apply to activities relating to petroleum, geothermal energy and greenhouse gas storage.

Landholders faced with petroleum exploration or production on their land would still have no right to refuse, even though those activities involve similar technologies, pose similar risks to land and water, and are currently regulated under the same legislation as coal seam gas in Queensland.

The explanatory memorandum provides no explanation as to why the provisions are sought to apply to gas and coal activities only and not to all resources and energy activities. The second reading speech suggests that the public are largely concerned with gas and coal, but does not suggest that any consideration has been given to the potential impacts of other resources activities.

Ownership interest in land

Clause 10(3) provides an exemption for companies that have consent from every person with an 'ownership interest' in the land, which is defined as a 'legal or equitable interest in it or a right to occupy it' (excluding a gas or coal mining tenement, but apparently including other resources tenements).

This definition is broader than the definition of 'landholder' in Queensland law, meaning that gas or coal tenement holders may need to seek consent from a broader group of people with an 'ownership interest' than the group of 'Landholders' they currently have to enter into a Conduct and Compensation Agreement with under the *Petroleum and Gas (Production and Safety) Act 2004* or the *Mineral Resources Act 1989*.

The note to clause 10(3) states that the evidential burden is on the 'defendant' (resource tenement holder) in relation to showing that they had prior written authorisation. However, people with an equitable interest in land may be impossible for a tenement holder to identify prior to commencing activities. There is therefore a high risk of tenement holders breaching clause 10(3) despite their best efforts to comply.

If these people with equitable interests (but who are not Landholders under Queensland law) can be identified, there is high probability that they will refuse consent to all activities on principle, because they have no right to compensation and no right to be a party to negotiations regarding conduct provisions. In instances where landholders have a good working relationship with resources and energy companies and wish to negotiate a conduct and compensation agreement, the interference of these other people with an 'ownership interest' as defined in the Bill could deny landholders that opportunity.

Costs of independent assessment

Clause 12(2)(e) provides that 'prior written authorisation' must include 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. It is unclear whether the State and Federal environmental assessments undertaken when reviewing and approving the project (eg. Environmental Impact Statement, Surat Basin Underground Water Impact Report or equivalent) are considered 'independent' for this purpose.

The Bill's ban on hydraulic fracturing, which has been approved by the Queensland Government in many Environmental Authorities, suggests that the government sources are not considered independent by the introducing Senator. If so, we would suggest that the Bill should provide for compensation to landholders for the cost of obtaining independent advice.

Consent is not agreement

We have considered the risk that a signed authorisation as described in clause 12 could constitute a conduct and compensation agreement, deferral agreement or opt-out agreement under Queensland law, meaning that once landholders gave a prior written authorisation, activities could commence on the land without any negotiation as to how and where the activities take place and what compensation is payable and when.

We are satisfied that prior written authorisation as described in the Bill does not meet the requirements of a conduct and compensation agreement or a deferral agreement under current Queensland law, or an opt-out agreement under the draft Mineral and Energy Resources (Common Provisions) Regulation 2015.

Inconsistent application

The outline in the explanatory notes states that the Bill '...bans the practice of hydraulic fracturing for coal seam gas, shale gas and tight gas...'. This is misleading.

The right to refuse, as set out above, relates the undertaking of 'gas and coal mining' activities (defined to include coal, coal seam gas, shale gas and tight gas). However, hydraulic fracturing is proposed to be banned for all applications, not just gas and coal activities (clause 14). No reason is given for this inconsistency.

In addition, hydraulic fracturing could be stopped by concerned landholders if the right to refuse is granted. No reason has been given for banning the technology outright rather than allowing landholders to consider its impact they way they are proposed to consider the impacts of other resources activities.

Fracking required for geothermal energy

Hydraulic fracturing is used for purposes other than gas and coal production, including geothermal energy production. Geothermal energy is renewable and (in some applications) carbon-neutral energy. The proposed ban on hydraulic fracturing would shut down the geothermal energy industry in Australia and therefore contradicts the introducing Senator's stated purpose of bringing the fossil fuel age to a close due to the threat of climate change (see second reading speech).

We note other concerns were raised regarding BTEX chemicals involved in the hydraulic fracturing process, but we are advised that that this concern is irrelevant in relation to geothermal energy. We recommend consultation with AGEA (Australia Geothermal Energy Association) and AGEG (Australian Geothermal Energy Group) regarding the engineering specifics, however it appears that the Bill does not achieve its stated purpose.

Comparison with current environmental law

We suggest that any environmental risks associated with hydraulic fracturing for gas and coal production are more appropriately legislated for under existing environmental laws.

That is to say, the legislature should focus on the environmental outcomes (rather than specific activities) and prosecute only in instances where environmental damage occurs, rather than banning a particular engineering practice or technology. This legal structure is more adaptable to new technologies and practices, where the potential risks may be unknown, as opposed to the technology-specific approach taken under this Bill.

Summary

We believe landholders would welcome and benefit from a right to refuse resources activities on their land. However, as above, we recommend that should not be limited to gas and coal activities. Voluntary and commercial negotiations for conduct and compensation agreements would greatly assist in achieving true co-existence between tenement holders and landholders.

We look forward to the Committee's report to the Senate.

Yours faithfully
CREEVEY RUSSELL LAWYERS

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