

12 July 2012

The Hon Chris Hartcher MP
Minister for Resources and Energy
GPO Box 5341
Sydney NSW 2001
By email: office@hartcher.minister.nsw.gov.au

Dear Minister,

Coal Seam Gas policy announcements, June 2012

Thank you for your invitation to provide feedback on the NSW Government's coal seam gas (CSG) policy announcements of 23 June 2012. As a community legal centre specialising in public interest environmental law, EDO NSW has a strong interest in the regulatory framework for CSG and other mining, and we have contributed to a range of recent consultations.¹ In the past two years, mining issues have come to dominate community requests to our office for legal education workshops, and a significant share of public enquiries to our telephone advice service. We welcome the Deputy Premier's commitment to 'ensure NSW has the strongest regulation of mining and gas extraction in Australia...'²

From the information available, we understand the proposals announced on 23 June include:

- 1) Appointment of a new **Land and Water Commissioner** to advise on aspects of CSG regulation on agricultural land, and oversee the finalisation of land access templates.³
- 2) Establishment of **Regional Community Funds**, to which CSG producers can voluntarily contribute.
- 3) The decision to **end the current five-year 'royalty holiday'** for CSG producers.

We comment on these in turn below.

Timeframes and legal status of policies should be clear

As a general comment from a legal service provider perspective, two key issues we look for in government law and policy announcements relate to implementation timeframes and the legal status of proposed changes. We welcome the Government's consultation on these changes, and would support a transparent timeframe for implementing these and other

¹ For example, NSW Legislative Council Inquiry into CSG, Draft Aquifer Interference Policy, Draft Code of Practice for CSG Exploration, Division of Mineral Resources' Draft EIA Guidelines, federal Senate inquiry on the Independent Scientific Expert Committee on CSG and Large Coal Developments, former NSW Coal and Gas Strategy. These submissions are available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#3.

² The Hon Andrew Stoner MP, media release, 'New Land & Water Commissioner, end to royalty holiday, and coal seam gas funds to benefit local communities', 23/6/2012, at www.resources.nsw.gov.au, as at July 2012.

³ In relation to land access templates, we support minimum landholder rights applying to both exploration and production, in line with the recent Legislative Council inquiry's recommendations – see Report of the NSW Legislative Council Inquiry into Coal Seam Gas (May 2012), recommendations 16-18. Available at: <http://www.parliament.nsw.gov.au>.

reforms to mining and CSG regulation. Timeframes should allow the views of all interested stakeholders to be taken into account (while avoiding unnecessary delay), with an emphasis on landholders, community groups and community members affected by mining and CSG. Reforms should also complement federal developments for harmonised CSG regulation.⁴

For clarity, certainty and public transparency, the legal mechanisms to implement the proposed regulatory changes should be explained upfront. For example, the status of other recent reforms, such as the ban on BTEX chemicals, the moratorium on fracking, and the draft code of practice for CSG exploration, has not always been clear. Other related reforms, such as the establishment of a federal Independent Expert Scientific Committee on CSG and Large Coal Developments (IESC) have had a clear role and legal status.⁵

1) Proposed Land and Water Commissioner

EDO NSW welcomes the announcement of a Land and Water Commissioner, however further detail is needed on the appointment process. This process should be transparent, expertise-based and ensure integrity. In our view, the new Commissioner should:

- be appointed on the basis of appropriate expertise and relevant experience –;⁶
- as a prerequisite, be free from conflicts of interest that could prevent the appointee from carrying out their functions independently and without fear or favour;
- have powers to consult with, and seek independent advice from, the federal IESC (as Minister's delegate), relevant State and federal agencies,⁷ and other relevant experts;
- publish relevant information and/or advice given to Government, to promote transparency and understanding (this could be similar to the IESC's functions);⁸
- have a clearly defined role, scope and powers – including in relation to regulatory bodies; and in relation to existing functions and processes under the *Petroleum (Onshore) Act 1991* and *Mining Act 1992* – such as arbitration, payment of costs of participation (which should be borne by proponents), and appeal rights to the Land and Environment Court (which we support) if the Commissioner is to make decisions.

In addition, decision makers under mining and planning law should be required to seek and take account of the Land and Water Commissioner's advice (as proposed for the federal IESC); and should be required to give reasons where their decisions do not align with relevant advice.⁹

⁴ Standing Committee on Energy & Resources communique of 9 December 2011; and note the IESC (below).

⁵ See, for example, Explanatory Memorandum (EM) to the Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012 (IESC Bill), Outline, p 2.

⁶ For example, expertise in two or more of the following areas: land access disputation and compensation relating to mining; environmental impact assessment relating to mining; agriculture or agronomy; natural resource management; hydrology, hydrogeology or ecology. A broadly similar list of suggested expertise is outlined in the Explanatory Memorandum to the IESC Bill 2012 (Cth), p 5, para 13.

⁷ In particular the Environmental Protection Authority, Office of Environment and Heritage, NSW Soil Conservation Service, Office of Water, National Water Commission, and NICNAS (national chemical regulator).

⁸ See, for example, Explanatory Memorandum to the IESC Bill 2012 (Cth), Outline, p 2; and cl 505D of the IESC Bill 2012 (Cth).

⁹ The Independent Commission Against Corruption has made a similar recommendation in relation to decisions of the Planning Minister, where those decisions do not reflect the advice from the Department. See ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 8.

2) Regional Community Funds (RCF)

As detail on this proposal is limited, we make three brief comments:

- i) The Government proposes that RCF project funding be determined according to community needs in consultation with the industry and the community.
 - o We believe the long-term health, wellbeing and ecological sustainability of NSW communities and the environment should be decisive factors here.
 - o We suggest the Local Government and Shires Association may be a more appropriate consultation partner in this process than the mining industry. Industry involvement may create perceptions that decisions about community investment are being driven by the industry rather than the community itself. There may also be potential conflicts of interest (for example, if a community wished to invest in renewable energy). Arguably, each community should determine the level of industry involvement in consultations, if any.
- ii) RCF funded projects should be additional to – not a substitute for – existing industry, corporate or government funding obligations and responsibilities (for example, industry obligations to remediate environmental impacts of mining; or government obligations to provide services that should be available to all NSW communities).
- iii) More detail should be provided on the interaction between royalties and RCF funding, including alternative funding models that have been, or will be, considered.

3) Ending the five-year royalty holiday for CSG producers

EDO NSW welcomes this policy decision, consistent with our 2011 submissions to the Legislative Council Inquiry into CSG.¹⁰ The removal of an artificial incentive for CSG activities is appropriate, given the broad stakeholder concerns and the need for a more precautionary approach. Furthermore, it is appropriate that the payment of royalties falls directly on the mining companies profiting from the extraction of Crown resources; and not on the public at large, via governments' compensation to those companies.¹¹

This change will require amendment to the *Petroleum (Onshore) Regulation 2007*.¹² Noting the significant potential growth of the CSG industry in NSW, we support a robust and transparent royalty regime that starts from the first year of production; and that requires publication of relevant data. The present regulation provides for incremental increase from six to 10 per cent over the sixth to 10th year of commercial production. The revised regulation should not simply extend this trend 'backwards' to year one. Rather, the amendments should provide that royalties commence at the full rate of 10 per cent from first production. This aligns with recommendation 27 of the report of the Legislative Council Inquiry into CSG.¹³

¹⁰ EDO NSW, *Submission to NSW Legislative Council Inquiry into Coal Seam Gas* (September 2011), pp 20-21, available at: http://www.edo.org.au/edonsw/site/pdf/subs/110912csg_inquiry.pdf.

¹¹ However, we note the recently announced increase in NSW mining royalty payments, by companies subject to the federal Mineral Resources Rent Tax, which will result in the companies themselves being "shielded" through compensation commitments by the Australian Government. See, for example, R. Gittins, *Sydney Morning Herald*, "O'Farrell to raise mining royalties", 6/9/11, available at <http://www.smh.com.au/nsw/ofarrell-to-raise-mining-royalties-20110905-1jubr.html>.

¹² See *Petroleum (Onshore) Regulation 2007*, clauses 23-24.

¹³ See also discussion at para 11.64 of the Inquiry Report.

Additional royalties or levies should fund additional monitoring and enforcement

EDO NSW noted the limited resources available to research and monitor mining activities, and to enforce compliance with regulations, in our submission to the CSG Inquiry. The committee noted other submissions that reinforced this view.¹⁴ In 2009, a Senate committee also called for urgent review of under-resourcing of federal environmental regulation.¹⁵

We submit that additional funding of research, monitoring and enforcement activities should be channelled from royalties or other sources, such as industry levies. If regulatory resources do not keep pace with industry expansion, the inevitable result is poorer regulation, and greater risk to the environment and communities.

Need for strong royalty audit regime

In its 2010 report on *Coal mining royalties*, the NSW Audit Office found significant shortcomings in the calculation, collection and audit of coal royalties by the Department of Industry and Investment. The Auditor-General proposed a range of solutions to improve royalty collection in NSW:¹⁶

- give clients online services and better guidance
- ensure companies provide more information to support royalty payment calculations
- validate information supporting the collection of royalties
- target auditing resources better
- impose penalties on companies which underpay royalties (not just for late payment).

In its formal response, the Department accepted all of the report's recommendations. We submit that the current proposals for royalty reform are a timely opportunity to reflect on the Audit Office's recommendations, ensure they have been implemented over the past 18 months, and examine whether those recommendations provide additional accountability mechanisms for administering CSG royalties (for example, in relation to calculation, accuracy of returns, transparency, independence, audit and enforcement).

Transferring administration of mining royalties to the Office of State Revenue

A further recommendation from the Auditor-General in 2010 was to consider transferring the administration of mining royalties to the Office of State Revenue (OSR). The Treasury committed to explore this proposal by June 2011, although we are not aware of the outcome.

This proposal has merit for three reasons. Firstly, as the Auditor-General noted, the OSR specialises in identifying and collecting revenue owed to the State. Secondly, placing this function at arms-length from the Department would be consistent with the Government's goal and targets in the State Plan to 'restore accountability to government', and trust in public service delivery. The Ombudsman has previously identified potential conflict of interests for the Department in its functions of promoting the industry, issuing licences and taking enforcement action.¹⁷ The Department's administration, auditing and enforcement of

¹⁴ See, for example, Report of the NSW Legislative Council Committee Inquiry into CSG (2012), paras 13.52 and 13.58-61.

¹⁵ See Senate Standing Committee report on *Operations of the Environmental Protection and Biodiversity Conservation Act 1999* (March 2009), rec. 4: 'The committee recommends that the government give urgent consideration to increasing the resources available to the department in the areas of assessment, monitoring, complaint investigation, compliance, auditing projects approved under Part 3 and enforcement action.'

¹⁶ See NSW Audit Office, media release, 'Coal mining royalties', 30 November 2010.

¹⁷ NSW Ombudsman, NSW Inquiry into Coal Seam Gas, submission no. 436 (September 2011). The Ombudsman further notes, "There are obvious challenges for one agency in advocating for businesses and

the royalties scheme presents similar potential for conflict. Finally, we note that state revenue offices in at least two other jurisdictions (Northern Territory and Queensland) already administer mining and petroleum royalties.¹⁸

We look forward to the Government's formal response to the Report of the NSW Legislative Council Inquiry into CSG, and to consultation on draft land access arrangement templates. EDO NSW would be happy to assist with further input on those matters. In the meantime if you or your staff would like to discuss any of these matters further, please contact me on (02) 9262 6989 or rachel.walmsley@edonsw.org.au.

Yours sincerely,
EDO NSW



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industries across the state while at the same time being an independent arbitrator of regulatory issues in relation to those same industries.”

¹⁸ See NT Territory Revenue Office, at <http://www.revenue.nt.gov.au/royalties.shtml>; see Queensland Office of State Revenue, <http://www.osr.qld.gov.au/royalties/administration-changes.shtml>. We understand the NT scheme includes a range of other safeguards such as requiring supporting evidence with royalty returns, independent auditing, and assessment of returns by the Minerals Secretary. See NSW Audit Office, *Coal mining royalties* (2010), Appendix 3, ‘Coal royalty regimes in Australia’, pp 23-24.