# Chapter 3

# Key issues

3.1 The committee received a significant amount of evidence on the specific clauses in the bill that would provide for the proposed landholders' right to refuse access to their land and that would implement a ban on hydraulic fracturing. Another overarching key issue in the evidence received by the committee, however, is whether the Commonwealth actually has a legitimate role in enacting legislation that relates to these matters. In addition to these key issues, stakeholders also highlighted potential drafting issues.

3.2 This chapter considers the bill in detail. The evidence received regarding the proposed landholders' right to refuse access to land is examined first, followed by the evidence received on the proposed hydraulic fracturing ban, the role of the Commonwealth and, finally, the potential drafting issues.

## Right to refuse access to land

3.3 The submissions received by the committee commented on the overall merits of the proposed right to refuse access to land and particular issues that this aspect of the bill may present. This section outlines the issues raised.

### *Overall observations*

3.4 Mrs Shay Dougall, the founder of the Hopeland Community Sustainability Group, provided the following heartfelt explanation as to why she supports the right for landholders to refuse gas and coal activities from being undertaken on their land:

> I spend every day and many nights fighting to maintain the line in the sand that this legislation is all about. It is all about what we have already done for ourselves. Hopeland has had a gas-free declaration, which was for our area to remain gas free. We stood up for our own rights. We said no. I want to support the financial, emotional and physical wellbeing of my family, my kids and my community, because the area will be unliveable and a disastrous financial loss to us because of this industry. Even if we did leave, where would we go?…If this legislation does not go through, no-one gets to say no to all of those petroleum leases. There is nowhere to go. This bill is life changing. After years of screaming into pillows, one simple act to uphold human rights by this government will at least level the playing field in this country. If the government will not protect us and help us protect our children, our food and our water security, at least give me and my community the right to protect them for you and the right to refuse gas and coal.[1]

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1 Mrs Shay Dougall, Spokesperson and Founder, Hopeland Community Sustainability Group, *Proof Committee Hansard*, 27 July 2015, p. 22.

3.5 Mr Drew Hutton, President, Lock the Gate Alliance, argued that a right for landholders to refuse gas and coal activities from being undertaken on their land is needed as negotiations between mining companies and farmers are not equal. Mr Hutton characterised such negotiations as occurring 'with a gun at the head of the landowner' as landholders who do not want mining on their land 'simply do not have the right to say no in the long run'.[2]

3.6 The EDOs of Australia submitted that it supports the bill because of various inadequacies in the state regulatory frameworks. The submission stated:

> Significant community concerns exist regarding notification, clear information, and local engagement in decision making processes for coal mining and unconventional gas activities. This includes initial licensing decisions, equity in negotiation of access arrangements, upfront consideration of environmental and social impacts, landholder and community appeal rights, and landholder access to compensation if activities cause damage.[3]

3.7 The EDOs of Australia further argued that it supports intervention by the Commonwealth in landholder rights as, in its view, the issue is 'of national significance in urgent need of national regulation'.[4]

3.8 The National Farmers' Federation (NFF) submitted that it supports 'the principle of requiring a landholder's agreement before extractive industries progress on private farmland'. Mr Charlie Thomas from the NFF explained:

> The NFF's view is that a forced negotiation, where the landholder does not have the option to refuse an agreement, is not an equal or fair negotiation. Fixed outcome negotiation provides an unfair advantage to well-resourced mining and gas companies, which employ skilled professionals to negotiate these types of agreements on a regular basis.[5]

3.9 Despite supporting the principle of landholder agreement, Mr Thomas recognised some limitations with such an approach. For example, Mr Thomas observed that 'a right of veto is no substitute for effective science-based regulatory mechanisms which protect agricultural land and water assets'.[6] Mr Thomas also noted that although there are international jurisdictions that provide landholders with more influence over whether or not minerals can be accessed, these arrangements have 'not

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2 Mr Drew Hutton, President, Lock the Gate Alliance, *Proof Committee Hansard*, 27 July 2015, p. 9.

3 EDOs of Australia, *Submission 33*, p. 3.

4 EDOs of Australia, *Submission 33*, p. 2.

5 Mr Charlie Thomas, General Manager, Agribusiness and Rural Affairs, National Farmers' Federation (NFF), *Proof Committee Hansard*, 28 July 2015, p. 22.

6 Mr Charlie Thomas, NFF, *Proof Committee Hansard*, 28 July 2015, p. 22.

necessarily led to better environmental outcomes'. Mr Thomas concluded that the NFF favours the consideration of:

> …regulatory mechanisms that can actually protect the land and water resources rather than require landholders to make the final determination.[7]

3.10 The NFF also cited various 'shortcomings' in how the bill is drafted as a reason why it does not support the bill.[8] These concerns are examined later in this chapter.

3.11 Although he supported the overall approach taken by the bill and noted that it 'is certainly a very strong way' of dealing with the issues facing landholders, Mr Leslie Manning from p&e Law noted that the bill was not the only way forward:

> There are things like disclosing greater information, disclosing more relevant information and entering agreements that say the company has to describe the impacts on this farm in exact detail so that any impact outside of that means a fresh claim for compensation. That can be done to incrementally improve it.[9]

3.12 Industry stakeholders did not support the proposed landholders' right to refuse access to resources. The following statement from the Australian Petroleum Production and Exploration Association (APPEA) is an example of the types of arguments that were presented to the committee by these stakeholders:

> There is no systemic issue that requires the Australian Government to take regulatory action and override State laws. There is ample evidence showing that farming and gas extraction can and does co-exist through responsible cooperation – and this is already demonstrated by the vast majority of oil and gas operations across the country.[10]

3.13 Industry submitters that oppose the bill also raised several specific issues, such as how the bill would interact with existing state frameworks and how various terms or concepts in the bill would be interpreted. Supporters, opponents and other interested parties gave evidence that provided various insights into these issues, which the following paragraphs discuss.

### *Interaction with existing state frameworks*

3.14 Ms Kate Galloway argued that in the competition between a landowner's rights and a miner's rights, the existing state legislative frameworks favour the miner's rights. Regarding the Queensland framework that provides for conduct and compensation agreements, Ms Galloway argued that the bill would address the

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7 Mr Charlie Thomas, NFF, *Proof Committee Hansard*, 28 July 2015, p. 29.

8 Mr Charlie Thomas, NFF, *Proof Committee Hansard*, 28 July 2015, p. 22.

9 Mr Leslie Manning, Director, p&e Law, *Proof Committee Hansard*, 27 July 2015, p. 42.

10 Australian Petroleum Production and Exploration Association (APPEA), *Submission 21*, p. 1.

'differential power between the parties however potentially leaves landholders open to political and financial pressure'. Ms Galloway suggested that the current compensation arrangements under state legislation 'represents a form of distributive justice', but fail 'to address the underlying competition between property interests'.[11] Ms Galloway concluded:

> 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.
>
> 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.[12]

3.15 p&e Law criticised the current Queensland legislation that requires conduct and compensation agreements. p&e Law suggested that the use of the term 'agreement' in the Queensland legislation 'is a misnomer'. It argued:

> An agreement in relation to land would normally be reached by an owner wishing to sell an interest and a purchaser wishing to buy an interest. Both the owner and purchaser have relatively equal access to information and knowledge. Either party can decide not to proceed.
>
> If as a consequence of negotiations under petroleum and mining legislation no agreement is reached, mining companies can take court action to determine the terms upon which they can enter land and conduct advanced activities. A landholder is compelled to allow access. In other areas of law relating to contracts a person entering into a contract as a result of 'compulsion' can have the contract set aside.[13]

3.16 Other organisations, however, argued that the state frameworks are effective. For example, APPEA submitted that 'land access can be and is being successfully managed', as shown by the 'thousands of land access agreements and compensation arrangements' between petroleum companies and farmers.[14]

3.17 Non-statutory resolutions to land use conflicts were also highlighted, with the committee informed that agreements regarding principles for land access have been entered into between certain CSG companies and agricultural organisations. AGL Energy submitted that in March 2014, it signed an Agreed Principles of Land

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11 Ms Kate Galloway, *Submission 10*, pp. 2–3.

12 Ms Kate Galloway, *Submission 10*, p. 3.

13 p&e Law, *Submission 24*, p. 2.

14 APPEA, *Submission 21*, p. 1. APPEA noted that 'over 4,700 landholder access agreements have been successfully negotiated in Queensland alone'.

Access with Santos, NSW Farmers Association, Cotton Australia and the NSW Irrigators Council. AGL stated that these principles reconfirm 'that we will respect the wishes of landholders regarding any exploration and production operations that take place on their land, meaning that landholders are free to say "yes" or "no".'[15] AGL added that it has 'never accessed a person's land without their explicit permission or exercised arbitration rights available under law for CSG exploration or production'. AGL stated that it:

> …is therefore confident that landholders will only sign access agreements with us that are considered by them to be fair and reasonable, and are in their commercial interests. Often landholders will value the diversification of revenue streams for their property and the stable and predictable payments that arise from hosting gas activities, which are not dependent on weather or other seasonal variances.[16]

3.18 Some submitters questioned how the state frameworks could operate if the bill is enacted. Professor Hepburn, for example, argued that the bill would conflict with state laws for access and compensation and the state licensing laws. In particular, Professor Hepburn suggested that 'it is difficult to see how state laws that seek to regulate the terms and conditions of access entitlements are to function' if a private landholder can veto access to the land. She added that the 'detailed regimes' for dealing with resource title holders' notification, compensation and conduct obligations 'will become redundant'.[17] Further, Professor Hepburn suggested that the bill would undermine the states' licensing frameworks. She argued:

> 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).[18]

3.19 Mr Thomas from the NFF queried whether the agreements specified under state legislation, such as Queensland's conduct and compensation agreements, would constitute the written authorisation required by clause 12 of the bill. Mr Thomas stated that if the state agreements satisfied the requirements of clause 12, then 'the right to refuse provisions under division 1 of this bill would be rendered redundant'.[19]

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15 AGL Energy, *Submission 25*, p. 1. Similarly, WAFarmers advised that it, VegetablesWA and APPEA are in the process of finalising a Land Access Agreement. See *Submission 29*, p. 2.

16 AGL Energy, *Submission 25*, p. 1.

17 Professor Samantha Hepburn, *Submission 86*, p. 10.

18 Professor Samantha Hepburn, *Submission 86*, p. 11.

19 Mr Charlie Thomas, NFF, *Proof Committee Hansard*, 28 July 2015, p. 22.

### *'Ownership interest', dispute resolution and compensation*

3.20 Mining and petroleum companies and their representative organisations argued that the bill would be unworkable because of the definition of 'ownership interest', which is defined in the bill as a person who has a legal or equitable interest in the land or a right to occupy it.[20] This is a key concept in the bill as a person with an ownership interest in the land can bring action if they have not given written authorisation for the activities referred to in the bill to take place.

3.21 It was argued that the scope of 'ownership interest' is too broad. The Minerals Council of Australia (MCA) argued that the definition does not align with definitions of 'ownership' or 'landholder' used by the states. Accordingly, the MCA argued that the definition 'is highly problematic as it extends protection to a broad group of persons, well beyond the occupier of the land'.[21] The MCA argued:

> 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.[22]

3.22 The MCA also noted that the bill 'is silent on the matter of compensation'. The MCA suggested that to obtain a written authorisation, it is likely that a company will be required to negotiate compensation with every person with an ownership interest. The MCA suggested that this would consume company time and resources, and could lead to cumulative compensation costs that were high enough to stop projects.[23]

3.23 The MCA also noted that the bill does not provide a dispute resolution process or a statutory timeframe within which an agreement on written authorisation needs to be reached. As a result, the MCA argued that the bill provides an 'absolute veto' over a project for any person with an ownership interest.[24] The MCA suggested that the definition of ownership interest would mean the process 'will be open to abuse', as:

- parties could seek unreasonable amounts of compensation; and

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20 Subclause 5(1).

21 The MCA considered the definition 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, 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, and situations where a person contributes to the purchase of land and are not a registered proprietor, as equity will recognise their interest in the form of a constructive trust. Minerals Council of Australia, *Submission 41*, pp. 5–6.

22 Minerals Council of Australia, *Submission 41*, p. 6.

23 Minerals Council of Australia, *Submission 41*, p. 6.

24 Minerals Council of Australia, *Submission 41*, p. 6.

- parties that object to the coal industry could 'seek derivate rights over land and use their veto to ensure projects do not proceed'.[25]

3.24 A further issue raised by the MCA is that the bill 'does not make provision for prior written authorisation to bind a successor entitled to the land'. The MCA argued that it appears the requirement to obtain written authorisation from any of the parties with an ownership interest would be triggered every time a change in the holder of the ownership interest occurred.[26]

3.25 Creevey Russell Lawyers noted that the definition used in the bill is broader than the definition of 'landholder' used in Queensland law. Although subclause 10(3) provides that the corporation would not commit an offence by entering land for a gas or coal mining activity or engaging in such an activity if they have prior written authorisation, the note to subclause 10(3) provides that the defendant (the corporation) bears an evidential burden to show that they had prior written authorisation. Creevey Russell Lawyers observed that:

> …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.[27]

3.26 Further, Creevey Russell Lawyers suggested that people who have an ownership interest (as defined by the bill) but who are not eligible for compensation or to be a party to negotiations under the state legislation would likely 'refuse consent to all activities on principle'. In instances where the landholder wanted to negotiate an agreement under state law 'the interference of these other people with an "ownership interest" as defined in the bill could deny landholders that opportunity'.[28]

3.27 The NFF also noted that the broad definition of ownership interest 'would be difficult to administer and would…not sit well with the existing requirements under state and territory legislation'.[29]

3.28 Some submitters, however, argued that the scope of the bill should be broadened further. The Latrobe Valley Sustainability Group argued that communities should be given the right to veto unconventional gas activities as 'CSG affects whole communities, not just individual landholders'.[30]

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25 Minerals Council of Australia, *Submission 41*, p. 6.

26 Ms Kirsten Livermore, Acting Director, Health, Safety, Environment and Communities, Minerals Council of Australia, *Proof Committee Hansard*, 28 July 2015, p. 43.

27 Creevey Russell Lawyers, *Submission 18*, p. 2.

28 Creevey Russell Lawyers, *Submission 18*, p. 2.

29 Mr Charlie Thomas, NFF, *Proof Committee Hansard*, 28 July 2015, p. 22.

30 Latrobe Valley Sustainability Group, *Submission 36*, p. 2.

### *Native title*

3.29 Ms Kate Galloway argued that under the bill, the status of undeclared native title interests is unclear. Ms Galloway explained:

> The source of native title lies in customary law, potentially recognised by common law through statutory process. Once native title is determined, 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.[31]

3.30 Ms Galloway argued that the bill should be amended to specifically include 'native title rights and interests within its scope'.[32]

3.31 Another issue raised in relation to native title was put forward by QGC. QGC objected to a statement made in the sponsoring senator's second reading speech about native title holders being excluded from decisions about activities on land. QGC submitted that the statement in question 'is incorrect':

> QGC has eight registered Indigenous Land Use Agreements across our footprint which are managed and implemented in close consultation with claimants and native title holders. Native Title is protected and governed under distinct legislation, the *Native Title Act 1993*. This Act protects native title holders and ensures that all industries are obliged to undertake activities with consideration of traditional owners.[33]

### *Requirement for an independent assessment*

3.32 The bill would require that prior written authorisation must contain certain information including, among other things, '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'.[34]

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31 Ms Kate Galloway, *Submission 10*, pp. 1–2.

32 Ms Kate Galloway, *Submission 10*, pp. 1–2.

33 QGC, *Submission 22*, p. 3.

34 Subclause 12(2).

3.33 Although he was not commenting on the specific independent assessment requirement in the bill, the evidence given by Mr Drew Hutton about the information that accompanies project applications appears to be relevant to this aspect of the bill. Mr Hutton argued that amount of information that accompanies project applications is 'quite often' minimal. Mr Hutton stated:

> If you look, for example, at the applications by Santos and BG and Origin here in Queensland for their projects, with the first two in particular, there is virtually no substantial evidence to back their claims about water. There is almost nothing on water modelling and nothing on how they will mitigate the impacts of their activities on underground water in particular.[35]

3.34 Dr Matthew Currell, a lecturer of hydrogeology and environmental engineering at RMIT University, wrote that the independent assessment requirement 'is a welcome idea'. However, he noted that questions may arise regarding the level of detail required in the independent assessments. On this matter, Dr Currell commented:

> In my experience, assessments of this nature commissioned by mining companies often include lengthy 'desktop' studies of the hydrogeology of a region, but the scale may be inappropriate (too large or too small) and they typically do not include adequate resources and time to install new groundwater monitoring wells and other infrastructure, so that baseline conditions can be comprehensively documented. This is vital so that any modelling predictions about the impacts of mining can be conducted with a high level of confidence. Numerous examples of problems in predicting impacts due to inadequate monitoring data can be seen in cases referred to the Independent Expert Scientific Committee on Large Coal Mining and Coal Seam Gas.[36]

3.35 Dr Currell suggested that the bill could be amended to prevent this issue.[37] He also argued that these assessments should include surface water, as well as groundwater systems.[38]

3.36 There is some uncertainty as to whether existing environmental assessments would meet the test proposed by the bill. Mr Dean Knudson of the Department of the Environment explained that 'it is a bit of a question of speculation' as to whether environmental assessments undertaken by the department would satisfy the bill's requirement. Nevertheless, he argued that 'an environmental assessment that is

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35 Mr Drew Hutton, Lock the Gate Alliance, *Proof Committee Hansard*, 27 July 2015, p. 9.

36 Dr Matthew Currell, *Submission 11*, p. 2.

37 Dr Currell suggested the bill could stipulate 'some minimum requirements of the groundwater assessment, which include drilling an adequate number of groundwater monitoring wells and collecting data from these for a baseline period prior to any further activity being conducted'. Dr Matthew Currell, *Submission 11*, p. 2.

38 Dr Currell stated that surface water 'can frequently be put at risk during coal and gas mining' and 'is typically in connection with groundwater and interacts with it extensively'. Dr Matthew Currell, *Submission 11*, p. 1.

undertaken under the EPBC Act, for example, is self-funded by the proponent and does have that rigour…that provides us with the substantiation we need to make an approval decision'.[39]

## Ban on hydraulic fracturing

3.37 This section outlines the arguments in support of, and against, the introduction of a ban on hydraulic fracturing.

### *Arguments in support of a ban*

3.38 Arguments in favour of a ban on hydraulic fracturing were based on environmental and health concerns. Several submissions that supported a ban on fracking pointed to the moratoriums that are in place in Australia (in Tasmania and Victoria)[40] and the bans and moratoriums in place overseas.[41] For example, Dr Emma Carmody from EDO New South Wales stated:

> The proposal to ban fracking is hardly a radical one when you consider it at an international level. There is precedent. For example, there are moratoriums in place in France, Scotland and Germany. These countries have other leading practice environmental laws. So I do not think Australia would be going out on a limb if it decided at the national level to ban this practice.[42]

3.39 Submitters argued that there is a need to better understand the long-term environment effects associated with hydraulic fracturing. Dr Matthew Currell highlighted potential pollution risks associated with various aspects of hydraulic fracturing operations. Dr Currell submitted that:

> Since 2010, a growing body of research has been carried out worldwide (particularly in the United States) to understand the impacts to the environment and human health associated with unconventional gas. Major risks from hydraulic fracturing to groundwater and surface water include:
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> (a) Risk of increasing stray or 'fugitive' gas into shallow aquifers and/or the near surface atmosphere.

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39 Mr Dean Knudson, First Assistant Secretary, Environment Standards Division, Department of the Environment, *Proof Committee Hansard*, 28 July 2015, p. 10.

40 EDOs of Australia, *Submission 33*, p. 9.

41 The committee was informed that bans or moratoriums are in place in certain European countries (Bulgaria, France, Germany, the Netherlands, Scotland and Wales and in parts of Spain and Switzerland), in parts of Canada (Quebec, Nova Scotia and Newfoundland), and in parts of the United States of America (New York State, Vermont and Washington DC, and parts of California, Colorado, Delaware, Hawaii and Texas). NSW Young Lawyers, *Submission 32*, p. 3.

42 Dr Emma Carmody, Policy and Law Reform Solicitor, Environmental Defenders Office New South Wales (EDO NSW), *Proof Committee Hansard*, 27 July 2015, p. 7.

(b) Risk of increasing pathways and connections for fluids (including potential contaminants) to travel between different geological layers, potentially into important groundwater or surface water bodies.

(c) Pollution risks associated with 'flow-back' or 'produced' water that is generated during hydraulic fracturing and/or gas well development (note that 'produced' waste water is generated from coal seam gas mining regardless of whether hydraulic fracturing is employed or not, and is a pollution risk in most unconventional gas developments).[43]

3.40 Dr Currell concluded:

> On balance, my opinion is that there are grounds for seriously considering enacting such as ban, because there are major potential risks to the environment and human health associated with hydraulic fracturing, and unconventional gas extraction more generally (regardless of whether it involves hydraulic fracturing or not).[44]

3.41 Submitters argued that hydraulic fracturing should be banned while there was uncertainty about the risks involved.[45] The EDOs of Australia argued that, 'at a minimum', a moratorium on hydraulic fracturing should be implemented nationally 'until such time as the significant list of knowledge gaps highlighted in reports and peer-reviewed literature have been properly addressed'.[46] NSW Young Lawyers highlighted the 'precautionary principle' to similarly argue that a ban on hydraulic fracturing would be 'a proportionate response to the serious threats which have been recognised in relation to that practice'. NSW Young Lawyers submitted:

> Scientists have long cautioned that the process of blasting sand, water and chemicals into coal seams or shale formations in order to release trapped gas could lead to irreversible and severe environmental damage and so warrants a precautionary approach. The precautionary principle is a cardinal element of the overarching concept of ecologically sustainable development that informs environmental law. The principle holds that '[w]here there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation'…Given the potential serious impacts of hydraulic fracturing on Australia's aquifer systems, including the Great Artesian Basin, a halt on the practice is appropriate, at least until it is proven to be safe.[47]

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43 Dr Matthew Currell, *Submission 11*, p. 2. Dr Currell listed examples of problematic instances of the treatment and disposal of flow-back water: see *Submission 11*, p. 8.

44 Dr Matthew Currell, *Submission 11*, p. 1.

45 See Mrs Allison Wharley, *Submission 9*, p. 2; Livestock SA, *Submission 20*, p. 3.

46 EDOs of Australia, *Submission 33*, p. 9.

47 NSW Young Lawyers, *Submission 32*, p. 3.

3.42 Mr Drew Hutton, the President of the Lock the Gate Alliance, told the committee that most of the monitoring work that is currently undertaken on the effect that CSG activities have on water 'is done on a complaints basis, not on a proactive basis'. Although there is 'now some monitoring going on with regard to water and the impacts on water', he observed that 'because the timeline on this goes for decades, not for a couple of years, it is very difficult to predict with any great certainty what is likely to happen in the years ahead'. As a result, he questioned whether it is possible for the make good agreements for water that are required under Queensland law to 'be effective in the years ahead'.[48]

3.43 Witnesses also questioned the effectiveness of the current state regulatory frameworks for hydraulic fracturing. For example, although the use of BTEX chemicals (benzene, toluene, ethylbenzene and xylene) in hydraulic fracturing has been banned by the states where hydraulic fracturing is undertaken and in the Northern Territory, the EDOs of Australia expressed its concern that the New South Wales ban is not enforced under legislation and '[c]onsequently, it could be reversed without parliamentary scrutiny.[49]

3.44 Dr Emma Carmody from EDO New South Wales explained that hydraulic fracturing is regulated by 'a set of piecemeal laws and policies'. Dr Carmody outlined her organisation's concerns about this as follows:

> For example, we have a code of practice for fracture stimulation, which some people have argued is perhaps best practice in Australia. That may be true; however, it is not linked to any specific piece of legislation and, to that extent, its implementation is not mandatory, which we think is problematic. At a legislative level, most CSG production will be considered what is called the state significant development under the Environmental Planning and Assessment Act. For state significant development, the minister has broad discretion to determine how the likely environmental impacts of a project are assessed and then to determine whether or not the project will be approved. We consider that that is problematic because the legislation is not prescriptive enough or detailed enough, requiring the minister to take into account specific elements.[50]

48 Mr Drew Hutton, Lock the Gate Alliance, *Proof Committee Hansard*, 27 July 2015, p. 10.

49 EDOs of Australia, *Submission 33*, p. 8.

50 Dr Emma Carmody, EDO NSW, *Proof Committee Hansard*, 27 July 2015, pp. 5–6.

### *Arguments against a ban*

3.45 The Department of Industry and Science submitted that fracking is used in approximately 20–40 per cent of Australia's CSG wells, and has been successfully used in Australia for over 40 years.[51] The department concluded that:

> …this experience suggests the technical risks can be managed through a well-designed regulatory regime, underpinned by effective monitoring and enforcement of compliance where activities are permitted. Unconventional gas operations are regulated by international standards, national and state legislations, guidelines and codes of practice.[52]

3.46 The Department of Agriculture advised that it did not support the proposed legislative ban on fracking. The department provided the following explanation of its position:

> While regulators must ensure that hydraulic fracturing operations are carefully planned, operated and monitored, scientific evidence confirms that hydraulic fracturing can be undertaken without causing long-term damage to natural resources. Community confidence in shale and coal seam gas extraction will be improved by monitoring the impact of hydraulic fracturing activities on local environments, including water resources.[53]

3.47 Mr Ian Thompson, Department of Agriculture, explained that the department would prefer not to have a blanket ban on fracking as it is focused on regulating outcomes, rather than particular techniques. Mr Thompson made the following observations:

> Hydraulic fracturing has been occurring in the gas industry for many, many years. Depending on the chemicals used and how it is applied, there can be some risks associated with that. Some of the worst chemicals that can be used and have been used in some instances are not permitted in Australia, from my understanding, so that risk is minimised. Fracking in the gas industry that is subject to appropriate controls and monitoring can continue. We are not in the business of making choices about how companies do their business. It is what outcome is achieved. Through the work of the states to look after groundwater and surface water, they are examining the impacts of fracking on water resources. So we would prefer not to have a blanket ban.[54]

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51 Department of Industry and Science, *Submission 31*, p. 5. See also APPEA, *Submission 21*, p. 10; South Australian Chamber of Mines and Energy (SACOME), *Submission 23*, p. 4.

52 Department of Industry and Science, *Submission 31*, p. 5.

53 Department of Agriculture, *Submission 26*, p. 3.

54 Mr Ian Thompson, First Assistant Secretary, Sustainability and Biosecurity Policy Division, Department of Agriculture, *Proof Committee Hansard*, 28 July 2015, pp. 18–19.

3.48 Further, the Department of Industry and Science stated that it:

- is concerned that 'community concerns have been exacerbated by lack of accessible information on the nature of the activities being undertaken, existing regulatory protections, and responses underway at all levels of government';
- considers 'there is unnecessary confusion' about CSG and shale gas, and that 'international experiences of best practice can help inform Australia's regulatory frameworks'; and
- considers the 'goal of achieving mutually beneficial outcomes has been complicated by hydraulic fracturing or "fracking" becoming an unnecessarily emotive topic'.[55]

3.49 Submitters also argued that misinformation about fracking is widespread.[56] APPEA argued that the proposed ban is 'not based on science or evidence and therefore should be rejected'. APPEA submitted that:

> The Australian Government, every state and the Northern Territory have undertaken reviews of unconventional gas, hydraulic fracturing or both. Every scientific and government review in Australia has so far reached the same conclusion—with a robust regulatory regime in place, the environmental risks associated with onshore gas operations, including hydraulic fracturing, can be managed effectively.[57]

3.50 The Petroleum Exploration Society of Australia wrote that 'the risk of fracture propagation leading to fracture stimulation fluids contaminating shallow aquifers is negligible'. It explained:

> The small volumes of chemical that remain in the fracture stimulated reservoirs cannot realistically migrate upwards to aquifers (used by people and industries) from the fracture stimulated intervals due to many overlying natural aquitards and low permeability rocks adjacent to, but unaffected by the fracture stimulation. Hence, the small volumes of chemicals pumped into, and not flowed back from fracture stimulated intervals are expected to remain in the fracture stimulated petroleum reservoirs indefinitely. It is worth remembering that after the initial hydraulic fracturing the producing formation may be dewatered, that is formation water is pumped to the surface. This results in a lower formation pressure allowing gas contained in cleats and micro-fractures in the coal or tight sand/shale to flow into the fractures produced by hydraulic fracturing then into the well bore and finally to the surface. The important point is that the producing interval is

55 Department of Industry and Science, *Submission 31*, p. 5.

56 For example, WAFarmers submitted 'there is a significant volume of misinformation used to manipulate public perception. This information is usually based on the hydraulic fracturing processes or historical information from [the] USA, with no relevance to Australia, or Western Australia'. WAFarmers, *Submission 29*, p. 1.

57 APPEA, *Submission 21*, p. 3.

> now at a lower pressure than the surrounding rocks so that any contained fluids in the surrounding rocks and in communication with the producing horizon will flow back towards the producing horizon and well bore.[58]

3.51 The Northern Territory Government argued that the industry 'has shown itself to be sensitive to public concerns about chemicals used in hydraulic fracturing fluids and has responded by using, where possible, compounds that will have minimum impacts'.[59]

3.52 Finally, APPEA cited a report by the New South Wales Chief Scientist and Engineer, which observed that all industries 'have risks and, like any other, it is inevitable that the CSG industry will have some unintended consequences, including as the result of accidents, human error, and natural disaster'. The report concluded that the most appropriate response to this risk is that industry, governments and the community should 'work together to plan adequately to mitigate such risks, and be prepared to respond to problems if they occur'.[60]

## Role of the Commonwealth

3.53 As this report has outlined, the states have primary responsibility for land access matters and for regulating onshore minerals and petroleum exploration and production. Despite the firmly put and well-articulated arguments for or against the introduction of a landholders' right to refuse gas or coal activities and the introduction of a ban on hydraulic fracturing, it is necessary to consider whether it is appropriate for the Commonwealth to be involved in these matters at all. This section considers the evidence received about the role of the Commonwealth with respect to the matters the bill seeks to address.

### *Arguments in favour*

3.54 In support of Commonwealth involvement, some submitters argued that state and territory legislatures have failed to deal with the issues addressed by the bill, and that intervention by the Commonwealth is, therefore, appropriate. For example, the EDOs of Australia argued that the issues related to access to land and fracking 'have generated significant community concern across many Australian jurisdictions, in part due to the inadequacy of state and territory laws'. As a result, the EDOs of Australia argued that these matters are 'therefore issues of national significance in urgent need of national regulation'.[61]

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58 Petroleum Exploration Society of Australia, *Submission 30*, p. 6.

59 Northern Territory Department of Mines and Energy, *Submission 16*, p. 2.

60 New South Wales Chief Scientist & Engineer, *Final Report of the Independent Review of Coal Seam Gas Activities in NSW*, September 2014, pp. 9–11; cited in APPEA, *Submission 21*, p. 13.

61 EDOs of Australia, *Submission 33*, p. 2.

3.55 The Lock the Gate Alliance similarly submitted that the 'consistent failure of the state legislatures…has necessitated this kind of legislative proposal' at the Commonwealth level. The Lock the Gate Alliance added:

> …although we believe that the power of veto should properly sit with the states…[t]he obvious conflict of interest between state royalty income on one hand and the states' duty to regulate to protect the environment and community on the other, renders it unlikely that states will ever uniformly provide veto rights for landholders.[62]

3.56 Further, the Lock the Gate Alliance argued that water resources 'of continental scale and significance, such as the Great Artesian Basin' should be conserved by the Commonwealth as 'the states, local governments and individual landholders and companies cannot be expected to take a broad perspective on their own use of such a resource'.[63]

### *Arguments against*

3.57 Submissions that argued against the use of the corporations power generally focused on the idea of the Commonwealth legislating in a way that affects the ability of the states and territories to recover Crown property and whether the bill is an appropriate use of the Commonwealth's constitutional powers. How the bill would interact with existing state law was also questioned.

3.58 Professor Samantha Hepburn argued that as state governments retain control over, and the power to regulate, the resources in their jurisdictions, 'it would appear to be beyond the constitutional mandate' of the Commonwealth to 'expressly override state legislation that confers access entitlements upon the holders of resource titles'.[64] To illustrate her argument, Professor Hepburn referred to section 6 of the *Petroleum (Onshore) Act 1991* (NSW), which she described as a 'powerful' provision:

> …[Section 6] makes it very clear that all petroleum existing in a natural state below the surface of any land is the property of the Crown and is taken to have always been so. It is actually retrospective.
>
> The states have ownership and ownership carries responsibility. So the states should be responsible for implementing a coordinated access regime that supports and does not undermine private landholder rights and that engages private landholders effectively…I think that that responsibility should not go to the Commonwealth because it would create a chaotic situation.[65]

62 Lock the Gate Alliance, *Submission 19*, p. 1.

63 Lock the Gate Alliance, *Submission 19*, p. 2.

64 Professor Samantha Hepburn, *Submission 86*, p. 7.

65 Professor Samantha Hepburn, *Proof Committee Hansard*, 28 July 2015, p. 38.

3.59 Australian government departments, state and territory governments, the NFF and peak petroleum industry bodies opposed the approach taken by the bill. For example, the Northern Territory Government submitted that the bill 'would represent an unacceptable intrusion on matters that are rightly the purview of the Territory Government'.[66] APPEA argued that there 'is no systemic issue that requires the Australian Government to take regulatory action and override state laws'.[67]

3.60 The Department of Agriculture provided the following statement that explained why it does not support the bill:

> The Bill is not an appropriate use of the Commonwealth's constitutional powers. While the department supports better land access arrangements for landholders, we believe that this should be progressed at a state level. Creating strong relationships between landholders and gas companies will not only help to address many concerns of agricultural stakeholders, but also promote responsible development of gas resources in a way that can benefit regional communities.[68]

3.61 The department added:

> The Australian Government has limited involvement in land access matters. While some work has been progressed on land access principles, the Australian Government cannot bind the states and territories to a resolution on land access. Improvements to land access arrangements should be pursued at a state and territory level.[69]

3.62 The South Australian Government questioned whether the bill would be constitutionally valid if enacted into law. The South Australian Government explained that, although there are laws in its jurisdiction that enable landholders to object to unreasonable access and provide compensation for any economic loss, 'there is no law in South Australia or Australia, constitutional or otherwise that would preclude responsible development in the public interest'. The South Australian Government questioned whether the bill would be consistent with the head of power under paragraph 51(xx) of the Constitution, 'under which the bill would purportedly be enacted'.[70]

3.63 The NFF, which 'supports the principle of requiring a landholder's agreement before extractive industries progress on private farmland', nevertheless argued that this principle should be introduced at the state level. Mr Charlie Thomas from the NFF stated:

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66 Northern Territory Department of Mines and Energy, *Submission 16*, p. 1.

67 APPEA, *Submission 21*, p. 1.

68 Department of Agriculture, *Submission 26*, p. 1.

69 Department of Agriculture, *Submission 26*, p. 1.

70 South Australian Government, *Submission 88*, p. 3.

> State and territory provisions are not perfect, but given the significant body of regulation that applies to this process at the state and territory level, it is unnecessary for the Commonwealth to also seek to regulate relations between landholders and resource companies as this bill seeks to do. Current state and territory provisions already outline the requirements of an access agreement with greater sophistication than what is proposed in the landholders' rights to refuse bill. It is the NFF's view that existing state and territory legislation provides a superior starting point for strengthening landholders' rights than this proposed Commonwealth intervention.[71]

3.64 Submitters also questioned whether the bill:

- amounted to 'an effective transfer of property rights from the Crown to select private landholders';[72]
- would limit the ability of the states and territories to extract their resources, thereby limiting the benefits to the community that arise from Crown ownership;[73]
- would have financial and economic impacts for states and the Commonwealth;[74]
- would provide a precedent for other Commonwealth action regarding other private sector land uses, such as road or rail projects;[75] and
- has the potential to result in 'a marked increase in acquisitions of agricultural land by government and resource companies, with a consequential reduction in the productive use of the acquired land'.[76]

3.65 Further, the Northern Territory Government commented specifically on the suggestion in the sponsoring senator's second reading speech that governments could acquire land on just terms. The Northern Territory Government argued that this proposal would be 'undesirable and impractical because it would impact significantly on state and territory budgets, and potentially remove primary producer families whose ongoing stewardship of the land is essential to its productivity'.[77]

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71 Mr Charlie Thomas, NFF, *Proof Committee Hansard*, 28 July 2015, p. 22.

72 QGC, *Submission 22*, p. 2. See also NFF, *Submission 28*, p. 1; South Australian Government, *Submission 88*, p. 3.

73 APPEA, *Submission 21*, p. 2.

74 QGC, *Submission 22*, p. 2.

75 QGC, *Submission 22*, p. 2.

76 QGC, *Submission 22*, p. 2.

77 Northern Territory Department of Mines and Energy, *Submission 16*, p. 1.

3.66 The Department of Industry and Science and the South Australian Chamber of Mines and Energy (SACOME) suggested that any concerns regarding matters of land access could be addressed by agreement between the states and territories.[78] SACOME submitted that the appropriate forum would be the COAG Energy Council, which it argued could 'assess legislation in each jurisdiction against best practice regulatory frameworks'.[79]

3.67 The NFF similarly suggested that the Commonwealth could facilitate discussions and otherwise encourage states to adopt best practice regulatory frameworks. Mr Thomas from the NFF highlighted aspects of the New South Wales framework that could be improved upon and then replicated elsewhere:

> The New South Wales government…through its process of the strategic agricultural land framework, has attempted to define areas where there is further regulatory prescription and assessment prior to these kinds of developments taking place. We think that a model like that—albeit an improved model, because we realise there are flaws in that model as well—could be taken up by other states and implemented across the board. There could be a role for the Commonwealth in facilitating some of those discussions and encouraging states to adopt best practice, based on what has been successful elsewhere.[80]

## Potential drafting issues and areas of uncertainty

3.68 Regardless of whether they supported or opposed the bill, various submitters commented on the drafting of specific clauses. The following paragraphs outline these comments.

### *Resources covered by the bill*

3.69 A key term in the bill is 'gas or coal', as the bill proposes that gas or coal mining activities undertaken without prior written authorisation from landholders would be unlawful. Clause 4 defines 'gas or coal' as meaning coal, CSG, shale gas and tight gas. Similarly, the proposed ban on hydraulic fracturing is defined by reference to the recovery (or the potential or enhanced recovery) of CSG, shale gas or tight gas.[81]

3.70 Submitters questioned the rationale behind the limited application of the bill to specific resources. For example, in relation to the proposed ban on hydraulic fracturing, SACOME argued that the proposed ban 'is not based on any logical reasoning when the bill continues to allow hydraulic fracturing for geothermal energy

78 SACOME, *Submission 23*, p. 2; Department of Industry and Science, *Submission 31*, p. 1.

79 SACOME, *Submission 23*, p. 2.

80 Mr Charlie Thomas, NFF, *Proof Committee Hansard*, 28 July 2015, p. 23.

81 See Clauses 4 and 14.

and tight or shale oil'. It concluded that the proposed ban is 'in effect a direct ban on the extraction of natural gas'.[82]

3.71 Dr Matthew Currell suggested that shale oil, which is not mentioned in the bill, may be a significant resource in Australia. He advised that the extraction of shale oil 'also generally requires hydraulic fracturing' and may therefore be associated with the similar risks considered to apply to CSG extraction.[83]

3.72 Creevey Russell Lawyers suggested that, should the bill be passed in its current form, landholders would not be able to refuse activities relating to petroleum, geothermal energy and greenhouse gas storage. Creevey Russell Lawyers noted that this is despite those activities involving similar technologies, posing similar risks to land and water, and being regulated under the same legislation as CSG in Queensland.

3.73 Ms Laura Hogarth, a solicitor at Creevey Russell Lawyers, remarked that the distinction between the resources covered by the bill and other petroleum activities 'does not make sense to me'. Ms Hogarth added:

> I think petroleum activities would have the same impacts that CSG activities would have. You are still drilling. You still have gathering lines—pipelines buried in a grid network throughout the property. I assume you would have a similar amount of access, as in frequency of drilling rigs returning to the land every year or two to work over the wells. I think it would have all the same environmental impacts and impacts on a farming or grazing business and on a family home on the land as well…I would want to see the bill applying across the board to all petroleum, mining and energy activities.[84]

### *Technology-specific approach used by the bill*

3.74 The technology-specific approach taken by the bill was also questioned. Creevey Russell Lawyers suggested that legislation 'should focus on the environmental outcomes (rather than specific activities)', with prosecutions 'only in instances where environmental damage occurs, rather than banning a particular engineering practice or technology'. According to Creevey Russell, an advantage of this approach is that the legislation would be 'more adaptable to new technologies and practices, where the potential risks may be unknown', as opposed to the technology-specific approach taken under the bill. Creevey Russell concluded that 'any environmental risks associated with hydraulic fracturing for gas and coal production are more appropriately legislated for under existing environmental laws'.[85]

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82 SACOME, *Submission 23*, p. 2.

83 Dr Matthew Currell, *Submission 11*, p. 9.

84 Ms Laura Hogarth, Solicitor, Creevey Russell Lawyers, *Proof Committee Hansard*, 27 July 2015, p. 47.

85 Creevey Russell Lawyers, *Submission 18*, p. 3.

### *Application only to constitutional corporations*

3.75 The bill only applies to constitutional corporations. NSW Young Lawyers noted that constitutional corporations are generally the entities involved in mining and CSG activities, however, it questioned whether these entities 'could potentially be re-structured into a different type of business vehicle' to avoid being captured by the bill.[86] Similarly, Professor Hepburn suggested that the bill 'will potentially create chaos' that will encourage companies to seek to avoid the application of the bill to them. Professor Hepburn told the committee:

> In the future, mining companies are going to want to avoid the prospect of simply being unable to access the resource. At the moment, there are clearly impediments; for example, in Queensland you obviously have to go through the notification, conduct, compensation and all that negotiation process, but there is not that provision at the state level which allows the landholder to simply say, 'No, I don't consent' and have that upheld, because that would clearly create chaos for the issuance of the resource title. So what will happen is that companies will seek to avoid the application of the Commonwealth provisions.…They will seek to recalibrate their organisations.[87]

3.76 To avoid such an outcome, NSW Young Lawyers suggested that the bill should also rely on the Commonwealth's power to legislate in respect of interstate and international trade, as provided for in paragraph 51(i) of the Constitution. Under this approach, the offences and civil penalty provisions in the bill could also be drafted so that they apply to persons who, for the purposes of trade or commerce, engaged in the prohibited conduct. NSW Young Lawyers noted that this approach has been used in section 24D of the *Environment Protection and Biodiversity Conservation Act 1999*.[88]

### *Ultimate effectiveness of the bill*

3.77 The final set of observations that this chapter will address is the effect that the landholders' right to refuse component of the bill is likely to have on coal mining operations. As has been noted, this aspect of the bill would make gas or coal mining activities undertaken by a constitutional corporation without prior written authorisation from landholders unlawful. However, the committee heard that it is 'ordinary business procedure' for coal mining companies to purchase the land they require.[89] Ms Leys from the NSW Farmers Association used the Shenhua Watermark mine as an example:

> Shenhua owns all of the land that they plan to undertake their operations on, certainly within the mining area and the disturbance area and parcels of

86 NSW Young Lawyers, *Submission 32*, p. 6.

87 Professor Samantha Hepburn, *Proof Committee Hansard*, 28 July 2015, p. 39.

88 NSW Young Lawyers, *Submission 32*, p. 6.

89 Mr Charlie Thomas, NFF, *Proof Committee Hansard*, 28 July 2015, p. 28.

> land around that, in a buffer. Early on they took a decision that they would go and make quite lucrative offers to landholders in that area to secure the area they wanted to mine.[90]

3.78 This observation is supported by the evidence received from a landholder in the area, who estimated that 17 people were 'bought out' to facilitate the Shenhua project.[91]

3.79 Ms Leys stated that the bill does not address NSW Farmers' main concern, which is that the planning laws allow mining to be undertaken on 'what we consider to be some of our best agricultural land'. Ms Leys concluded:

> A right to refuse does not address the issue of up-front planning processes that identify areas where industries may be able to go and identify industries that should be off limits.[92]

3.80 Mr Paul Nankivell from Save Our Soils Liverpool Plains similarly highlighted the importance of planning arrangements. Although he argued that landholders should have the ability to veto access to their land, he added that 'the real question should be: why are these mining companies allowed to go everywhere?'[93]

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90 Ms Danica Leys, Policy Director, Environment, New South Wales Farmers Association, *Proof Committee Hansard*, 28 July 2015, p. 28.

91 Ms Rosemary Nankivell, Chairman, Save Our Soils Liverpool Plains, *Proof Committee Hansard*, 25 August 2015, p. 3.

92 Ms Danica Leys, New South Wales Farmers Association, *Proof Committee Hansard*, 28 July 2015, p. 23.

93 Mr Paul Nankivell, Adviser, Save Our Soils Liverpool Plains, *Proof Committee Hansard*, 25 August 2015, p. 5.