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Submission on draft Code of Practice for Land Access

16 December 2013

1 The right of landowners to say "no" to CSG exploration or production on their land.

The draft code has limited, if any, application because it is not mandatory[1], and in practice, miners are not assuming the higher standard. In fact, where possible, miners are assuming the lowest standard possible and pushing all risk and cost onto the landholder. [2]

If this is to be a best practice framework for explorers it must state that miners have no "right to enter" under their licence or the PO Act and entry requires an access arrangement "acceptable to both parties", s69J(1) of the PO Act. Acceptable to both parties does not mean acceptable to the miner and not to the landholder. If an arrangement is not acceptable to both parties access should be denied.

The draft code should explain the landholders' rights to protect their land and their significant improvements and provide some guidance on what must be had by miners before they may undertake certain activities on the landholders land, such as, the requirement for an approved Review of Environmental factors for certain drilling and an environmental impact statement for certain intensive drilling which is state significant development.

2 Landholder rights embedded in the PO Act must also be embedded in access agreements.

If the Code is to set best practice, the miner should at least be required to comply with the terms of its licence and the law as part of the access arrangement. The draft code should embed landholder rights set out in the PO Act in the access arrangement.

The Code should embed the landholders rights under the PO Act and at law in the access arrangement. The code should also require the miner to comply with the terms of its licence while on the landholder's land.

The Code should not derogate from landholders existing rights in the PO Act to protect their significant improvements[3]. Allowing for minimum harm to significant improvements is a derogation of the landholders existing rights to prevent any activity of the miner on their significant improvements under s72 of the PO Act.

Any provision of the access arrangement derogating from the landholder's rights to protect their significant improvements is irrevocable under s72(2). In other words, agreeing to "minimum harm" to significant improvements, such as fences, gates, buildings, roads, dams, contour banks soil conservation works etc is a very significant incursion into the existing rights of a landholder to protect those significant improvements from any activity of the miner.

3 Mining companies should be legally subject to the highest standards of openness, transparency and accountability.

The draft Code does not require the mining company to disclose all approvals, licences, insurances,

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[1] Because it can be varied or not agreed see paras 1.6-1.8 and s69DB

[2] For example, allowing minimum harm to significant improvements which are otherwise wholly protected; requiring the landholders to determine what consents and approvals the miners have, allowing minimum harm to water and environment, and cleanup and rehabilitation only so far as reasonably practicable. These standards are far lower than those set in legislation or instruments issued under that legislation. The discrepancy creates confusion and this is exploited by miners.

[3] Delete clause 3.7 The Ulan case holds that roads are significant improvements of the landholder. Agreeing to use of the landholders roads in an access arrangement would be irrevocable. Experience shows miners causing damage to existing landholder roads and not repairing except for their own purposes during operations. This is a derogation from the landholders existing rights.

consents and operational plans to the landholder to enable the landholder to have a complete understanding of the obligations on the miner and what needs to be covered in the access arrangement.

The draft Code fails to deliver the most basic transparency and leaves the landholders negotiating without having the full and relevant facts before them.

The Code should require that

- *the miner discloses to the landholder all its approvals. licences and consents under the PO Act and other relevant legislation such as the Water management Act, the Protection of Environment Operations Act and the terms of the exploration licence*
- *all approvals be in place before the miner seeks access to the landholder's land.*

This should be a precondition to access and mandatory provision of the code. Further, as there is no guarantee that the miner will obtain these approvals from the Department, ie approval to drill[4], the miner must not seek access before these are had, as the miner is wasting the landholder's time and money.

The draft Code potentially fast tracks the negotiating process for miners and may result in landholders being forced into the arbitration process much earlier than is common practice. Clause 2.8 of the draft code facilitates CSG companies issuing a formal s69E notice of intent to obtain an access agreement at a very early stage in the process, soon after initial contact with the landholder. This means that the landholder has only 28 days to respond before the company may seek arbitration.

The Code should maximise the time available outside formal legal processes to enable landholders to become fully informed about the issues and risks.

4 No Confidentiality as it is used against the landholders

Clause 3.1(d) of the draft Code appears to offer confidentiality of the agreement between the landholder and the CSG company. Confidentiality clauses prevent landholders from speaking out concerning the negative impacts of CSG and can cause landholders to be "played off" against one another, can prevent landholders notifying authorities when pollution or contamination events occur, and ensure landholders are unable to compare the deal or protections they are being offered. It further limits landholders ability to share details of their agreement with outside parties or the wider public, and allows CSG companies to distort the truth about how access agreements are operating and how they are impacting on landholders.

Landholders should never agree to keep the access arrangement confidential. It is necessary that landholders be able to inform others within the title area of what is going to happen on their land, and inform authorities if there is any pollution or contamination event.

5 Code uses weak language

The language used in the Code is weak, discretionary and is not prescriptive enough to properly protect landholders' interests. The use of such language makes it very difficult for landholders to understand their rights and enforce their rights. For example:

- "promptly pay the compensation" at clause 3.1. Who defines "promptly"? What does it really mean? So far, requests by landholders for the payment of legal costs, which had previously been offered by the miners, have been later ignored. Even after several requests. Apparently, the miners are making the landholders go to the LEC for recovery of costs previously promised. Of course, the costs of commencing proceedings in the LEC for a previously offered $2500 far outweigh the amount offered. Making a mockery of the offer, and the provisions.
- "minimise potential for any damage" at clause 3.6. "Minimise", "potential" and "damage" will all require interpretation.
- And more expressions which are vague or open to degrees of interpretation such as "where

[4] There are several known instances where approval to drill has not been granted, ie Leichhardt Resources in PEL470, and other instance where miners have sought access when these approvals have not been held, ie Leichhardt Resources.

practicable", "take reasonable steps", "minimises disturbance." These must all be tightened to take guesswork out of the equation.

6 Independent legal advice from practitioners who regularly practice in the field

The Code should stress the importance of landholders obtaining independent legal advice in order to protect their rights and interests. That advise should be sought from practitioners practicing in the field. There needs to be adequate legal and expert support for the landholder in the process, including the arbitration process.

Landholders legal costs from first contact through to the conclusion of the arbitration process should be paid for by the CSG company. Experience to date indicates that if a landholder wishes to know their rights, know the position and rights of the miner, know what approvals and licences the miner has, know the extent of those approvals, determine what on the landholder's property can be protected and how to protect it, is a complex and lengthy process. One must determine whether there is a licence in place, whether it covers the land of the landholder, what the terms of the licence are, whether the miner has approval to undertake the activities it is seeking to undertake on the landholders land, what the terms of that approval are, review of any review of environmental factors, agricultural impact statement, whether it has the necessary Ministerial consents, water licences and approvals, EPL's etc. This can involve the review of thousands of pages and the complex interaction of several documents, the terms of the licence, the terms of the REF, and approval, the terms of related legislation and regulations are all relevant for example for use of water, creek crossings, cutting of timber, use of public roads, drilling, drill hole positions, intensity of drilling etc.

7 Timing to suit landholders

There needs to be a reasonable time for a landholder to prepare for any meeting, including for the discussion and negotiation of a land access arrangement prior to forced arbitration. It is harsh and unconscionable for a landholder to be expected to prepare for a meeting within 14 days when the CSG miner has been preparing for months and usually has years of experience. The Code should provide for a minimum period of 90 days.

8 Flaws in the arbitration process

The code needs to address arbitration provisions of the PO Act.

The "loophole" which allows for CSG proponents to escalate through various stages of the arbitration process without a requirement to demonstrate genuine engagement on their behalf must be eliminated.

The Code must ensure the impartiality of the arbitrator by setting a standard of arbitrator who understands what impartiality involves as well as the principles of procedural fairness. The Code should set out the requirements for Arbitrators, ie that they have knowledge of the key aspects of the PO Act and environmental planning, water and environmental protection law, and that Arbitrators be either Senior Counsel or a retired Judge.

Full transparency in the arbitration process must be guaranteed, along with the establishment of appropriate mechanisms for the review of Arbitrator performance. Records and/or transcripts must be compulsory, and the costs included along with those of the Arbitrator. Experience to date in 9 arbitrations across NSW has shown that arbitrators deny statements, which if stated by a judge, would ordinarily require their recusal. A transcript would encourage an arbitrator to act with greater impartiality and a certainly would allow for unnecessary later argument as to whether or not something was said. This arbitration process is not voluntary, landholders are forced against their will, and great expense, in circumstances and under conditions vastly tipped against them, every effort should be made by the legislature and the land and Water Commissioner to balance the existing imbalance between a miner and a landholder.

9 Compensable loss

This is an opportunity to broadly define compensable loss as inclusive of all the Landholders costs and expenses including for protection of the environment. The Courts have recognised that the current provisions are unworkable. Compensable loss should include not only loss of use of the land, but loss of income for the landholder and loss of value of the property and all costs associated with a miner seeking access to their land.

10 The code should ensure the landholder and the land are No worse off

The code must provide for the protection of landholders both financially and environmentally, so that the landholder and the environment are no worse off as a consequence of the miner's activities on their land.

The code must address insurance and indemnity issues, requiring insurance by CSG companies to cover all personal injury, property and environmental loss occasioned by or to a landholder and his or her land, such insurance must allow the landholder the right to claim on the miner's insurance and all deductibles for a claim must be paid by the miner.

11 Contractors should not be given the rights of the title holders

Contractors to CSG miners must not be given title-holder rights as they are not then bound by title conditions, have undergone no due diligence, are not subject to the terms of the access arrangement.

12 Scientific assessment.

The draft code must provide for mandatory baseline studies and continued monitoring on issues such as health, biodiversity, environment, ground and surface water and produced water. These baseline studies must be carried out by independent scientific experts with free public access to the data gathered.

Environmental audits must be publicly available and with no commercial interest exclusion.

The draft code foreshadows that a baseline water monitoring regime will be developed in the future through negotiation between "stakeholders". There is no definition of who those stakeholders are. Baseline water studies have been sought for many years, and so far have not been undertaken by AGL in Camden, will not be undertaken before fracking begins by AGL in Gloucester, were not done by Santos as operator under Eastern Star Gas in the Pilliga. These studies are essential not only for the protection of our seriously scarce water resources and the integrity of the aquifer, but also for the determination of compensable loss and pollution and contamination events.

The right to clean water can be directly impacted by a neighbour giving permission to mine for CSG. There needs to be a mechanism in the Code where the view of neighbouring, including remote neighbouring, landholders are considered with the majority prevailing. The ability of the CSG company to purchase neighbouring real estate and attempt to influence the views of neighbours should be recognised and restricted in this process.

The code should set minimum guidelines for the protection of ground water and for the disposal of produced water.

Some but not all the comments are set out in the following table.

Code clause	issue	response
1.5	Does not prescribe mandatory provisions	delete as misleading, or alternatively make the mandatory provisions mandatory by removing the right to agree or vary

Code clause	issue	response
1.6-1.8	Either make the provisions mandatory or not and remove the confusion	
1.9	What is the effect of amendment of the code when its provisions are in existing access arrangements?	If the standard is improved for the benefit of the landholder the provision be incorporated
1.11	What is required is baseline water data and ongoing monitoring against baseline. Water testing does not satisfy this requirement	Require baseline water data and monitoring. To be undertaken by an independent expert, engaged by the landholder and paid by the miner either directly or out of the security given to the government
1.14	Inaccurate description and misleading	accurately describe those activities that are requiring of a EPL
2.1	The most important requirements are not here	Explorers must have in place all approvals, consents and licences for the activities they seek to undertake before they seek access to a landholders land
3.6		(d) immediately notify the landholder ...
		(e) rectify without delay ...
3.7	(a) this derogates from the landholders rights to protect their significant improvements	make this known to the landholder that they do not have to allow use of their roads and tracks
	(d) not operate in wet conditions	
3.11	(a) delete "take reasonable steps to"	reasonable is too vague
	(b) delete "take reasonable steps to"	reasonable is too vague
	(c) delete "if the risk of spreading ...	
3.12	This derogates from the landholders right to ensure no activity on significant improvements	replace with "The miner has not consent to exercise any right under the licence on the landholders significant improvements."
3.18	an actual list of chemicals required	
include	Insurance	insurance to cover for personal injury, property damage and environmental damage, noting of the landholder on the policy to make claims and payment of any deductible if the landholder does make a claim

Code clause	issue	response
	compliance with the terms of the licence and the law	The miner must comply with the terms of the licence and the law while undertaking any activity on the landholders land.
	no worse off principle	The miner must ensure that the landholder and the property are no worse of as a consequence of the miners activities on the landholders land