

Submission to Environment and Communications Legislation Committee Inquiry into the Landholders' Rights to Refuse (Gas and Coal) Bill 2015 (‘Bill’)

Thank you for the invitation to make a submission to this Inquiry. The jurisdiction in which I have particular expertise is Queensland, and I will use examples from Queensland law in this submission. For the most part, there are equivalent laws in other Australian jurisdictions.

Summary

1. This Bill supports the norms of private property that are widely understood to underpin Australian land holding systems.
2. To better reflect the goal of protecting native title rights and interests, the Bill should be amended to refer specifically to such interests.

1. The Bill seeks to achieve two aims (s3):
 - 1.1. To stop hydraulic fracturing (‘fracking’) by constitutional corporations; and
 - 1.2. To require informed landholder consent to entry onto land for the purpose of gas and coal exploitation.
2. The legal issues underlying the Bill’s aims are twofold. First is the Commonwealth power to legislate for land use and mineral exploitation, both of which are a state concern. Second is the question of framing rights between two interest-holders in the same land: the miner and the landholder. Miners’ rights are directly derived from the State and are an expression of the bounds of the State’s original grant of land. Therefore the second question potentially involves redistribution of the boundaries of ownership between the State and the landholder. This submission focuses on the latter issue of distribution of property rights between miners and landholders.
3. Land ownership - context
 - 3.1. The Bill requires miners to obtain consent from ‘each person with an ownership interest in the land’ (‘landholder’) before engaging in mining activity.¹ ‘Ownership interest’ in land is a legal or equitable interest in it, or a right to occupy.²
 - 3.2. Generally, interests in land may be held as native title,³ freehold,⁴ or State tenures (‘leasehold’).⁵
 - 3.3. Freehold can be held either as a legal interest (registered title)⁶ or an equitable interest (broadly speaking, unregistered but still recognised by law⁷). Interests in land extend beyond freehold estates, to easements, mortgages and leases – all of which can be either legal or equitable. The Bill uses the term ‘legal or equitable interests’ in land. All of these freehold interests are likely to be contemplated within this definition.
 - 3.4. However the **status of undeclared native title interests is unclear** under the term ‘legal and equitable interests’. The source of native title lies in customary law, potentially recognised by common law through statutory process. Once native title is

¹ Section 10(3).

² Section 5.

³ Native title is customary title recognised by the common law *Mabo v Queensland (No2)* (1992) 175 CLR 1; *Native Title Act 1993* (Cth).

⁴ Granted under *Land Act 1994* (Qld), s14, and registered in the Torrens register under the *Land Title Act 1994* (Qld), s47.

⁵ In Queensland, granted under the *Land Act 1994* (Qld).

⁶ *Land Title Act 1994* (Qld), s

⁷ *Butler v Fairclough* (1917) 23 CLR 78

determined,⁸ it is likely to have the status of a legal interest in land as it is recognised pursuant to the law. But before native title is determined, its status as a legal or equitable interest in land is less certain. Whether or not traditional owner groups have lodged a native title claim (that is yet to be determined) they may have a *right to negotiate* in respect of mining activity, which is a future act under the *Native Title Act 1993* (Cth). Further, such groups may enter into an Indigenous Land Use Agreement, which may afford rights to the group. While the right to negotiate is a right afforded by law, its status as a 'legal or equitable interest in land' is uncertain – it reflects connection with land, it is a right afforded by law, but it is not strictly a legal interest *in land*.

3.5. It is clearly the intention for the rights of Aboriginal and Torres Strait Islander Australians to be protected by the Bill.⁹ To ensure this aim is met, **the Bill should be amended** to include specifically native title rights and interests within its scope.

3.6. It is anticipated that, subject to clarification of the application of the Bill to Aboriginal and Torres Strait Islanders particularly concerned with the land, the Bill complements the future acts regime under the *Native Title Act*.¹⁰ To the extent that the Bill applies to traditional owners, it supports the purpose of empowering traditional owners to have a say over land with which such groups have a particular connection.

4. Mineral rights – context

4.1. Australian state jurisdictions separate rights to minerals from ownership of 'land' itself. Thus when the Crown in the right of the State grants an interest in land, it reserves mineral rights to the Crown.¹¹ Miners' rights are therefore qualitatively different from landholders' interests, despite the ostensibly common object of the rights (land).

4.2. Further to its reserved interest in minerals, the State grants what might broadly be described as *mineral rights*¹² independently of any interest held in land.¹³ While mineral rights may take a number of forms, the primary distinction identified in the Bill is between gas or coal *exploration* and gas or coal *mining or production*.¹⁴ Mineral rights are less extensive than the bundle of rights comprising the concept of *ownership* of land. They attach to the minerals alone, but have implicit rights of access and to lay waste to the land itself.

4.3. This framework is concerning to landholders for two related reasons – it affects both the object and the extent of their ownership. First, the activity of mining and some lesser mineral rights, lawfully undertaken, consume the land itself. The activities destroy the *object* of landholders' ownership, even though ownership rights continue. Even fulfilment of remediation requirements cannot reinstate the landholder's land. Compensation equalises the respective values of the interests at stake, but the exercise of the mineral rights alters what might be called the *property* itself.

4.4. Secondly, while ostensibly a narrower bundle of rights, the mineral rights operate *despite* the landholder's rights, affecting the *extent* of their ownership. The State regulatory framework therefore represents a qualitative shift in the historical and contemporary understanding the extent and quality of an estate in land.¹⁵ The State's

⁸ *Native Title Act 1993* (Cth), s225.

⁹ Commonwealth of Australia, *Parliamentary Debates*, Senate, 4 March 2015, 1171 (Senator Waters).

¹⁰ *Native Title Act 1993* (Cth), Part 2, Division 3.

¹¹ See eg *Mineral Resources Act 1989* (Qld), s8; *Land Act 1994* (Qld), s21.

¹² See eg distinction in John Southalan, *Mining Law & Policy: International Perspectives* (Federation Press, 2012), 43.

¹³ *Mineral Resources Act 1989* (Qld), ss 9-10.

¹⁴ Section 4 definitions.

¹⁵ See discussion in Kate Galloway, 'Landowners' vs Miners' Property Interests: The Unsustainability of Property as Dominion' (2012) 37(2) *Alternative Law Journal* 77.

- provision for compensation represents a form of distributive justice, but it fails to address the underlying competition between property interests.¹⁶
- 4.5. Because mineral rights are a lesser right, mining legislation requires mineral rights holders to give notice before entering private land for *preliminary* activities; and to enter into a *conduct and compensation agreement* with the landowner before exercising *advanced* mining activities.¹⁷ The *Land Access Code 2010* (Qld) illustrates that the intent of these agreements is to facilitate mining. Agreement simply implements the State's own reservations in the original grant of freehold, ostensibly by the parties' consensual acts.
 - 4.6. The State legislation establishes a structure for negotiation and mediation, but ultimately the goal is privatisation of compensation for landowners resulting from the State grant of rights at odds with the concept of land *ownership*. It does not resolve the impact of the exercise of mineral rights upon *property* in land.
5. Resolving the competition – the Bill
- 5.1. As a competition between rights – the miner wants the access and use inherent in the landowner's rights; and the landowner wants to preserve the physically delineated land inherent in the miner's rights – the existing State legislative framework favours mineral rights. The State process requires *private* resolution of a competition that arises through the allocation of rights by the *State* where the exercise of those rights fundamentally conflicts with the object and extent of rights inherent in land ownership.
 - 5.2. The process translates the landholder's property rights into a right to negotiate the conduct and compensation agreement. The differential power between the parties however potentially leaves landholders open to political and financial pressure. This is relieved by the operation of the Bill.
 - 5.3. Both the purpose and the method of the Bill uphold the extent and nature of the landholding interest against the competing mining interest. The Bill affords priority to landholders' prior and more extensive interest, over the lesser mining interest that remains derivative of the State. In doing so, it upholds *private property* interests, but it leaves in place the State legislation that allows for distributive justice through compensation if the landowner chooses to consent.
 - 5.4. The **Bill therefore supports private property interests** and is thus a better reflection of the property norms that are generally accepted to form the foundation of Australian landholding systems.

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¹⁶ See discussion in Lael K Weis, 'Resources and the Property Rights Curse' (2015) 28 *Canadian Journal of Law and Jurisprudence* 209, 222.

¹⁷ *Mineral Resources Act 1989* (Qld), Schedule 1.