



WESTERN RIVERS ALLIANCE

Protecting the Channel Country

A GUIDE FOR LANDHOLDERS

Managing the business risks of shale or other gas developments on your property

“In our assessment, the current arrangements to provide rural landholders with an appropriate and adequate remedy for Land Access Damage, primarily under the [Conduct and Compensation Agreement] is woefully inadequate with no recourse available to any insurance cover for such damage.”

Legal advice to the Western Rivers Alliance, January 2016 ^[1]

Shale and other unconventional gas mining bring risks for rural landholders of land and water contamination and other types of damage. Although the industry and governments have sought to reassure landholders that the risks are low and that companies will ‘make good’ any losses, a range of potential impacts are not covered under existing laws, agreements or insurance policies. This could leave landholders without any access to compensation, and liable for the costs of rehabilitation and damage to other parties.

The purpose of this guide is to help landholders negotiate with gas mining companies to obtain more adequate remedies if there is land access damage resulting from gas extraction. This advice is based in large part on an insurance and liability gap analysis commissioned by the Western Rivers Alliance and undertaken by lawyers with expertise in insurance. ^[1]



TERMINOLOGY

Miner or mining company: The tenement holder.

Land access damage: Physical damage to property, both above and below ground, loss of accreditation, contamination of livestock and interruption to or contamination of surface and/or groundwater.

Conduct and Compensation Agreement: Under Queensland’s resource legislation, there is a requirement for resource companies and rural landholders to enter into a Conduct and Compensation Agreement prior to undertaking any ground disturbing activities on private land. In this document, the term refers to the standard version dated 27 August 2010.

LEGAL ADVICE

The legal advice referred to in this guide is entitled ‘Legal opinion – Rural landholders land access insurance and liability advice’ and dated 20 January 2016. It was provided to Western Rivers Alliance in confidence and on condition of anonymity. This is due to intellectual property issues and the desire of the legal firm to stay anonymous due to its industry client base. The advice given here is generic and the Western Rivers Alliance strongly recommends that landholders seek independent legal advice while negotiating a Conduct and Compensation Agreement.

SCOPE

The legal advice obtained by the Western Rivers Alliance is focused on Queensland but similar gaps also exist in other states.

THE RISKS OF GAS MINING FOR LANDHOLDERS

“The major concern, which is still being researched, is the potential impact on groundwater quantity and quality ...”

Meat & Livestock Australia 2014 ^[4]

“Potentially the most significant negative impact on livestock focused landholder income identified through CSG co-existence is the increased risk of contaminant residues in cattle sharing pastures with CSG or consuming contaminated water. The increased risk of trade in contaminated livestock was also identified.”

Rural Industries Research & Development Corporation 2013 ^[2]



The main concerns for graziers – as identified by organisations such as the Meat and Livestock Association and the Rural Industries Research & Development Corporation – are potential impacts on groundwater quantity and quality and contamination of groundwater, soil and pasture. Other risks include biosecurity failures – for example, the introduction of new weeds.

“[Landholders] have primary liability in the event of contamination of the soil, pasture or groundwater, neighbouring properties, as well as livestock which, if then processed and consumed, could breach Australian food standards or importing country requirements for meat.”

Meat and Livestock Australia 2014 ^[4]

The consequences for landholders could include loss of industry accreditation (for example, Livestock Production Assurance), loss of livelihood, and decline in property values, as well as liability, including criminal liability, for harm due to contaminated livestock (particularly for those who sign a national vendor declaration). ^[2,3,4] Landholders could also be liable for damage caused to nearby properties and be required to pay the costs of remediation on their own and other properties. ^[1,3]

These are not just theoretical risks. There have been several instances, in Australia and overseas, of aquifers being contaminated by CSG mining. In 2014 Santos was fined for contamination of an aquifer in New South Wales which led to elevated levels of lead, aluminium, arsenic, barium, boron, nickel and uranium. ^[5]

GAPS IN THE CONDUCT AND COMPENSATION AGREEMENT

The standard Conduct and Compensation Agreement provided by the Queensland government fails to cover many risks of great concern to rural landholders, including ^[1]:

- Contamination of surface or underground water,
- Damage to neighbouring properties for which a claim is made against the landholder with the gas mining on their property,
- Loss of industry accreditation,
- Spread of noxious weeds and other land management impacts.

Although the landholder could bring a legal claim against the miner should damage not covered by the agreement occur, this would need to be done through formal legal proceedings, which are costly and time-consuming. Any compensation to the landholder is also contingent on the capacity of the miner to pay. This obligation may be hollow if the mining company is a shelf company with no assets.



LIMITATIONS OF PUBLIC LIABILITY INSURANCE

“...the necessity of the tenement holder to maintain only public liability insurance to comply with the [Conduct and Compensation Agreement] is of little or no benefit to the rural landholder particularly with respect to Land Access Damage.”

Legal advice to the Western Rivers Alliance, January 2016 ^[1]

Under the Conduct and Compensation Agreement, gas miners are required to take out public liability insurance, but this type of insurance provides limited cover and ‘no real remedy for rural landholders in the event of Land Access Damage’. ^[1] There is a standard exclusion for personal injury or property damage arising from pollution of land, air or water, except if it is a result of a sudden, unexpected event such as an explosion).^[1] And most such insurance policies limit their coverage of property loss to ‘physical loss, destruction or damage to tangible property’. This means that loss of industry accreditation or the spread of noxious weeds, for example, may not be covered. There is also an onus of proof on landholders to prove that any claimed damage was caused by gas mining.

AVAILABILITY OF OTHER TYPES OF INSURANCE

“We caution that these alternative classes of insurance may not always be readily available for all resources companies given the limited risk appetite of insurance companies and limited number of insurance companies prepared to offer such policies...”

Legal advice to the Western Rivers Alliance, January 2016

Farm insurance policies typically held by landholders do not cover land access damage due to mining, or the loss of income or legal liability to third parties due to such damage. Landholders and miners can seek other types of insurance to cover the risks not covered by public liability insurance or the Conduct and Compensation Agreement. However, due to the ‘limited risk appetite of insurance companies’, the options are limited and may not cover all risks.^[1]

Some graziers have sought insurance coverage for pollution from gas mining and been unable to obtain it. One example is in a case study by the Rural Industries Research & Development Corporation based on a grazier who refused to sign a Conduct and Compensation Agreement because ‘effective indemnity [against the risk of chemical contamination of cattle] could not be secured from either an insurance company or the CSG company’.^[2] The grazier’s supply-chain partners had indicated that the grazier would be liable for any contamination.



Gas mining companies may be able to obtain insurance policies to cover damage from pollution. However, the more hazardous operations (including gas mining) are subject to restrictive terms and require high policy excesses – potentially ranging from \$100,000 to \$1 million.^[1] This means the insurance is only payable if the mining company first meets that excess.

The Conduct and Compensation Agreement also fails to stipulate that gas mining companies hold other types of insurance normally be required under such contracts, including workers' compensation insurance and motor vehicle liability insurance.

RECOMMENDATIONS FOR NEGOTIATING A REVISED CONDUCT AND COMPENSATION AGREEMENT

If you are a landholder negotiating with a gas mining company about access to your property, it is strongly recommended you seek to revise the standard *Conduct and Compensation Agreement* in the following ways to better protect your business and livelihood:

- 1. Broaden the scope of the Conduct and Compensation Agreement:** Ensure that your agreement with the gas mining company is comprehensive and explicitly covers all forms of potential land access damage. This includes the examples of potential damage mentioned in this guide as well as those specific to your circumstances.
- 2. Obtain insurance coverage for land access damage:** Because the insurance obligations under the *Conduct and Compensation Agreement* are limited, you should request the mining company to seek alternative types of insurance to cover all types of land access damage such as pollution, loss of accreditation and future income losses. One benefit is the greater financial security offered by an insurance company over a mining company. However, even if such policies are available, they are likely to require large excesses to be paid by the miner before any insurance is payable.
- 3. Obtain indemnity against claims by third parties:** Ensure that you are covered against any claims by other parties – for example, neighbouring landholders – arising from the activities of the miner. To achieve this, the insurance obligations in the *Conduct and Compensation Agreement* should be expanded to require that you be noted as an 'interested party' under the miner's public liability insurance and other relevant insurance policies with respect to the miner's activities on your property. However, it is vital that you are not a 'named insured' under a policy because this would likely nullify the cover for damage to your own property.



- 4. Address the contract liability exclusion:** Make sure the *Conduct and Compensation Agreement* you negotiate with the miner is specifically noted in any insurance policy and that it provides cover for obligations arising under the Conduct and Compensation Agreement and ‘removes any application of any contractual liability exclusion applicable under the policy with respect to this agreement’. Otherwise, the contractual liability exclusion clause, which is standard to such policies, limits coverage only to obligations that arise under common law.
- 5. Obtain proof of insurance policies:** Under the *Conduct and Compensation Agreement*, the miner should be required to provide evidence of their insurance policies for public liability, land access damage and other relevant liabilities (typically by way of a Certificate of Currency) at least 1 month prior to accessing your property and on the annual anniversary of each policy. The Certificates of Currency should include a description of the business and all activities to be undertaken by the miner. The limit of public liability should be at least \$20 million for any one claim and unlimited for the aggregate of multiple claims.
- 6. Obtain compensation security:** To overcome the risk of a ‘hollow compensation obligation’ (for example, if the mining company is a shell company), the *Conduct and Compensation Agreement* should require the company to hold a bank guarantee or alternative financial instrument, like a surety bond in your favour. When negotiating the agreement, it is important to ascertain the identity of the company, their corporate structure, financial integrity and insurance arrangements.
- 7. Ensure the company is insured against other risks:** The *Conduct and Compensation Agreement* should include requirements for the miner to hold other classes of insurance, including workers’ compensation insurance and motor vehicle liability insurance, the latter including cover for property damage caused by a registered motor vehicle.

These recommended changes to individually negotiated agreements cannot provide absolute or guaranteed protection to you, for they rely on the availability of insurance for land access damage, and the financial security and ability of the miner to meet the terms and conditions of insurance policies. Also needed is a general compensation package for land access damage ‘which is supported by robust and concrete financial security to ensure any such package is not illusory’.^[1]



QUICK REFERENCE FOR LANDHOLDERS NEGOTIATING A CONDUCT AND COMPENSATION AGREEMENT

Risks	Recommendations
<p>Land access damage, for example:</p> <ul style="list-style-type: none"> ➤ Pollution of surface waters or groundwater ➤ Contamination of livestock ➤ Loss of accreditation and loss of future income 	<p>Identify all potential risks relevant to your circumstances in the Conduct and Compensation Agreement.</p> <p>Ensure all risks are explicitly covered under one or more insurance policies (additional to public liability insurance).</p>
<p>Damage to other properties and businesses due to mining on your property.</p>	<p>Obtain indemnity against claims by 3rd parties by the landholder being named as an interested party (but not a 'named insured') on the mining company's insurance policies.</p>
<p>Contract liability exclusion (most insurance policies limit coverage only to obligations that arise under common law).</p>	<p>Ensure that contract liability exclusion clauses are removed from insurance policies and that the Conduct and Compensation Agreement is noted in the policies.</p>
<p>Liabilities or costs arising from neglect by the miner to maintain other required types of insurance.</p>	<p>Require the miner to provide evidence of other classes of insurance including workers' compensation insurance and motor vehicle liability insurance.</p>
<p>The gas mining company fails to obtain or maintain required insurance policies.</p>	<p>Require the miner to provide a Certificate of Currency for all relevant insurance policies at least 1 month prior to accessing your property and on each annual anniversary of the policies.</p>
<p>The gas mining company lacks the security or financial means to meet its compensation obligations.</p>	<p>Require that a bank guarantee or surety bond or similar is held in your favour.</p>



For further information:

Western Rivers Alliance - <http://wra.nationbuilder.com/>

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Sources:

[1] Confidential. 2016. *Legal Opinion – Rural Landholders Land Access Insurance and Liability Advice*. Commissioned by Western Rivers Alliance.

[2] Clarke M. 2013. *Principles for Negotiating Appropriate Co-existence Arrangements for Agricultural Landholders*. Rural Industries Research and Development Corporation.

[3] Lock the Gate. 2015. *Qld Livestock Producers' Glovebox Guide to Gasfield Contamination*.

[4] Meat & Livestock Australia 2014. *Coal Seam Gas Operations on Livestock Property. General Information for Livestock Producers*.

[5] Nichols S. 2014. Santos coal seam gas project contaminates aquifer. *Sydney Morning Herald*. <http://www.smh.com.au/environment/santos-coal-seam-gas-project-contaminates-aquifer-20140307-34csb.html>

