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# *Mining and Petroleum Legislation Amendment Package 2015* (NSW)
## Briefing Note – February 2016*

*EDO NSW is a community legal centre specialising in public interest environmental law.*

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* *Please note: This briefing note provides general information only, not legal advice. Visit the official* NSW Legislation *webpage for the most up-to-date information. For further information on this briefing note please contact Nari Sahukar, Senior Policy & Law Reform Solicitor (contact details at top).*

## About this briefing note

On 15 October 2015 the NSW Government introduced a package of five Bills into Parliament that make significant amendments to the State's minerals and petroleum (coal seam gas) laws. The Bills passed the Parliament without amendment a week later. They have now been assented to (signed into law) but not all the Bills or provisions had commenced as at January 2016. Further amendments to regulations are also likely under the *Mining Act 1992* (**Mining Act**) and the *Petroleum Onshore Act 1991* (**Petroleum Act**).

This briefing note gives an overview of key changes and EDO NSW analysis of each Bill, with more detail on the changes at the end.

## Overview of the Bills

Here is a quick overview of what each Bill does:

1. **'Grant of Titles Bill'** – Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Bill 2015
    - Changes how the Government will identify and release new exploration and mining areas, and how exploration and mining 'title' applications are assessed and granted.
2. **'Harmonisation Bill' –** Mining and Petroleum Legislation Amendment (Harmonisation) Bill 2015
    - A lengthy Bill that aims to align mining and gas laws, and makes a range of significant changes under the Acts. This includes for example: standard provisions on granting titles, a new approval requirement for gas exploration; new offences and enforcement tools; and new objects in the Petroleum Act.
3. **'Land Access Bill' –** Mining and Petroleum Legislation Amendment (Land Access Arbitration) Bill 2015
    - Changes how mining companies and landholders negotiate access to private land (including tightening the meaning of a 'significant improvement' which can exclude mining on private land); includes new arbitration procedures; and requires mining companies to pay the reasonable costs of resolving disputes.
4. **'Gas Enforcement Bill' –** Protection of the Environment Operations Amendment (Enforcement of Gas and Other Petroleum Legislation) Bill 2015
    - Expands the EPA's oversight and investigation powers for coal seam gas, to oversee and enforce requirements in planning, mining, gas and water laws.
5. **'WH&S Bill'** – Work Health and Safety (Mines and Petroleum) Legislation Amendment (Harmonisation) Bill 2015.
    - Aligns work health and safety requirements in mining and gas laws (this briefing note does not examine the WH&S Bill in detail).

## Background to the Bills Package

The Bills were passed with very limited consultation and no public 'exposure drafts' before they were introduced into Parliament.[1]

The NSW Government has stated that the Bills implement various recommendations from prior government consultations and expert reviews. These include:

- Chief Scientist & Engineer's Review of NSW Coal Seam Gas Legislation (2014)
- NSW Government's Gas Plan (2014)
- Bret Walker SC's Review of Land Access and Compensation (2014)
- ICAC recommendations from its corruption inquiry into coal licence allocation (2013)
- Coal Exploration Steering Group on coal licence allocation (2014-15)
- Draft Strategic Release Framework for Coal and Petroleum (2015).

For EDO NSW submissions on several of these consultations and reviews, see: http://www.edonsw.org.au/mining_coal_seam_gas_policy.

### Which laws are affected

The five Bills amend the following Acts (and makes consequential changes to a few others):

- *Mining Act 1992* (**Mining Act**) – which regulates coal mining and other listed minerals, including the exploration or prospecting stage;
- *Petroleum (Onshore) Act 1991* (**Petroleum Act**) – which regulates coal seam gas (**CSG**) and other petroleum extraction and exploration;
- *Protection of the Environment Operations Act 1997* (**Pollution Act**) – which regulates pollution via the NSW Environment Protection Authority (**EPA**) and other regulators.

### When the changes commence

As at end January 2016 only some Bills and provisions had commenced (i.e. a start date hadn't been proclaimed for others). Four components commenced on **18 December 2015**:[2]

- ***Strategic Release Framework*** – a process to identify new areas for coal and gas exploration, to involve an Advisory Body of Government executives and a Preliminary Regional Impact Assessment (**PRIA**) based on existing information and consultation.
- ***Seismic survey notifications*** – requiring 21 days' notice (instead of written consent) to allow seismic surveying within 50m of a garden/improvement or 200m of a house.
- ***Operational Allocation*** – existing licence holders can apply for smaller coal licences (an exception to competitive grants to expand operations or extend life of a mine etc).
- ***Beneficial use of gas*** – allowing CSG prospectors (explorers) to use and sell? gas from prospecting activities within certain thresholds and limits (e.g. instead of flaring).

*Update 29/2/2016: Shortly after we first published this briefing note, the Government set a commencement date of **1 March 2016** for all remaining Harmonisation Bill provisions and for certain, transitional provisions in the Land Access Bill. The Government also made new*

[1] For example, the EPA consulted EDO NSW on the Enforcement Bill. We understand other stakeholder groups such as the mining industry and farming bodies were consulted on parts of other Bills before introduction.
[2] NSW Department of Industry - Resources & Energy, *NSW Gas Plan legislation update* (December 2015).

*regulations that give further effect to the Harmonisation Bill, amending existing regulations under the Mining and Petroleum Acts.*[3]

We outline key changes and analysis of each of the mining and gas amendment bills below. The key changes generally apply to both the Mining Act and Petroleum Act unless specified.

## 1. Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Bill 2015

The Grant of Titles Bill changes how the NSW Government will identify and release new exploration and mining areas for coal and gas, and how the Resources Minister will assess and grant exploration and mining title applications.

The Bill amends the Mining and Petroleum Acts to establish a 'Strategic release framework' for how land will be allocated for new coal and coal seam gas (**CSG**) exploration areas. Instead of a 'first-come, first-served' approach, the Bill also enacts a 'competitive selection process' for granting exploration licences and assessment leases[4] for coal (and other 'controlled minerals') and CSG. These provisions are in a new Schedule 1A in both Acts.

### Key changes in brief – Grant of Titles Bill

- **'Strategic Release Framework'**
- **New areas to prospect (explore) for resources**
- **Competitive process to apply for prospecting titles**
- **Public notification via Government Gazette instead of newspapers.**

Further details on each of these changes are addressed at the end of the briefing note.

### EDO NSW Analysis

- The competitive licence allocation process may improve the quality and transparency of applications. More clarity is needed on how communities will be notified of title grants.
- This Bill only implements the 'competitive tender' aspects of the Strategic Release Framework. The lack of clear, legislated assessment criteria for the Framework, Advisory Panel and 'Preliminary Regional Issues Analysis' Guidelines (**PRIA Guidelines**) remains a concern. The Bill should have addressed this after relevant consultations.
- EDO NSW made a submission on the Strategic Release Framework, which is to be informed by the PRIA Guidelines. We recommended:
    - implementing the PRIA and Advisory Body on Strategic Release in legislation;
    - including independent experts and added transparency for the Advisory Body;
    - considering climate change impacts in the Framework and PRIA Guidelines; and
    - the PRIA should go beyond existing data (adopting the precautionary principle, clear environmental assessment criteria, exclusion zones and cumulative impact assessment).

[3] Regulations and explanatory notes published 24 February 2016: Mining Legislation Amendment (Harmonisation) Regulation 2016: http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2016-102.pdf; Petroleum (Onshore) Legislation Amendment (Harmonisation) Regulation 2016: http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2016-105.pdf.

[4] An assessment lease is a separate type of mineral or gas prospecting title with specific rights attached.

- A strategic release framework that fails to consider climate change is not very strategic.
- It is unfortunate that the Bills package was introduced to Parliament and passed *during* the consultation period on the draft Strategic Release Framework (by the Department of Industry) and associated Preliminary Regional Impact Assessment (Department of Planning and Environment).
- This timing issue, and the lack of full stakeholder consultation or briefing on the Bills, sends confusing messages about how the many pieces of law and policy fit together.

## 2. Mining and Petroleum Legislation Amendment (Harmonisation) Bill 2015

The Harmonisation Bill makes a range of significant changes to processes and requirements under the Mining and Petroleum Acts, and makes mining and gas laws more consistent. According to the NSW Government, this Bill is 'the first stage in delivering a single resources act in NSW in line with the NSW Chief Scientist and Engineer's [2014] recommendations.'[5]

### Key changes in brief – Harmonisation Bill

- **Standard provisions for granting mineral and petroleum titles (Schedule 1B)**
- **New 'activity approval' process and conditions for prospecting activities**
- **New offences, enforcement tools, reporting and governance**
- **Beneficial use of gas from prospecting activities allowed.**

Further details on each of these changes are addressed at the end of the briefing note.

### EDO NSW Analysis

- The Harmonisation Bill contains over 100 pages of significant amendments. The lack of public consultation or an 'exposure draft' before the Bill was introduced is concerning. Unfortunately there is no legal obligation or policy commitment to consult on such Bills.[6]
- The Bill fails to implement the Preliminary Regional Impact Analysis (**PRIA**) Guidelines or require related studies, for example, on hydrogeology or high conservation value land mapping.
- Including environmental considerations in the licence assessment process is important, but the terms are very general, instead of building on existing specific considerations.[7]
- Listed considerations should have included the need to minimise greenhouse gas (**GHG**) emissions, including fugitive and legacy emissions. CSG is methane – a potent GHG.

[5] Department of Industry: Resources & Energy, 'Message from the Deputy Secretary' (email) 20 October 2015.
[6] This contrasts with State Environmental Planning Policies for example, where there is some (albeit discretionary) obligation for Ministers to consult and seek public submissions: *Environmental Planning and Assessment Act 1979* (NSW), s 38.
[7] See Harmonisation Bill 2015, new Schedule 1B, clause 3 to the Mining Act (and new Schedule 1B, clause 2 to the Petroleum Act). Cf Mining Act s. 237, Petroleum Act s. 74. The Bill (Schedule 2 item [3]) inserts a definition of ***environment*** into the Petroleum Act to reflect the existing definition in the Mining Act – to include 'all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social grouping'.

- The Bill continues to give the Resources Minister excessive discretion in considering and assessing resource title applications, conditions and exemptions.[8] In addition:
    - The purpose or need for ministerial discretion to grant exemptions from reporting or standard conditions is unclear.[9]
    - Similarly, exemptions and variations to title conditions (in Schedule 1B) are widely discretionary, and geared towards mining companies or the minister proposing changes.[10]
    - Instead, the ability to exempt or vary title conditions should be limited to specific criteria *and* be based on 'continuous improvement' of environmental outcomes.
- The Bill maintains excessive ministerial discretion around protecting 'exempted areas' (such as Crown lands including state forests) instead of clear exclusions or procedures.[11]
- The Bill misses significant opportunities to improve transparency and engagement, including public consultation, notice, publication of titles, conditions etc.
- The fact that gas explorers can now use and sell gas from the exploration stage reinforces our recommendation that all gas exploration should require consent and EIS.
- Potentially positive changes in the Harmonisation Bill include:
    - attempts to harmonise Mining and Petroleum Act provisions,
    - a new 'activity approval' and conditions requirement for prospecting activities (but further information on this requirement is needed),
    - new enforcement tools and offences,
    - frequent inclusion of 'cost recovery' options for regulators, and
    - inserting objects into the Petroleum Act (which previously had none), including 'having regard to the need to encourage ecologically sustainable development'; compensation to landholders for loss and damage; the need for appropriate returns to the State; ensuring effective rehabilitation of land and water (and security payments for this); and minimising environmental impacts.

[8] See for example, new Schedule 1B to the Mining Act (clauses 3-11) and Petroleum Act (clauses 2-8).
[9] See for example, Harmonisation Bill, 163C to the Mining Act and 97C(2)(b) to the Petroleum Act (reporting). See also Harmonisation Bill Schedule 1B, clause 11 to the Mining Act; clause 8 to Petroleum Act (conditions).
[10] See Harmonisation Bill, new Schedule 1B, Part 4 to both the Mining Act and Petroleum Act. Public notification and a 28-day submission period are required *if a variation affects a condition imposed by the Regulation* (Sch. 1B clause 13 to Mining Act; clause 9 to Petroleum Act). However, public notification and submissions do not seem to apply to other variations or to *exemptions* from conditions (Sch. 1B clause 11-12 to Mining Act; clauses 8-9 to Petroleum Act).
[11] See existing Mining Act s. 30; existing Petroleum Act s. 70.

## 3. Mining and Petroleum Legislation Amendment (Land Access Arbitration) Bill 2015

The Land Access Bill changes how mining companies and landholders negotiate access to private land. The Bill also reforms arbitration procedures and costs for resolving disputes. According to the Government, 'the new land access framework offers a fairer, more efficient, consistent and transparent process for parties to reach agreement.'[12]

### Key changes in brief – Land Access Bill

- **Access arrangements now required for gas production stage**
- **Resource title holders to pay landholders' reasonable costs**
- **Stricter definition of 'significant improvement' on private land will limit exclusions**
- **Roadside seismic surveys – landholder notification, not consent**
- **More stringent requirements for dispute mediation, arbitration and Panel appointment**
- **Access Code and mandatory provisions in access arrangements**
- **Exclusion of reckless conduct from the general immunity of landholders.**

Further details on each of these changes are addressed at the end of the briefing note.

### EDO NSW Analysis

- It is good that the Land Access Bill extends requirements for access arrangements to the petroleum production lease stage. This addresses a gap that EDO NSW and others identified in the 2011 parliamentary inquiry into CSG.
- The Bill restricts the definition of 'significant improvement' on private land (under both Acts). This will make it more difficult for landholders to exclude resource-related activities. The new definition includes several steps, all of which must be satisfied for landholders to access protections for 'significant improvements' on their land.
- The Bill downgrades landholder rights in relation to resource-related seismic surveys close to their homes, gardens and significant improvements. Consent is no longer required when the survey occurs on a public road. Previously this did require landholder consent, but the Bill now requires *21 days' notice* instead.
- The Bill goes some way to improving the situation of *landholder costs* in resolving land access disputes in three ways (but arguably protections could be stronger):
    - it spells out dispute resolution (mediation/arbitration) procedures more clearly
    - requires resource companies to pay 'reasonable' landholder costs of negotiation, legal advice, arbitration and future court proceedings (although the costs caps will need to be set high enough to cover actual costs in full), and
    - provides for minimum-standard, mandatory clauses in access arrangements.
- Requiring mining companies to pay landholders' reasonable costs of negotiations, hearings and court proceedings is more equitable than landholders bearing their own costs.

[12] Department of Industry: Resources & Energy, 'Message from the Deputy Secretary' (form email) 20/10/2015.

## 4. Protection of the Environment Operations Amendment (Enforcement of Gas and Other Petroleum Legislation) Bill 2015

The Gas Enforcement Bill amends the *Protection of the Environment Operations Act 1997* (NSW) (**Pollution Act**). The Bill formalises the NSW Environment Protection Authority's (**EPA**) authority to investigate breaches and bring enforcement proceedings for petroleum-related activities that are authorised under petroleum, planning and water laws.

The EPA consulted EDO NSW and other stakeholder groups prior to this Bill's introduction.

### Key changes in brief – Gas Enforcement Bill

- **Extending existing EPA powers to cover *petroleum offences* under other laws:**
  - *Petroleum (Onshore) Act 1991* (NSW) **(Petroleum Act)**
  - *Environmental Planning and Assessment Act 1979* (NSW) **(Planning Act)**
  - *Water Management Act 2000* (NSW)
- **Better tools to respond to breaches**
- **Information sharing between agencies.**

Further details on each of these changes are addressed at the end of the briefing note.

### EDO NSW Analysis

- We support the expansion of the EPA's role to oversee titles and enforce gas offences.
- We proposed several recommendations prior to the Gas Enforcement Bill's introduction:
  - clarify the EPA can enforce breaches of *Part 5 approvals* that don't need consent (EPA confirms that such activities, including gas exploration, are covered);
  - allow the community to bring civil court cases under the Petroleum Act – by extending 'open standing' as under planning, pollution, mining and water laws (not accepted by Government);
  - clarify that *offences* under Chapter 7 of the Pollution Act apply to petroleum activities (the EPA confirmed that they do);
  - clarify and update circumstances in which EPA will require mandatory audits (not accepted, based on existing guidance);
  - remove the 'ceiling' on *penalty notice* amounts in the Petroleum Act (repealed by the Harmonisation Bill[13]),
  - increase other outdated, insufficient penalties under petroleum and water law:[14]

[13] Petroleum Act s. 137A(7) limited the maximum prescribed penalty notice amount to 100 penalty units (**PU**) (repealed by Harmonisation Bill, Schedule 2, item [47]). Most prescribed penalty notices remain far below this.

        - to date, a company that breaches a petroleum title condition could be issued with a penalty notice of $2500 – just 0.2% of the maximum penalty a court could impose for breaching a condition ($1,100,000);
        - similarly, water regulations set penalty notices of between $200 - $1500;
        - by contrast, Planning Act penalty notices recently increased tenfold.[15]
    - require publication and public access to monitoring data for any 'petroleum authority' condition (referred for future consideration);[16]
    - 'petroleum authorities' (titles) should also include 'activity approvals' as defined under the Water Management Act (not accepted);
    - all CSG exploration should require an EIS, consent and public consultation (not accepted).[17]
- It is encouraging that the Harmonisation Bill above removes the $11,000 cap on penalty notices under the Petroleum Act, but the low penalties noted above remain in place at the time of writing.

## 5. Work Health and Safety (Mines and Petroleum) Legislation Amendment (Harmonisation) Bill 2015

The WH&S Bill aligns work health and safety requirements in mining and gas laws.

Following its enactment with the other Bills in October 2015, this Act and its new regulations commenced on 1 February 2016.

This briefing note does not consider the WH&S Bill in any further detail.

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[14] Under the Gas Enforcement Bill, clause 3(4), if another Act prescribes a penalty notice for a petroleum offence (e.g. petroleum, planning or water laws), then that becomes a penalty notice offence under the Pollution Act. While the EPA can now issue such penalty notices, the other Act determines the penalty amount.

[15] See the Petroleum (Onshore) Regulation 2007 and the Water Management (General) Regulation 2011. Cf Environmental Planning and Assessment Regulation, Schedule 5 (Penalty notice offences). The EPA noted the concern regarding penalty notices and stated that any decision to change penalty amounts would occur through parent legislation rather than the Bill. (Letter from EPA to EDO NSW, 14 October 2015).

[16] For example, by expanding Pollution Act section 66(6).

[17] EDO Submission on *Protection of the Environment Operations Amendment (Enforcement of Gas and Other Petroleum Legislation) Bill 2015*, 24 September 2015, 1.

# Key changes of the Bills in detail

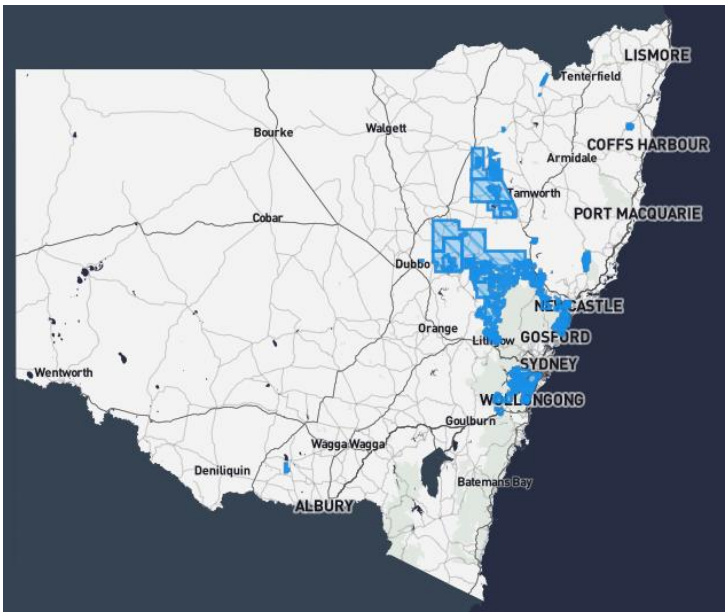
## 1. Grant of Titles Bill (detail)

### 'Strategic Release Framework'

The Bill amends the Mining and Petroleum Acts to establish a 'Strategic release framework' for how land will be allocated for new coal and coal seam gas (**CSG**) exploration areas. Instead of a 'first-come, first-served' approach, the Bill also enacts a 'competitive selection process' for granting exploration licences and assessment leases[18] for coal (and other 'controlled minerals') and CSG. These provisions are in a new Schedule 1A in each Act.

### New areas to prospect (explore) for resources

The Bill makes the entire State a 'controlled release area' for coal.[19] This means that the new Strategic Release Framework and competitive title allocation will apply across the State (apart from lands covered by existing titles) under new Schedule 1A of each Act.[20]




***Coal** exploration licences in force as at 17 February 2016*[21]

In the Bills' second reading speech, the Resources Minister said that statewide coverage of CSG exploration licences has been reduced from 60 per cent of the state to 8.5 per cent, following 16 licence buybacks and cancellations and setting aside of existing applications.[22]

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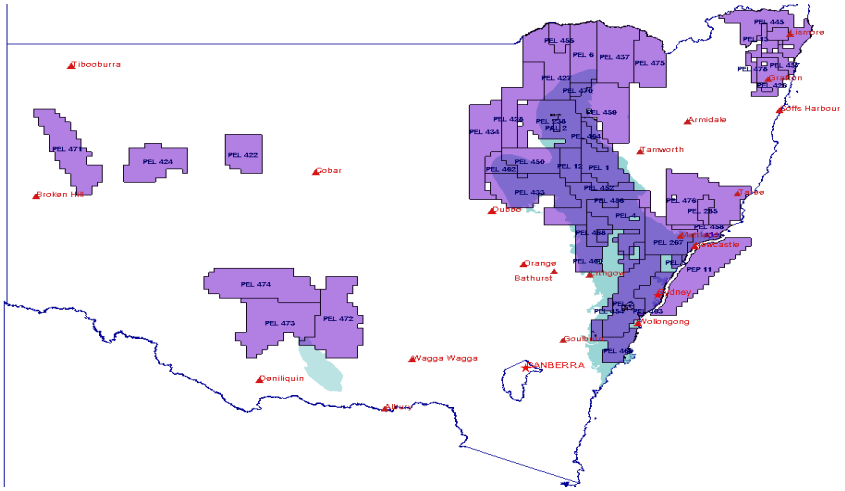
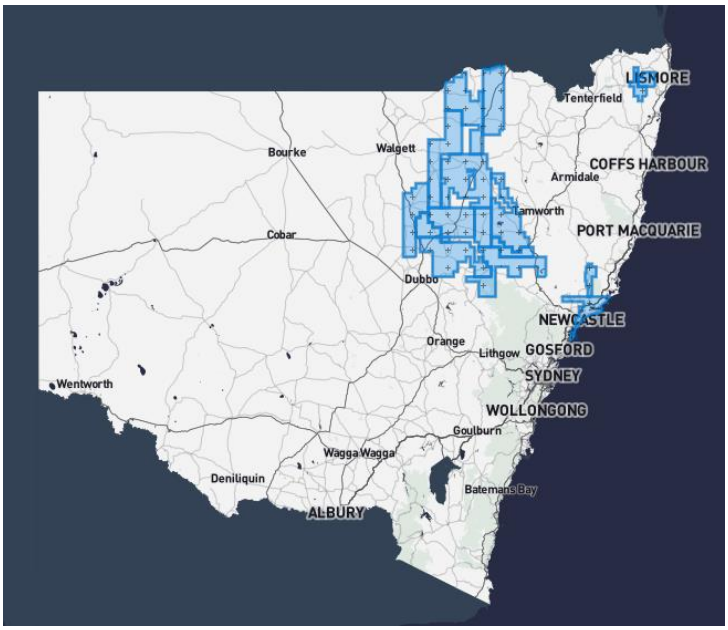
[18] An assessment lease is a separate type of mineral or gas prospecting title with specific rights attached.
[19] The Bill allows the Resources Minister to designate any land in NSW a 'controlled release area' for prospecting (exploration) relating to coal and other minerals (but not CSG/gas). See Grant of Titles Bill, Schedule 1, item [18], which inserts a new s. 368A in the Mining Act.
[20] Grant of Titles Bill, Schedule 1 item [1] and [19]; Schedule 2 items [1] and [7]. See also Mining Act, new s. 13(3A); Petroleum Act, new s. 8.
[21] NSW Department of Industry – Resources & Energy, *Common Ground*: http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/common-ground
[22] Minister Anthony Roberts, Second Reading Speech, NSW Legislative Assembly hansard, 15 October 2015.




***CSG** titles as at 3 July 2012 (this map includes exploration and production licences)*[23]




***CSG** exploration licences as at 18 February 2016 (production licences not shown)*[24]

[23] Source: NSW Department of Industry – Resources & Energy, *TASMAP*: http://www.dpi.nsw.gov.au/minerals/titles/online-services/tasmap

[24] Source: NSW Department of Industry – Resources & Energy, *Common Ground*: http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/common-ground

**Competitive process to apply for prospecting titles**

The Bill requires that *prospecting titles* (i.e. to explore for coal, mineral and gas resources[25]) must be granted via a competitive selection process (with some exceptions).[26]

In making decisions on these competitive title applications, the Minister must consider factors set out in the Mining or Petroleum Act, and any new regulations. However, the Bill also gives the Minister wide discretion to consider any other factors, and what weight to give those matters.[27]

A competitive selection process does not guarantee that a prospecting title will be issued (because all competing applications may be refused).[28]

**Public notification via Government Gazette instead of newspapers**

The Bill requires the Government to publish invitations for competitive tender of *prospecting titles* (mining or gas) in the Government Gazette. This is publicly available on the NSW Legislation website.[29] The invitation may require additional information to existing application requirements.[30]

To date the Mining Act has required a prospecting title applicant to publicly notify they've applied, via a local and statewide newspaper. However, the Bill exempts applicants from having to do this for competitive tenders for prospecting titles.[31] When a prospecting title under the Mining Act is *granted*, the Bill also exempts the Government from notifying this in the Gazette.[32] It is not clear to us whether this is replaced by other public notice or formal inter-agency processes beyond the Strategic Release Framework.

For competitive applications for assessment leases under the Mining Act, it appears the Minister will no longer have to notify affected Government agencies and local councils of the Minister's intention to grant an assessment lease, and resolve their objections.[33] Nevertheless, the Strategic Release Framework will apply upfront (with some consultation).

The competitive selection process 'can' include the public release of information as to the money that applicants undertake to pay for the grant of a prospecting title. The amount of money can be a relevant consideration in the competitive selection process.[34]

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[25] Under the Bill:
- ***controlled release prospecting title*** means an exploration licence or assessment lease that relates to a controlled release mineral in a controlled release area.
- ***petroleum prospecting title*** means an exploration licence, assessment lease or special prospecting authority under the Petroleum Act.

[26] Specific exceptions apply in the Mining Act for existing titleholders and Government applications (inserting new sections 13C and 13D in the Mining Act). i.e. The Government itself can apply for a prospecting title to gather information on State (Crown) land.
[27] See e.g. new Schedule 1A to Mining Act and Petroleum Act, clauses 4-6.
[28] Grant of Titles Bill, see note to Schedule 1A to Mining Act, clause 6 (equivalent note in Petroleum Act).
[29] See: http://www.legislation.nsw.gov.au/maintop/epub.
[30] New Schedule 1A in the Mining Act and Petroleum Act, clause 2(4).
[31] See Mining Act ss 13A(3) and 33A(3); cf Grant of Titles Bill Schedule 1 item [2] and [6]. At the production stage, the Mining Act still provides that the Minister may invite tenders for a mining lease by notice in a local and statewide newspaper (including for 'controlled release areas'). See Mining Act, s. 52.
[32] As s 136 of the Mining Act does not apply to competitive prospecting tenders.
[33] Grant of Titles Bill, Schedule 1 item [8]. Cf Mining Act, Schedule 1, Part 1.
[34] See new Schedule 1A in the Mining Act and Petroleum Act, clause 5.

## 2. Harmonisation Bill (detail)

*NB: The Harmonisation Bill contains over 100 pages of significant amendments to the Mining and Petroleum Acts. The changes identified below largely rely on the explanatory note to the Bill.*

**Standard provisions for granting mineral and petroleum titles (Schedule 1B)**

The Bill brings together provisions on how the Resources Minister and other decision-makers will assess and grant mining and gas permits for exploration and production of coal, minerals and CSG. It does this by inserting a separate Schedule of standard clauses in the Mining and Petroleum Acts (Schedule 1B).

These consolidated provisions are intended to:

(i) allow a decision-maker to require title applicants to provide further information,
(ii) require applications and tenders to be supported by a proposed work program,
(iii) provide broader, flexible grounds to grant, suspend or cancel mining and petroleum titles,
(iv) require the Minister to take into account the need to conserve and protect the environment in considering applications,
(v) specify other matters that *may* be taken into account in considering applications, such as the applicant's technical and financial capability, compliance history and ability to meet minimum standards,
(vi) set out a non-exhaustive list of grounds on which applications or tenders can be refused,
(vii) provide broader and more flexible powers to impose and vary conditions,
(viii) allow security deposit conditions to be imposed in relation to any impact that is the result of work carried out under an authorisation or title (on any land), and
(ix) allow exploration licence renewals to change the amount of land to which the licence can apply.

**New 'activity approval' process and conditions for prospecting activities**

In addition, the Bill creates a new process to require the holder of a *prospecting title* (exploration licence or assessment lease) under either Act to obtain a further 'activity approval' for prospecting *activities* (this excludes exempt development under planning legislation).[35] It also creates a power to impose conditions on such activity approvals. This could improve the oversight of Part 5 activities, which now include all CSG, coal and mineral exploration.[36] However, there is limited information on how this will work in practice.

[35] Harmonisation Bill, new s. 23A to the Mining Act; This requirement applies to any '***assessable prospecting operation'***, which means any prospecting operation that is not exempt development within the meaning of the *Environmental Planning & Assessment Act 1979.*
[36] *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007,* clause 6.

**New offences, enforcement tools, reporting and governance**

The Bill aims to harmonise certain Petroleum Act compliance, investigation and enforcement provisions with the Mining Act (such as aligning provisions on audits, inspection and investigative powers, directions, enforcement and administration).

The Bill creates additional offences, including making it an offence to aid, abet, counsel or conspire in the commission of an offence. It also creates civil enforcement options which makes it easier to demonstrate that someone has carried out unauthorised prospecting or mining. A court may then order the person to pay costs and expenses of preventing or managing any environmental impact or land or water rehabilitation, or to pay compensation for loss or damage suffered.

The Bill provides for title holders to give 'enforceable undertakings' in relation to breaches of the Act. This is a useful enforcement tool for regulators that exists under other (e.g. pollution) laws. It also allows inspectors to issue prohibition notices or suspension notices in certain circumstances (such as suspected unauthorised activity or matters that could constitute grounds for cancellation).

The Bill requires title holders to lodge reports on all operations carried out under a mining authorisation or petroleum title, and requires any record created or maintained under the Act to be kept in a legible form for at least 4 years after the expiry or cancellation of the authorisation or title.

The Bill also ensures that notices and conditions on titles have longer effect, and that enforcement notices have effect overseas. It also prohibits inspectors, certain departmental staff and people who exercise judicial or official functions under the Acts from holding an interest in resource titles.

**Beneficial use of gas from prospecting activities allowed**

The Bill amends the P*etroleum Act* to permit prospecting title holders to beneficially use gas recovered when prospecting for petroleum. This could include, for example, selling the gas or piping it to power related facilities.

## 3. Land Access Bill (detail)

### Access arrangements now required for gas production stage

The Mining and Petroleum Acts already require resource companies to have access arrangements in place with landholders before they can prospect on private land. The Bill extends the requirement for access arrangements to apply at the *gas production* stage.[37]

### Resource title holders to pay landholders' reasonable costs

As detailed below, the Bill clarifies that title holders must pay the reasonable costs of landholders in negotiating land access arrangements, and resolving various disputes via arbitration or in court. The Regulations can cap reasonable costs.

### Stricter definition of 'significant improvement' on private land will limit exclusions

Currently, the Mining Act and Petroleum Act prohibit activities under a resource title within *200m* of a 'dwelling-house' (a person's main residence), *50m* of a garden, or *on* a 'significant improvement' on a property, unless the owner gives written consent.[38]

The Bill replaces the existing definitions of 'significant improvement' with a stricter definition. The effect of this is to broaden the area of land accessible for resource-related activities and to narrow excludable areas (although this will still be subject to land access arrangements).

A 'significant improvement' on land now means a work or structure that:[39]

- is a substantial and valuable improvement to the land, *and*
- is reasonably necessary for the operation of the landholder's lawful business or use of the land, *and*
- is fit for its purpose (immediately or with minimal repair), *and*
- cannot reasonably co-exist with the exercise of rights under the resource title or access arrangement without hindering use or functionality of the work/structure, *and*
- cannot reasonably be relocated or substituted without material detriment to the landholder.

The regulations can include or exclude specific kinds of works or structures.

The Bill now requires title holders to pay the 'reasonable' costs of the land owner in future Land and Environment Court proceedings in a dispute about whether resource-related activities can occur near homes, gardens (etc) or on significant improvements.[40]

### Roadside seismic surveys – landholder notification, not consent

The Bill amends the Mining and Petroleum Acts to allow resource title holders to do *seismic surveys on public roads* close to a home, garden or significant improvement (*within* the

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[37] See Petroleum Act, new s 69X, 'Part 4A extends to access arrangements for production leases'.
[38] See for example Mining Act, s 31 and Petroleum Act, s 72. The Petroleum Act also specifies vineyards and orchards in addition to gardens.
[39] See Mining Act Dictionary, new definition of 'significant improvement'; see also Petroleum Act, new s 72(6).
[40] See amendments to Mining Act sections 31, 49 and 62; and Petroleum Act new s 72(4). The Court may also determine access arrangements if it is already considering the issue of significant improvements (see Mining Act new s 158A; and Petroleum Act new s 69V). For a recent interpretation of land access requirements under pre-existing laws, see *Hall v O'Brien [2015] NSWLEC 200*.

distances noted above). The title holder must now give 21 days written notice to the owner and home occupants.[41] Until now, such activities on public roads may have been prevented by the legislated prohibitions against resource title activities near a home, garden, or on a significant improvement without the landowner's consent (as above).[42]

**More stringent requirements for dispute mediation, arbitration and Panel appointment**

The Bill includes more detailed and stringent requirements for mediation, arbitration and appointment of arbitrators. This follows a review by Bret Walker SC.[43] Arbitrators on an Arbitration Panel hear certain disputes under both Acts (in particular disputes over land access arrangements).[44] If mediation regarding land access doesn't result in an agreement, the arbitrator must conduct a hearing.[45]

Changes in the Bill include:

- Arbitrators can inspect a relevant property with reasonable notice;[46]
- Landholders can have legal representation at hearings (without further agreement);[47]
- Prospecting title holders are to pay landholders' reasonable costs of negotiating land access arrangements, mediation or initial arbitration (Government can cap costs);[48]
- Parties to an arbitration must participate in good faith;
- An online public register of *arbitrated* access arrangements (personal details needn't be published);[49]
- Details of arbitrators are also to be kept in a public register;[50]
- Further 'approved arbitration procedures' can be made in the regulations.[51]

**Access Code and mandatory provisions in access arrangements**

The Bill provides for an 'access code' to be made under the regulations, which can guide land access negotiations between title holders and landholders. The code can also specify mandatory provisions to be included in access arrangements. An access arrangement cannot *weaken* obligations of prospecting title holders specified in mandatory provisions.[52]

**Exclusion of reckless conduct from the general immunity of landholders**

The Bill amends landholders' general immunity from liability under both Acts, to exclude intentional or reckless act or omissions.[53]

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[41] See for example Mining Act, new s 31(7), 49(7) and Petroleum Act new s 72(7).
[42] See for example Mining Act 1992, ss 31, 49, 62 (exploration licences, assessment leases and mining leases); and Petroleum Act s 72. The Petroleum Act specifies buffers for vineyards and orchards in addition to gardens.
[43] See http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/landholders-rights/walker-review-of-land-arbitration-framework, accessed January 2016.
[44] See amendments to Mining Act s 139; see also Mining Act s 144 and Petroleum Act s 69B.
[45] See Mining Act, new s 145B; and Petroleum Act new sections 69H-69HB.
[46] See Mining Act, new ss 148B; and Petroleum Act s 69KB.
[47] See Mining Act, revised s 146; and Petroleum Act revised s 69I.
[48] See for example Mining Act s 142 amendments; and Petroleum Act new sections 69E(2A) and 69KC. The Minister can set a maximum amount of such costs by notice in the Gazette.
[49] See for example Mining Act amendments to s 156; and Petroleum Act new s 69SA.
[50] See amendments to Mining Act s 139. The register is to contain information such as name, business address, contact information, qualification, experience, and potential conflicts of interest or other information required by the regulations.
[51] See Mining Act, new ss 148A-148C; and Petroleum Act s 69KA.
[52] See Mining Act, new ss 141A-141B; and Petroleum Act, new ss 69DA-69DB.
[53] See Mining Act new subfrom the section 383C(1A); Petroleum Act new subsection 141(1A).

## 4. Gas Enforcement Bill (detail)

### Extending existing EPA powers to cover 'petroleum offences' under others laws

The Bill extends the EPA's existing investigative powers to determine whether a 'petroleum offence' has been or may be committed, and to obtain information to enforce the law.[54] The EPA now has formal standing to bring proceedings for defined 'petroleum offences' under NSW petroleum, planning and water laws – and to issue (minor) penalty notices for those offences.[55]

### Better tools to respond to breaches

The Bill allows the EPA to accept 'enforceable undertakings' regarding suspected breaches.[56] The EPA now has the authority to issue 'environment protection notices', such as clean up notices, in relation to petroleum activities.[57] If the EPA suspect that a petroleum offence has occurred which has caused or is likely to cause environmental harm, it has the discretion to require an environmental audit at the cost of the petroleum title holder.[58]

### Information sharing between agencies

The Bill also allows government agencies to exchange information, records and advice in relation to petroleum activities and environment protection licences (pollution licences).[59]

# Further information

This briefing note provides general information only, not legal advice. While we have made every effort to translate and interpret the Bills, we welcome any suggestions or corrections.

For further information, please contact Mr Nari Sahukar, Senior Policy & Law Reform Solicitor, EDO NSW (contact details on page 1).

The full text of Bills, Acts and commencement is available on the NSW Legislation site: www.legislation.nsw.gov.au.

The NSW Government Department of Industry – Resources and Energy has an overview of the Bills package. It may also provide updates on commencement dates and related matters: http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/programs-and-initiatives/land-resources-legislation.

EDO NSW has a free weekly e-bulletin to keep up-to-date on environmental law and policy: www.edonsw.org.au.

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[54] Per existing investigative powers under Chapter 7, Pollution Act. See Gas Enforcement Bill, Schedule 1, cl. 2.
[55] See Gas Enforcement Bill, Schedule 1, clause 3.
[56] For the purposes of section 253A of the Pollution Act. See Gas Enforcement Bill, Schedule 1, clause 4.
[57] See Gas Enforcement Bill, Schedule 1, clause 5.
[58] See Gas Enforcement Bill, Schedule 1, clause 6.
[59] See Gas Enforcement Bill, Schedule 1, clause 7.