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Can councils deny access to coal seam gas seismic activities on council owned roads? Yes, if the road qualifies as an improvement under s72 of the Petroleum (Onshore) Act 1991 (NSW)

In summary
With a growing list of councils[1] stating their opposition to coal seam gas (**CSG**) activities by declaring a moratorium on these activities in their local government areas, the question is increasingly asked: Over what land can councils say "no"?

Under section 72 of the *Petroleum (Onshore) Act 1991 (NSW)* (**Petroleum Act**), councils, as landholders, have rights to say "no" to any activity of CSG companies on their "improvements". The NSW Supreme Court, in the Ulan case[2], held a "public road" was an "improvement"[3] as qualified in the *Mining Act 1992 (NSW)* (**Mining Act**). Given the similarity of the qualification in the Petroleum Act and the Mining Act to the interpretation of the word "improvement", there is a good argument that the decision in Ulan is of assistance in interpreting the meaning of "improvement" in s72 of the Petroleum Act.

The consequence being that councils, as landholders of certain roads, can refuse consent to any CSG activity, whether in exploration or production, on roads which qualify as "improvements".

If there is a dispute, either party may apply to the Land and Environment Court for a determination.

If the council does resolve to give its consent under the Petroleum Act, it must do so in writing. Before giving that consent, the council should agree the terms of an access arrangement with the CSG company. The access arrangement is a necessary precondition to access for the CSG company. Because the consent is irrevocable, careful consideration should be given to the terms of the access arrangement. Further, because public roads are exempted areas, the CSG company must also have a consent from the Minister to access exempted areas under s70 of the Petroleum Act.

Under s138 of the Roads Act 1993 (NSW) (**Roads Act**), Councils also have powers to decide what activities are conducted on their roads, unless the activity is sought to be undertaken by a CSG company with development consent to carry out a state significant development (SSD). Petroleum production and certain intensive petroleum exploration is SSD[4].

Section 72 Petroleum Act rights of councils as landholders
Councils are landholders of certain roads in their local government area[5]. As landholders, councils have certain rights and powers under the Petroleum Act. Some of those rights and powers are set out in section 72 of the Petroleum Act.

Section 72 of the Petroleum Act prevents any CSG prospecting or mining within certain distances, in relation to specified improvements, without the written consent of the landholder. In particular s72 provides

> ***72 Restrictions on rights of holders over other land***
> *(1) The holder of a petroleum title must not carry on any prospecting or mining operations or erect any works on the surface of any land:*
> *…*
> *(c) on which is situated any **improvement** (being a **substantial** building, dam, reservoir, contour bank, levee, water disposal area, soil conservation work, or other **valuable work or structure**) …,*
>
> *except with the written consent of the **owner** of the … improvement …*
>
> *(2) A consent under this section is irrevocable.*
>
> *(3) If need be, the Minister is to determine whether any improvement referred to in subsection (1(c)) is **substantial or valuable**, and may define an area adjoining any such improvement on the surface of which no prospecting or mining operations are to be carried out, or works erected, without the consent of the owner of the improvement.*
>
> *(4) If a dispute arises as to whether or not this section applies in a particular case, any party may apply to the Land and Environment Court for a determination of the matter.*

In other words, a CSG company must request the written consent of council to undertake an activity, such as, seismic testing, on council-owned roads which qualify as "improvements". A council may refuse its consent under s72 of the Petroleum Act if the road qualifies as an improvement. If need be, the Minister may determine that the improvement is substantial or valuable. If there is a dispute, either party may apply to the Land and Environment Court for a determination of the application of the section.

How does a road qualify as an improvement?
Unfortunately, s72 of the Petroleum Act does not expressly list "roads" as an improvement. There is no case law on s72 of the Petroleum Act. However, there is case law on s62 of the Mining Act. Section 72 of the Petroleum Act and s62 of the Mining Act qualify "improvements" in almost identical terms as

> *any substantial building, dam, reservoir, contour bank, … levee, water disposal area, soil conservation work, or other **valuable work or structure***

In ***Ulan Coal Mines Ltd v Minister for Mineral Resources***[6] the NSW Supreme Court held a public road was an improvement under s62 of the Mining Act. Smart JA, held that despite the dilapidated nature of the road ie it was a dirt road, there was

[1] Wingecarribee, Richmond Valley, Lismore, Marrickville, Moree; and others have expressed concern Leichhardt, Kyogle, Byron, Tweed, Wollongong, Camden, Campbelltown, Wollondily, Coffs Harbour
[2] Ulan Coal Mines Ltd v Minister for Mineral Resources *[2007] NSWSC 1299*
[3] *[2007] NSWSC 1299 at [48]- [49]*
4 SSD is 6+ wells within 3 kms of another well on a single tenement in *exploration, or, petroleum production under a petroleum production lease.*
[5] s7(4) and s45 of the Roads Act 1993 (NSW)
[6] *[2007] NSWSC 1299*

marked erosion, and [it had] not been maintained for a long period [7] it was still "substantial and valuable"[8] and qualified as an improvement.

In Ulan, Smart JA held, to qualify as an "improvement", the thing on the land must "enhance the land's value compared with its natural state" and be "substantial and valuable". "To be valuable an improvement must be of more than minimal value".[9]
Some indication of what is required to satisfy "more than minimal value" is given by Smart JA where he holds that a "track" is not an improvement.

> *[100] … The track… was merely a track caused by vehicular access with* ***no formation or maintenance work*** *being carried out … I am unable to tell whether a grader had been used on the track or other work done on it. [101] I am satisfied that the fence was probably a substantial and valuable improvement but I am not satisfied that the track was.*

The lack of maintenance and formation work on the track appears to be an important reason for Smart JA's decision that it was not an improvement.[10] Further, Smart JA held "cleared land", although usually considered an improvement under other legislation, in the context of s62 of the Mining Act, was not an improvement. He held

> *other valuable work … assume[s] work beyond clearing of the land*"[11] *.*

The extent of protection
It is clear that the carriageway itself, adjoining verges, drains[12], footpaths, earthworks, utilities, formation works and maintenance work on land in the road reserve will all assist in qualifying that land as an improvement. If this substantial or valuable work or structure extends to the abutting property boundaries, for example, by the planting and maintaining of gardens[13], or possibly even, by implementing vegetation management plans, by planting and maintaining vegetation, the whole road reserve, from boundary to boundary, presumably would qualify as an improvement under s72 of the Petroleum Act.

What about wide road reserves where no work is done on the side of the road except clearing? If this land does not qualify as an improvement, can councils otherwise deny CSG activities on this land?

In this respect, councils do have another weapon in their arsenal. Provided the CSG activity is not for the carrying out of state significant development, section 138 of the Roads Act gives councils the power to refuse consent to CSG activities in their road reserves.

Public roads under the Roads Act
A public road in the Roads Act includes all that land dedicated as a public road in a plan registered with the office of the Registrar General[14]. In other words, a public road is the strip of land so dedicated between abutting property boundaries. It includes the carriageway, footpaths and verges on either side and all the land to the abutting property boundaries, regardless of the improvements in it.

Section 138 of the Roads Act provides a person must not carry on a work, or disturb the surface of a public road, otherwise than with the consent of the appropriate roads authority. The council is the roads authority for its roads. This section applies unless its operation is expressly excluded by another Act. Section 89K of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**) provides that consent under s138 of the Roads Act cannot be refused if it is for the carrying out of *state significant development*.

State Significant Development (SSD)
Councils will not be able to refuse consent under s138 of the Roads Act if the consent is for the CSG company carrying out a state significant development. SSD requires development consent under Part 4 of the **EP&A Act.**

Seismic testing in road reserves
In practice, council road reserves appear to be the preferred areas of land on which to undertake seismic surveying activities. These activities are classified as Category 3 activities in petroleum exploration licences. Before being undertaken they require an approved review of environmental factors under Part 5 of the EP&A Act, and, as in exempted areas, require consent from the Minister under s70 of the Petroleum Act. Seismic surveys are generally undertaken before core hole drilling takes place in order to obtain a preliminary assessment of the underlying geology. In other words, most seismic surveying is sought to be undertaken before the CSG activity qualifies as SSD and in these circumstances councils can utilize their powers under s138 of the Roads Act to refuse consent.

Council land and access arrangements
If a council does resolve to grant consent to CSG activities being undertaken on its land it has rights under s69C of the Petroleum Act to require the CSG company to enter into an access arrangement before commencing that activity. The CSG company must not carry out prospecting operations on the land except in accordance with that access arrangement. As the principal party in this relationship, it should be the council who determines these terms. Once consent is given, it is irrevocable under s72(2) of the Petroleum Act. Very careful consideration should therefore be given to the terms of any access arrangement. It is recommended that it be structured in the form of an umbrella arrangement such that overriding protective terms apply to individual activities, confined in space and time. Otherwise, one may find they have given unrestricted access to undertake any activity for an indeterminate period of time.

In short
Under the Petroleum Act, councils have rights under s72 to protect improvements. A public road has been held to be an improvement. Councils may refuse consent to activities on their roads which qualify as improvements, both in exploration and production and whether or not a SSD. Should a council resolve to give its consent, CSG companies wishing to undertake seismic testing on council roads must have council consent in writing, must have Ministerial consent under s70 of the Petroleum Act and must enter into a written access arrangement. Under the Roads Act, councils may refuse consent to activities on their roads, as long as those activities are not for the carrying on of state significant development.

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[7] *[2007] NSWSC 1299at [48]-[49]*
[8] *[2007] NSWSC 1299* at [49], Smart JA
[9] *[2007] NSWSC 1299 at [31]*
[10] *[2007] NSWSC 1299* at [100], Smart JA
[11] *[2007] NSWSC 1299* at [211]
[12] *[2007] NSWSC 1299* at [57]
[13] Which would receive additional protection under s72, ie no CSG activity within 50 m of a garden or orchard.
[14] Section 9 Roads Act