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Chair, Inquiry into Coal Seam Gas Impacts  
NSW Legislative Council  
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SYDNEY

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Dear Members of the Committee

### **Inquiry into Coal Seam Gas Impacts – Responses to Questions on Notice**

The EDO is pleased to provide the below responses to Questions on Notice (**QON**) taken from our appearance at the CSG Inquiry on 8 December 2011. We also provide further information on certain other relevant matters raised at our appearance.

These responses are in addition to the written and oral submissions and recommendations provided to the Inquiry. (See [www.edo.org.au/edonsw/site/pdf/subs/110912csg\\_inquiry.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/110912csg_inquiry.pdf).)

The QON and further information are addressed in the following order below:

- 1. Overview of EDO's community legal education workshops on CSG/mining (QON)**
- 2. Landholders' ability to withhold consent to CSG production & related issues (QON)**
- 3. Regulating fugitive and greenhouse emissions from CSG activities (QON)**
- 4. Reviews of environmental factors (further information)**
- 5. Sources of EDO funding (further information)**

Please contact me if the Committee requires further information or assistance from the EDO in relation to this Inquiry, and thank you for considering our submissions.

Yours sincerely

**Environmental Defender's Office (NSW) Ltd**

**Mr Nari Sahukar**

Acting Policy and Law Reform Director



## **1. Overview of EDO's community legal education workshops on CSG/mining (QON)**

*Prepared by Jemilah Hallinan, Legal Outreach Director*

The EDO conducts community legal education workshops throughout rural and regional NSW. The vast majority of these workshops are in response to a direct request from an individual or community group. They can cover a range of issues. We frequently get requests for workshops on planning law, private conservation, coastal protection law and rural land management law. More recently, the requests have been almost exclusively for workshops on coal and CSG mining law. Mining issues therefore occupied the majority of the EDO's capacity for outreach workshops in 2011.

Once a request is received, we work with the person or group making the request to identify the key issues facing that community and their legal education requirements. This allows us to tailor the workshop to the community. We then organise the workshop and promote it throughout our networks. This often includes media (radio and newspaper) as well as on our website and e-bulletin and through local council, local universities, local community legal centres etc. The person or organisation requesting the workshop is also responsible for promoting it within their community.

Workshops are intended to inform the community about the law and empower them to use the law to protect their interests and the environment.

The typical format for a mining or CSG workshop is to provide an overview of the legal framework (the key laws, the main decision-makers, the types of licences and leases that can be granted and the location of those leases and licences in the local area). We then provide a step-by-step guide to the decision-making process at both the exploration and production stages (this takes in the process for granting a lease/licence as well as the process for granting development consent, where relevant).

We focus on opportunities that members of the public have to influence outcomes and landholder rights – whether to be notified of a proposal, to comment on a proposal, to object to the granting of a lease, to negotiate an access arrangement, to challenge a decision, to seek to enforce a condition of consent. Whatever opportunities the law provides, we highlight the opportunity and explain how to engage effectively in the process.

We also discuss Commonwealth approvals and how to have a matter referred for assessment under the EPBC Act.

It is our experience that landholders are desperate for reliable information regarding the various decision-making processes and their powers within those processes. They are particularly interested in access arrangements. We do not advise landholders with regards to specific access arrangements. Rather, we give a general outline of the law that applies, and provide a range of tips and possible options. This tends to lead to a discussion of the pros and cons of each option; for example, choosing to negotiate with the company as opposed to going to arbitration. Much of this discussion happens between the workshop's attendees. The vast majority of CSG and mining workshop attendees are landholders, many of whom own land that is subject to some form of exploration, assessment or mining lease. Workshops are also commonly attended by Councillors, council staff, CMA staff, environmental consultants, Aboriginal Land Councils and lawyers. Workshops are open to all.



From time to time we have a guest speaker from the community or another organisation address the audience. This is at the request of the community and is organised by the group or individual who requested the workshop. On one occasion, we've invited representatives of a gas company to address the workshop and provide an industry perspective. However, in most cases we do not feel the community is served by providing an additional platform for mining or gas companies. The mining and gas companies have ample opportunity to reach the community and communicate their perspectives. As the workshops focus on the law, and not policy, it is neither appropriate nor necessary to ensure that all interests are heard.

The value of an EDO workshop is that it provides an impartial overview of the law with a focus on legal rights and obligations. We do not discuss the merits or otherwise of CSG or mining, nor the likely environmental, social or economic impacts. We are there to help the community understand what the law says and what the law allows them to do. It is up to the community to decide what it is they want to achieve. If the community wants to allow mining or CSG on their land, we would not attempt to talk them out of it. On the other hand, many people attending our workshops tend to be looking to the law to help them avoid coal and CSG proposals on or around their land. We respond to this need by helping landholders identify and utilise the limited legal provisions available to them.

In 2011, we have conducted 10 workshops on mining/CSG. A breakdown follows below. Where possible, we have indicated where the original request for the workshop came from.



## 2011 WORKSHOPS ON MINING & COAL SEAM GAS LAW PRESENTED BY EDO NSW

Venue and Date	Subject-matter	Presenters	No. of attendees	Requested by (if known)
Lismore (3 February 2011)	Gas exploration and production	Three EDO staff – a solicitor, an educator and a scientist	160 people	
Grafton (19 May 2011)	Coal Seam Gas	EDO solicitor and an EDO educator	75 people	
Murwillumbah (9 June 2011)	Coal Seam Gas	EDO solicitor and an EDO educator	100 people	EDO organised this event as a result of the concentration of enquiries coming from this area about CSG
Byron Bay (5 July 2011)	Coal Seam Gas	EDO educator	250 people	BSANE (Byron Saving Australia's Natural Environment), a community environment group
Casino (11 August 2011)	Coal Seam Gas	EDO educator, an EDO solicitor, a representative of Metgasco and a	150 people	



		representative of the National Toxics Network		
Moss Vale (13 August 2011)	Coal and CSG Mining	Two EDO solicitors	60 people	Southern Highlands Coal Action Group
Baerami (20 August 2011)	Coal and CSG Mining	Two EDO solicitors	77 people attended	Local landholder
Narrabri (1 September 2011)	Coal Seam Gas	Two EDO solicitors	45 people	Councillor from Narrabri Shire Council
Running Stream (10 September 2011)	Coal and CSG Mining	Two EDO solicitors	15 people	Local landholder
Merriwa (24 September 2011)	Coal and CSG Mining	EDO solicitor	20 people	Local landholder
Monkerai (9 October 2011)	Gold and CSG Mining	EDO solicitor and an EDO educator	30 people	Karuah River Protection Group
Warrimoo (19 November 2011)	Coal Seam Gas	Two EDO solicitors, a member of the Sydney Catchment Authority and a representative of the Lock the Gate alliance	32 people	Western Sydney Conservation Alliance



## **2. Landholders' ability to withhold consent to CSG production & related issues (QON)**

In Committee hearings of 8 December 2011, the Committee asked the EDO the following:

*...You would be aware that access agreements can be compulsorily sought for exploration under both Acts [Mining Act 1992 and Petroleum (Onshore) Act 1991]. Does your organisation hold the view that perhaps the Petroleum [(Onshore)] Act should be amended so as to allow for a refusal at the exploratory stage for petroleum and coal seam gas exploration?*

*...given that an access agreement can be denied for production and given the nature of coal seam gas is there an argument to be made for allowing the refusal to take place at an earlier stage; in other words, when the exploration stage is commencing?*

In short, the EDO would strongly support additional landholder rights at the exploration and production stages, with some amendments and clarifications. In responding to this question we would like to clarify some of the matters discussed during our appearance. To further assist the Committee in this regard, we also attach an excerpt from the EDO's factsheet on Coal Seam Gas (October 2011), at **Attachment A**.<sup>1</sup> In particular we draw attention to the factsheet's sections on 'Restrictions on petroleum production on cultivated land' and 'Access Arrangements'. We also note that proponents are not legally required to make access arrangements with landholders at the production stage (discussed below).

### **EDO recommendations regarding landholder rights to object etc (summary)**

- **Stage of objections** - We would support the suggestion to give landholders the ability to object to petroleum/CSG activities on cultivated or agricultural land at the *exploration stage* as well as the production stage.
  - This is supported noting that some exploration activities, such as drilling of gas wells for pilot testing, can be potentially disruptive and cause damage, even before commercially viable gas supplies are found and before a production lease is obtained.
- **Broadly define relevant land** - Broadly define the type of land on which landholders may object to such activities, to avoid the loss of productive areas for other purposes.
- **Consistency** - Where practicable, the Petroleum (Onshore) Act and the Mining Act should adopt a consistent definition for cultivated/agricultural land. This should involve stakeholder consultation including with farming groups and communities.
  - There are unnecessary and confusing differences in the wording and effect of corresponding provisions under the two Acts. These inconsistencies should be resolved (to the extent appropriate given the types of activities involved), with favour given to protective rights for existing landholders.<sup>2</sup>

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<sup>1</sup> Available at [www.edo.org.au/edonsw/site/factsh/fs05\\_1\\_6.php](http://www.edo.org.au/edonsw/site/factsh/fs05_1_6.php).

<sup>2</sup> Relatedly, in the federal Senate Committee's interim report into CSG in the Murray Darling Basin (Nov. 2011), recommendation 18 suggests that where discretion exists, such as in s 71 of the P(O) Act, "the exercise of that discretion should be required to give priority to maintaining agricultural production with minimum disruption to the existing land-use."

- **Allow objections for conservation lands** - Extend landholders' ability to withhold consent to CSG/petroleum production (and as suggested, exploration) to land with 'high conservation values',<sup>3</sup> as well as on cultivated/agricultural land.
  - This should specifically and particularly apply to land subject to a conservation agreement or a Nature Conservation Trust agreement.
  - This would recognise the genuine natural resource constraints of the area, and the significant value of conservation areas on private land, in line with the principles of ecologically sustainable development (eg value of ecological services to the economy and community; protecting biodiversity; potential economic values such as ecotourism, biobanking or carbon farming; and as a buffer against land clearing, mining and other cumulative impacts).
- **Minimise discretion** - Transfer the Minister's discretion to determine *what is cultivated/agricultural land* to an independent body, and confine the discretion to be based on clear definitions and binding criteria.
- **Minimise discretion** - Remove the Minister's *discretion to allow* CSG/petroleum production on parts of land that has been determined to be cultivated/agricultural land.
- **Reviewable decisions** - Allow a decision regarding the status of land as 'cultivated/agricultural land' to be reviewable by the Land and Environment Court.

Taken together, these changes would rectify some of the inequity and complexity around landholders' rights and environmental protection under the Petroleum (Onshore) Act; as well as certain inconsistencies with the Mining Act. While there has been some recent progress in community engagement before mining decisions are made, it is important for certainty, transparency and accountability that protections are enshrined in the law.

#### ***Additional related recommendations***

During the EDO's inquiry appearance, the discussion of the above issues also touched on notification to and access arrangements with landholders. We make the following additional comments on these matters.<sup>4</sup>

- **Existing notification requirements are unnecessarily complex** - This hinders transparency and community engagement. For example, different notification requirements for exploration, assessment leases and production. The assessment lease notification provisions are particularly complex.<sup>5</sup>
- **Notification regarding exploration licences** - We would support strengthened legal requirements for notification at the exploration stage, including direct notification to

<sup>3</sup> Or similar term. Eg, see the Threatened Species Conservation (Biodiversity Banking) Regulation 2008, Part 2, clause 3. That clause requires that the scientific methodology underpinning the biobanking offsets scheme 'must provide for a method of identifying areas of land that have high biodiversity conservation values', based on characteristics like vegetation type, species and ecological communities in the area.

<sup>4</sup> We also note the Legislative Council Committee on State Development previously recommended (at p 203 of its Dec. 2009 report): "That the process of the granting of mining exploration licences be amended so that at the same time that a licence is granted, the government appoint an independent committee of stakeholders to determine the terms of reference and manage a strategic and scientific assessment of natural resource constraints, which is to be funded by the mining company." We too would support greater independence in the process of granting exploration licences for CSG and other mining.

<sup>5</sup> See *Petroleum (Onshore) Act 1991* (NSW), s 36(2).

affected landholders.<sup>6</sup> Currently there is *no legal requirement* for the public to be notified of *CSG exploration licence applications* (although departmental protocols may require newspaper advertising).

- **Notification regarding production leases** - We would support a legal requirement for direct notification to relevant landholders regarding *CSG production lease applications*. Currently there is no legal requirement for CSG proponents to do this. As well as being a fairer process for landholders, this would be more consistent with requirements for mining leases under the Mining Act (Sch 1, cl 21).
- **Access arrangements for production** - We would support legal requirements that a mining company make an access arrangement with a landholder at the *CSG/petroleum production stage*, noting there is no legal requirement to do so (as distinct from the exploration stage).
  - This would clarify rights and obligations between landholders and mining proponents. It makes little sense to have a legal requirement regarding exploration, only to remove that requirement when a project progresses to production.
  - For CSG production, where landholders may be less likely to be ‘bought out’ at the production stage compared with coal and other mining, a legal requirement to make access arrangements before production activities commence is all the more important.

### Detailed response to support recommendations

The current ‘cultivated land’ exception under Part 5 of the *Petroleum (Onshore) Act 1991* (NSW) (**P(O) Act**), which relates to the production stage, is limited in scope. We submit that this should not be referred to as a ‘veto’, which may imply the landholder has the final word, or can close down an entire CSG operation.

In brief, under section 71 of the P(O) Act, mining activities under a petroleum *production lease* must not be carried out on land which is *under cultivation* without the landholder’s consent. However, *the Minister can nevertheless approve such activities*. If this occurs, the Land and Environment Court must assess the compensation which is payable for any damage caused to crops. Compensation can also be agreed between the parties.

Specifically, section 71 provides as follows (emphasis added):

- (1) *The holder of a production lease must not carry out any mining operations or erect any works on the surface of any land which is under cultivation except with the consent of the landholder.*
- (2) *The Minister may, however, if the Minister considers that the circumstances warrant it, define an area of the surface of any parcel of cultivated land on which mining operations may be carried out or works may be erected, and may specify the nature of the operations to be carried out or the works to be erected.*
- (2A) *Before any such operations are commenced or works are erected, an assessment is to be made as to the amount to be paid as compensation for any loss of or damage to any crop on the land concerned.*

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<sup>6</sup> This occurs in some other States, eg Victoria (Mineral Resources Development Regulations 2002, reg 16), WA (*Mining Act 1978*, s 31) and NT (*Mineral Titles Act*, s 66(2)). See Christensen et al (2011), p 391 & footnote 100.



- (2B) The assessment is to be made as agreed between the landholder and the holder of the production lease or, failing agreement, by the Land and Environment Court on the application of either or both of them.
- (3) Cultivation for the growth and spread of pasture grasses is not to be taken to be cultivation within the meaning of this section unless, in the opinion of the Minister, the circumstances so warrant.
- (4) In the case of dispute as to whether land is or is not under cultivation within the meaning of this section, the Minister's decision on the matter is final.

The key aspects we note from this provision to the Committee are:

- The provision does not permit a landholder to object to the production lease itself, rather it allows a limited objection to the exercise of certain rights under that lease.
- The landholder's ability is not a 'veto', but an ability to 'withhold consent' – to mining operations or the erection of works in certain areas.
- This ability or right is restricted to 'land which is under cultivation'.
- Land 'under cultivation' is not defined (unlike 'agricultural land' in the Mining Act 1992); however, it expressly *does not* include 'cultivation for the growth and spread of pasture grasses', unless the Minister determines this.
- The Minister (for Resources and Energy) has the final say on whether land is or is not under cultivation.
- Notwithstanding the landholder's ability to withhold consent in those limited circumstances, this ability is further restricted by the Minister's discretion to *allow* certain mining operations or erection of works on specified cultivated land, 'if the Minister considers that the circumstances warrant it'.

We make recommendations in relation to these points above.

### ***Corresponding provisions under the Mining Act (objections to mining on agricultural land)***

The *Mining Act 1992* (NSW) (**Mining Act**) uses a different term, 'agricultural land', in somewhat similar provisions.

Under the Mining Act, within 21 days of applying for a *mining lease* (which is proposed to extend to the surface of land), the applicant must notify those landholders whose land will be covered by the lease.<sup>7</sup> A landholder then has 28 days within which to lodge a written objection to the granting of a lease.<sup>8</sup>

A landholder is only entitled to object to a proposed mining lease on the basis that the land over which the lease is sought is *agricultural land*.<sup>9</sup> (Other grounds of objection can be cited, but they are not capable of stopping a lease from being granted).

"Agricultural land" is defined in Schedule 2 of the Mining Act.<sup>10</sup> If the land is determined to be agricultural land, the mining lease cannot be granted unless the landholder consents.<sup>11</sup>

<sup>7</sup> *Mining Act 1992* (NSW), Schedule 1, cl 21(3).

<sup>8</sup> Sch 1, cl 21(4)(c).

<sup>9</sup> Sch 1, cl 22(1).

<sup>10</sup> It includes, for example:

- land that has been sown with not less than 2 crops of an annual species during the period of 10 years immediately preceding the relevant date;



### 3. Regulating fugitive and greenhouse emissions from CSG activities (QON)

In Committee hearings of 8 December 2011, the Committee asked the EDO the following:

*...[I]n the recent Senate inquiry, Senator Bill Heffernan's inquiry, he recommends that it is absolutely critical for consideration of the development of the coal seam gas industry that there be improved regulation and then compliance measures developed to deal with fugitive emissions. You may wish to take this on notice, but could you comment on that and whether you have any recommendations about what areas we should be looking at to improve those regulations for the industry in New South Wales, and what areas of compliance may also need to be improved?"*

*... For instance, the science shows that whereas the greenhouse gas emissions from burning coal mainly occur in the burning, the bulk of those that occur with coal seam gas are in the production and transport phases. As a consequence the future of this industry will be critically impaired or improved by the development of regulations, technology and compliance measures to overcome the issue of fugitive emissions.*

#### **EDO recommendations relating to fugitive and other greenhouse emissions (summary)**

- Further independent scientific studies into the lifecycle greenhouse gas (GHG) emissions of CSG, coal and other energy sources in NSW and Australia (both non-renewable and renewable).
  - This will assist decision makers to make good decisions on energy production and development; form an objective basis to evaluate efficiency claims; and help transition to a low-carbon economy, consistent with Australia's commitments and international obligations.
- Mandate the assessment of GHG emissions of proposed mining projects at the *environmental impact assessment* stage, and assessment of plans to minimise emissions.
- Include GHG emissions and climate change as an *explicit, mandatory consideration* for decision makers:
  - in assessing applications for *development consent* under the *Environmental Planning & Assessment Act 1979* (eg at s 79C or equivalent); and
  - in assessing applications for *exploration or production titles* under the *Petroleum (Onshore) Act 1991* (eg at s 74).
- Mining and planning laws could mandate that decision makers impose GHG-related *conditions* on exploration and production titles, and/or development consents (instead of relying on discretion to impose or not impose such conditions).
- Even if imposing GHG-related conditions remains discretionary, the *Petroleum (Onshore) Act 1991 (P(O) Act)* should make *specific reference to* and permit conditions that protect air quality and minimise GHG emissions (eg at ss 74-77).
- Move towards including GHGs as pollutants in *State pollution control laws*, to recognise their contribution to environmental degradation and encourage behavioural change.

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- land on which at the relevant date, shade, shelter or windbreak trees are growing;
  - land that is used, to an extent acceptable to the relevant authority, for the production of grass seed, pasture legume seed, hay or silage; or
  - land that has a preponderance of improved species of pasture grasses.

<sup>11</sup> Mining Act 1992, Sch 1, cl 23(1). A similar procedure inviting objections from landowners applies before the Minister can invite tenders for a mining lease which will extend to the surface of land (Sch 1, Div 4, cl 21).

- Increase requirements on industry to *monitor and minimise emissions during CSG/coal extraction*. Minimisation/mitigation could include improved extraction technologies, carbon credit offsets or other abatement measures.<sup>12</sup>
- *Increase resourcing* for relevant compliance and enforcement divisions in order to improve rates of audits, investigations and prosecutions (for breaches of conditions).
- Fund additional compliance activities through industry licensing fees/levies.
- More generally, the EDO makes nine recommendations to improve monitoring and enforcement of the mining industry in its June 2011 discussion paper, *Mining Law in NSW*, tabled at the Committee hearings.<sup>13</sup>

### Detailed response to support recommendations

The federal Senate Committee’s interim report on CSG in the Murray Darling Basin [at 5.21] concludes that fugitive emissions from CSG “is a serious issue and it does merit continued study”, particularly given the potency of methane emissions in contributing to global warming (noted in our written submission). The report finds “it is vitally important to have accurate data collected from the actual gas facilities rather than relying on extrapolation from a small sample or another region.”

This is reinforced in a Citigroup Investments paper on *Coal Seam Gas & Greenhouse Emissions*.<sup>14</sup> That paper notes, among other things:

*The CSG projects appear to assume that minimal quantities of methane gas escape as fugitive emissions. ... However, fugitives depend heavily on actual operating practices, including ship operations, and we are not yet convinced that all these are well understood. If fugitive emissions were 1% higher than the numbers in this report, this would add an estimated 0.034t/MWh (6-7%) in the [Combined Cycle Gas Turbine] case... (emphasis added)*

The Citigroup paper also notes:

- “A new gas fired baseload power station would have roughly half the emissions of a typical coal plant” (p 3), but also “power station efficiency is the most critical variable”. (p 7)
- “For CSG/LNG emissions in production, processing, transport and regasification equate to around 30-37% of the emissions that occur in the power station. For coal, the production and transport emissions are roughly 6-7% of power station emissions, under base case assumptions.” (p 5)
- “Quantification and measurement of leaks/fugitives appears imprecise at present, and generalized assumptions tend to be made.” (p 12)
- Gas *consumed* during the production phase (focusing on LNG studies), including venting and fugitive gas, is estimated at around *one quarter* of the gas produced (p 14)
- Overseas comparative emissions studies, such as that of Howarth,<sup>15</sup> are of limited application to the Australian industry (p 17).

<sup>12</sup> Christensen et al, at 411. See eg *Greenpeace Australia v Redbank Power Company and Singleton Council; Hunter Environment Lobby v Minister for Planning* (‘Ulan’).

<sup>13</sup> Tabled at the Legislative Council inquiry on 8/12/2011, and available at [http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining\\_law\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf).

<sup>14</sup> E Prior et al, *Coal Seam Gas & Greenhouse Emissions* (August 2011), Citigroup Global Markets (Australia/NZ).

The Senate Committee [at 5.23] considered that the most important message that emerged on the question of fugitive emissions “is that government must have in place rigorous monitoring and regulatory regimes.” It suggested this must include technical monitoring capacity, adopting the most efficient technologies to minimise fugitive emissions, and a ‘qualified inspectorate’ to ensure compliance.

The EDO supports these findings, as fugitive emissions are an important part of the equation. As noted below though, the broader question is how to better regulate GHG emissions more generally.

A recent article in the *Environment & Planning Law Journal*, *Regulating greenhouse gas emissions from coal mining activities in the context of climate change*, notes:

*Several legislative mechanisms currently exist which appear to offer the means to bring about the reduction or mitigation of greenhouse gas emissions from coal [including CSG] mining activities, yet Australia’s emissions from coal mining continue to rise.<sup>16</sup>*

By way of context:

- Australia has made an unconditional and bipartisan commitment to reduce its GHG emissions by at least 5% from 2000 levels by 2020, under the Copenhagen Accord;
- yet in February 2011 the Australian Government predicted a projected increase in emissions of 24% *above* 2000 levels;
- in 2009 the Government estimated that fugitive emissions accounted for 7% of Australia’s GHG emissions, and that fugitive emissions would effectively double on 2000 levels by 2020.<sup>17</sup>

The EDO supports Christensen et al’s conclusion that – despite the potential avenues to deal with and reduce fugitive and other GHG emissions – current regulation is uncoordinated and inadequate, and a range of measures are needed at different stages. This includes at the stages of **environmental impact assessment, development consent, granting of titles, pollution control laws, and monitoring and enforcement** (eg prosecution for breaches). Such measures are needed in addition to a national carbon price. We explore these in turn.

### ***Environmental impact assessment***

For example, the EP&A Act or its successor should *require* that the environmental impact assessment process incorporates assessment of the GHG emissions, and corresponding environmental impacts, of a development (particularly large projects). This would arm decision-makers with information that they may not have, or ask for, under current requirements. As Christensen et al note, having the information is only a first step. The *Ulan* case below illustrates the gap between assessing emissions and actually minimising/offsetting them.<sup>18</sup>

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<sup>15</sup> Robert Howarth, “Methane and the greenhouse-gas footprint of natural gas from shale formations” (March 2011), Cornell University, Ithaca, NY.

<sup>16</sup> Article by Professor Sharon Christensen, Dr Nicola Durrant, Assoc. Prof. Pamela O’Connor and Angela Phillips, *Environmental and Planning Law Journal*, Vol 28/6, November 2011, at 381.

<sup>17</sup> Christensen et al, at 381 and 385. The doubling refers to a 97% increase (Dept of Climate Change and Energy).

<sup>18</sup> Christensen et al, at 403.

## *Placing conditions on development consent*

### *Hunter Environment Lobby Inc v Minister for Planning ('Ulan')*

The recent *Ulan* case highlights the Planning Department's unwillingness to use the development assessment process to impose conditions relating to greenhouse emissions on coal mines generally. The case involved merits review of the former Planning Minister's decision to consolidate various development consents, and approve an expansion that would effectively double the capacity of the Ulan coal mine, 40 km north of Mudgee.

As Justice Pain noted at [59], "There is no formal document setting out the government's position on the treatment of scope 1, 2 and 3 GHG emissions and the risk of climate change in the development assessment process under the EP[&]A Act." The case has resulted in the first imposition of conditions to offset greenhouse emissions from an Australian coal mine.<sup>19</sup>

Two bases for the Department's reluctance demonstrated by *Ulan* appear to be maintaining 'equity' with conditions on more than 50 pre-existing NSW coal mines; and the lack of specific requirements to consider climate change under the EP&A Act.<sup>20</sup>

Noting the above, the EDO strongly recommends GHG emissions and climate change impacts become an *explicit consideration* for decision makers in the planning system, including when assessing development proposals for CSG and other mining projects.<sup>21</sup> If projects are approved, *conditions to minimise, quantify and offset* GHG emissions should also be placed on development consents.

## *Placing conditions on mining titles*

To supplement development consent conditions, another way to improve monitoring and compliance related to fugitive and other greenhouse emissions would be to *impose conditions on exploration and production titles*. For example, requiring proponents to report on,<sup>22</sup> and importantly, reduce greenhouse emissions (including fugitive emissions).

There are usually extensive conditions attached to the exploration or production title, and/or the development consent. The conditions attached to a title<sup>23</sup> or a development consent are legally binding.<sup>24</sup> Different types of (discretionary) conditions can be attached to a licence as required.<sup>25</sup>

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<sup>19</sup> The final scope of the offset is still to be determined, and the mining company may appeal against the Land and Environment Court decision.

<sup>20</sup> Amongst other reasons cited. See *Ulan*, paras 60-61.

<sup>21</sup> See EDO NSW, *Submission to the Review of the NSW Planning System (Stage 1)*, 4 November 2011, 'Guiding principle – Making planning law climate change ready', pp 18-23.

<sup>22</sup> Under, eg, s 133 of the P(O) Act and cl 14 of the P(O) Regulation 2007. However we suggest the Minister be required to make comparative emissions data publicly available, encouraging scrutiny and improvement.

<sup>23</sup> P(O) Act s 136A. In addition, the Minister for Resources and Energy can serve a written notice on the holder of a petroleum title directing the person to give effect to any conditions included in the petroleum title. Failure to comply with such a direction is an offence which may incur a maximum penalty of \$11,000 [P(O) Act s 77]. If the person fails to comply with the direction, the Minister can have the work undertaken at the expense of the title holder [s 78].

<sup>24</sup> See, eg, EP&A Act 1979, s 89E(1)(a).

<sup>25</sup> See P(O) Act, s 23 and ss 75-76.

### ***Specific environmental considerations in the Petroleum (Onshore) Act***

In addition to the above suggestions, the P(O) Act (eg s 75, which lists topics for discretionary environmental protection conditions) could be amended to specifically refer to conditions to *protect air quality* and *minimise greenhouse emissions* – in addition to protecting matters such as flora, fauna, fish, and scenic attractions.

The Resources Minister could also be required to take into account the need to reduce GHG emissions, in deciding whether or not to grant a petroleum title (in addition to the existing environmental matters listed in s 74 of the P(O) Act).<sup>26</sup>

### ***Regulate greenhouse emissions under pollution law***

The EDO has elsewhere argued that policymakers and regulators should consider updating NSW pollution laws to regulate greenhouse gases as an environmental pollutant (eg load-based licensing under the *Protection of the Environment Operations Act 1992*).<sup>27</sup>

### ***Increased monitoring and enforcement***

Conditions on mining titles, development consents and pollution licences would only be effective if government agencies monitor, audit and enforce the conditions once imposed (as the federal Senate report concurred). The NSW Ombudsman has suggested that additional compliance activities could be funded by licensing levies.<sup>28</sup> We would support this suggestion.

### ***Comparing fossil fuels and renewables***

Finally, we note that the Citigroup paper (above) suggests that renewables, rather than coal, might become the more appropriate comparison for CSG/LNG greenhouse emissions in the longer term (p 15):

*Gas is compared with coal under the assumption that gas will displace potential coal use... However, gas still has significant GHG emissions, and it appears unlikely that the 2°C global warming scenario will be achieved unless electricity generation is largely decarbonised.*

Similarly, in our oral evidence to the Committee, the EDO noted:

*On the issue of fugitive emissions, there is uncertainty as to their quantity and they need to be properly studied and further examined. It is in everyone's interests, both the companies who are potentially losing gas through fugitive emissions as well as the environment [and] the communities that those emissions be properly quantified and factored into a full life cycle assessment of the greenhouse emissions in relation to coal seam gas as distinct from other fossil fuels. As we said in our submission, we [would] welcome the Committee's consideration beyond fossil fuels to alternative energies to look at comparative emissions and environmental impacts.*

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<sup>26</sup> Subsection 74(2) already empowers the Minister to cause studies to be carried out (including environmental impact studies) to enable such a decision to be made.

<sup>27</sup> *The case for regulating carbon dioxide emissions using the load-based licensing scheme – Discussion paper* (July 2010), at [www.edo.org.au/edonsw/site/pdf/subs/100721load\\_based\\_licensing\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/100721load_based_licensing_discussion_paper.pdf).

<sup>28</sup> NSW Ombudsman, Submission 436 to NSW Legislative Council CSG Inquiry, 19/9/2011.

#### **4. Reviews of environmental factors (further information)**

The review of environmental factors (**REF**) process was discussed in the EDO's appearance, and in Appendix 1 to our written submission to the Inquiry. An REF is a preliminary review of environmental impacts for projects that don't require development consent. REFs are intended to comply with Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), although REFs are not prescribed in the Act itself.

Since the EDO's written submission, the Department (**DTIRIS**) has issued draft guidelines on the REF process for public consultation. The EDO's comments on the draft guidelines, including a summary, are available on our website.<sup>29</sup> It is not clear what proportion of new CSG projects the guidelines and Part 5 will apply to. We understand that most CSG exploration and production projects will now be classified as State significant development.<sup>30</sup> Some further background on REFs and environmental impact assessment is provided below.

#### **Background – Environmental Assessment of CSG exploration activities<sup>31</sup>**

Environmental assessment is undertaken by a consultant paid for by the proponent. The environmental assessment that is undertaken for CSG exploration will depend on whether or not the exploration activities require development consent.

Where development consent is required, the environmental assessment will occur under the relevant provisions of the EP&A Act. In most cases, this will be the environmental assessment process that applies to State significant development. Sometimes, the project will not qualify as State significant development, and in those cases it is likely to be assessed as designated development.

#### *Where CSG exploration does not require development consent (REF and EIS processes)*

Even where development consent is not required, the environmental impacts of the exploration will still need to be assessed by way of an REF.<sup>32</sup> If the REF reveals that an exploration title is likely to have a significant impact on the environment, then the applicant must provide the Minister for Resources and Energy with an environmental impact statement (**EIS**).<sup>33</sup> An EIS is a more detailed assessment of the environmental impacts. In addition, a Species Impact Statement (**SIS**) assesses the impact of the development on threatened species, populations, and ecological communities and their habitats. A SIS is only required where a significant impact is likely.

These environmental assessment reports can only be accessed by the public after approval has been given.<sup>34</sup>

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<sup>29</sup> [http://www.edo.org.au/edonsw/site/pdf/subs/111201dtiris\\_eia\\_guidelines.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/111201dtiris_eia_guidelines.pdf). The submission argues that while more stringent guidelines may improve the quality of REFs, such guidelines will not by themselves address the broader legal and structural factors that hinder environmental impact assessment for mining and CSG exploration in NSW.

<sup>30</sup> *State Environmental Planning Policy (State and Regional Development) 2011*, Schedule 1, cl 6, 'Petroleum (oil and gas)'.

<sup>31</sup> Based on EDO's CSG factsheet (Oct 2011), at 5.1.6.3.3.

<sup>32</sup> EP&A Act, s 111.

<sup>33</sup> EP&A Act, s 112.

<sup>34</sup> See DTIRIS Draft Guidelines on EIA; reports available at [www.dpi.nsw.gov.au/minerals/environment/nod](http://www.dpi.nsw.gov.au/minerals/environment/nod).



## 5. Sources of EDO funding (further information)

On page 12 of the transcript, Mr Smith informed the Committee that the NSW Environmental Trust had funded the EDO for three education project over the past three years. This is correct. However, Mr Smith wanted to clarify to the Committee that the projects funded were for:

- *Rural Landholders' Guide to Environmental Law* - a booklet and 10 complementary workshops.
- *Private Conservation* - a booklet and 4 complementary workshops on the various conservation options available to landholders and facilitation of access to pro bono legal advice on this.
- *Mining* - A booklet and 6 complementary workshops to educate the community about the regulation of mining in NSW.

In this respect, Mr Smith mistakenly stated to the Committee that the coastal law booklet was funded by the Environmental Trust, whereas the third project was in fact the mining booklet and workshops referred to above.<sup>35</sup> Mr Smith wishes to apologise to the Committee for this error.

For completeness, Mr Smith also wanted to inform the Committee that in the past three years the EDO has received a grant from the NSW Environmental Trust under the Lead Environmental Community Groups Program (**LECG**). The objective of the LECG program is to provide administrative funds to assist eligible lead environmental community organisations in NSW to value, conserve and protect the natural environment through:

- actively involving the community in projects to protect and enhance the natural environment
- raising community awareness and understanding of, and gathering information on, environmental issues with a view to bringing about behavioural change across the community
- being effective advocates in expressing the community's environmental concerns and
- being actively involved in program and policy development initiatives with governments and industry bodies on environmental issues.

The funding received through this program is applied to rent for the Office, contributing approximately 39% of total rent payable by the organisation.

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<sup>35</sup> The coastal law booklet was funded under a federal government grant.



## **Attachment A – Excerpt from EDO Coal Seam Gas factsheet (October 2011)**

### **5.1.6.4.6 Landholder rights**

#### **Finding out about CSG production**

- Production leases

An applicant must notify the public of an application for a production lease within 21 days of lodging the application. Notice must appear in a newspaper which has a State-wide circulation.<sup>93</sup>

The notice must state that an application for a production lease has been or will be lodged and contain enough detail to allow for the identification of the area of land over which the lease is sought. It must include a plan and a description of the area as well as the approximate direction and distance of the nearest town.<sup>94</sup>

- Development consent

If development consent is required, the application will be publicly notified on the [Department of Planning and Infrastructure's website](#).

#### **Having a say**

Affected landholders do not get a say as to whether a production lease is granted.

However, when development consent is applied for, members of the public can write a submission outlining objections to the proposal. This must be done in the 30 day exhibition period.<sup>95</sup> Any person can write a submission. When writing, people are encouraged to consider what conditions would minimise the adverse impacts of the development on them, and ask for these conditions to be attached to the consent. Conditions could relate to things such as:

- The public interest;
- Restrictions on noise, dust, light and operating hours;
- Buffer zones to preserve visual amenity;
- Restoration works;
- Avoidance of certain sites; and
- Water monitoring.

#### **Restrictions on petroleum production near houses, gardens etc**

A landholder must give written consent for petroleum production to occur within:

- 200m of a house;
- 50m of a garden, vineyard or orchard; or
- On any 'improvement' (substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure).<sup>96</sup>

This is an important right that landholders can exercise to ensure that petroleum production activities do not encroach too close the landholder's assets. Once a landholder has given consent it cannot be withdrawn.<sup>97</sup>

The Minister for Resources and Energy decides whether an improvement is substantial or valuable.<sup>98</sup>

Disputes are heard by the Land and Environment Court.<sup>99</sup>



### **Restrictions on petroleum production on cultivated land**

The holder of a production lease must not carry out any mining operations or erect any works on the *surface* of any land which is under cultivation except with the consent of the landholder.<sup>100</sup>

This is an important provision to protect cultivated land from the adverse impacts of CSG production. It is important that landholders are aware of their right to withhold consent and the implications of giving such consent.

Despite this, the Minister for Resources and Energy may define an area of the surface of any parcel of cultivated land on which mining operations may be carried out or works may be erected.<sup>101</sup>

#### **5.1.6.4.7 Landholder Obligations**

A person must not unlawfully obstruct or hinder the holder of a production lease from undertaking activities that are authorised by that lease. The maximum penalty is \$11,000.<sup>102</sup>

It is not unlawful to obstruct or hinder a title holder if the purpose of the obstruction is to prevent unauthorised actions.

#### **5.1.6.4.8 Access Arrangements**

There is no requirement for the gas company to negotiate an access arrangement with you for mining/production activities. Access arrangements are only required for the exploration and assessment stage.

Your existing access arrangement may cover production activities.

