Submission No 1

INQUIRY INTO PETROLEUM (ONSHORE) AMENDMENT (CANCELLATION OF ZOMBIE PETROLEUM EXPLORATION LICENCES) BILL 2021

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The Hon. Mark Banasiak, MLC
NSW Legislative Council's Portfolio Committee No. 4 – Industry
Inquiry into the Petroleum (Onshore) Amendment (Cancellation of Zombie Petroleum Exploration Licences) Bill 2021

***By Email to the Portfolio Committee No. 4 - Industry*:** PortfolioCommittee4@parliament.nsw.gov.au

Dear Hon. Banasiak,

It is with pleasure that we attach our below submission upon the invitation of the Committee in response to the *Inquiry into the Petroleum (Onshore) Amendment (Cancellation of Zombie Petroleum Exploration Licences) Bill 2021*. Our submission draws on our extensive research and expertise on gas policies and regulation in Australia. We provide targeted comments on the benefits of the introduction of legislation abolishing currently dormant gas exploration licences.

We are happy to elaborate on our submission further, provide further evidence and consult with the Committee.

Yours faithfully,

Dr Madeline Taylor (Sydney Law School)

Professor Tina Soliman Hunter (Macquarie Law School)

Inquiry into the Petroleum (Onshore) Amendment (Cancellation of Zombie Petroleum Exploration Licences) Bill 2021 Submission

The objectives of the Petroleum (Onshore) Amendment (Cancellation of Zombie Petroleum Exploration Licences) Bill 2021 are twofold: first, to provide for the expiry of petroleum exploration licences at the end of their respective term unless renewed and second, to cancel exploration licences remaining in force due to a pending renewal application.

Our submission will focus on aspects of agricultural land preservation, since there are particular risks associated with petroleum exploration licences remaining dormant for substantial periods of time. Such risks will become evident if pending renewal applications are granted over exploration licences on Biophysical Strategic Agricultural Land within the Liverpool Region and surrounding areas.

1. Unconventional Gas Development on Agricultural Land

Regulatory concern about the development of unconventional gas on agricultural land, land access and compensation are not unique to New South Wales (NSW). For decades, inquiries, policies frameworks and regulation have been established to promote co-existence between coal seam gas activities and agricultural land. The reason for this is due to the geological circumstances in which unconventional gas is formed. Marine, fluvial, and lacustrine deposits create an environment of high organics, which give rise to the formation of unconventional gas following millions of years of continued deposition, heating, and pressure. These same geological landscapes produce prime agricultural land of high soil quality, supporting cropping and other agricultural activities.

The main concerns surrounding agricultural land degradation due to coal seam gas development include the impact on food production, the use and contamination of underground and surface water resources, agricultural landholders' rights over land, the effects on the socio-economic environment in the affected regions, and the future viability of farming in affected areas.[1] Queensland provides a stark example of adaptive management regulation whereby the *Regional Planning Interests Act 2014* (Qld) (RPI Act), coupled with an initially voluntary Land Access Code (LAC), was established to regulate unconventional gas activities and address conflicts arising from the coal seam gas development on agricultural land. Such an adaptive management approach has seen a highly complex, rule-based regulatory regime which identifies regional interest areas, gives effect to policies within regional plans, and 'manages' the impact of resource activities in areas of regional interest through coexistence.[2] A regional interests development approval (RIDA) then provides an additional approvals process for resource activities on agricultural lands to be carried out. However, pursuant to s 22 of the RPI Act, a RIDA is not required where petroleum titleholders have negotiated a Conduct and Compensation Agreement with the relevant landholder, or entered into a written agreement, and the activity is not likely to have a 'significant impact' on the priority agricultural or strategic cropping area nor have an impact on the landholder. A significant impact is broadly

[1] See Madeline Taylor and Tina Soliman Hunter, *Agricultural Land Use and Natural Gas Extraction Conflicts A Global Socio-Legal Perspective* (Routledge, 2019) Australian Government, *Office of the Chief Economist, Review of the Socioeconomic Impacts of Coal Seam Gas in Queensland* (2016) <https://industry.gov.au/Office-of-the-Chief-Economist/Publications/Documents/coal-seam-gas/Socioeconomic-impacts-of-coal-seam-gas-in-Queensland.pdf>.

[2] *Regional Planning Interests Act 2014* (Qld) s 3(1).

defined as being an impact 'that is important, notable or of consequence, having regard to its context or intensity'.[3]

This exception mechanism has effectively created a loophole for petroleum titleholders, requiring each RIDA application be assessed on a case-by-case subjective basis. This provides an *ad hoc* adaptive approach to agricultural land protection and is arguably a lower threshold to prove than an objective-based definition, or a land class system such as that implemented in British Columbia, Canada. Under the Delegation Agreement for Oil and Gas Uses in the Agricultural Land Reserve zone of British Columbia, regulation specifies the types of resource activities that do constitute a significant impact.[4] The legacy of the RPIA regime has seen a number of inquiries into its effectiveness, including the recent Queensland Audit Office Report highlighting that 'concerns from landholders and other stakeholders persist regarding the effectiveness of the framework in managing issues such as priority agricultural areas, offsite impacts, and the long-term environmental effects of coal seam gas activities. The regulators need to continue to refine their engagement and regulatory processes, procedures, and systems in response to concerns and the changing environment'.[5]

Comparatively, NSW is an emerging coal seam gas industry, with several petroleum exploration licences cancelled in 2015 under the NSW Gas Plan, and the establishment of the Gateway Panel procedure (Gateway Process) for development on strategic agricultural land. Further, Agricultural Impact Statements are now required for all mining and petroleum exploration activity requiring approval under Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW) and all State Significant development Applications. Arguably however, the Gateway Process does not provide an effective regulatory approach to the protection of biophysical strategic agricultural land, as a gateway certificate is only required where the project will *significantly* the agricultural productivity of any affected Biophysical Strategic Agricultural Land (BSAL); and for projects in a Critical Industry Cluster (CIC) – whether the project will have a significant impact on the relevant CIC. This is problematic as the Gateway Process does not consider cumulative impacts to agricultural land. This is because unconventional gas activities' infrastructure is typically classified as being 'temporary' in nature during exploration, extraction, and decommissioning, even though these activities may last for forty years or more.

For example, a coal seam gas well itself may be remediated and the soil rehabilitated, but the flow back of produced water could arguably create permanent impacts to surface and groundwater systems if not adequately treated. Indeed, in a study by Ali, Strezov, Davies and Wright, water found downstream of UGR activities pointed to high metal content including aluminium, iron, manganese, nickel and zinc.[6] This would likely impact current and future farm soil and cropping viability to agricultural lands reliant on surface and underground water aquifers. Therefore, even though coal seam gas activities are temporary in nature, the potential

[3] Queensland Government, Department of Infrastructure, Local Government and Planning, *RPIA Statutory Guideline 02/14* (2017) 2.

[4] See Madeline Taylor and Susanne Taylor, 'Agriculture in A Gas Era: A Comparative Analysis Of Queensland And British Columbia's Agricultural Land Protection And Unconventional Gas Regimes' (2016) 22 (3) *Australasian Journal of Regional Studies* 459.

[5] Queensland Audit Office, *Managing coal seam gas activities (Report 12: 2019–20)* (2019) < https://www.qao.qld.gov.au/sites/default/files/2020-02/Managing%20coal%20seam%20gas%20activities%20%28Report%2012%E2%80%942019%E2%80%9320%29.pdf> 7

[6] Ali Al-Ibrahim, Vladimir Strezov, Peter Davies and Ian Wright, 'Environmental impact of coal mining and coal seam gas production on surface water quality in the Sydney basin, Australia' (2017) 189(9) *Environmental Monitoring* Assessment 408.

impact to underground aquifers is long term and permanent. It is thus vital that cumulative impacts are comprehensively address prior to any Gateway Approval and petroleum production lease approval on biophysical agricultural land.

Effective land use regulation creates legitimate regulatory objectives warranting legal intervention in the relationship between agricultural land use and petroleum titleholders and their mutual use of the land. Firstly, the state must promote the public interest in the development of its natural resources and not simply the interests of private parties. Secondly, the state must manage the implications of information asymmetry and ineffective land use zoning and exclusions between the two land uses. Thirdly, the state must adopt appropriate allocation of the regulatory objectives of unconventional gas development on agricultural land to create mutual coexistence as the result of effective principles-based regulation.[7]

2. Protecting Agricultural Land: Exclusion and Collectivisation

Arguably, the expiry of petroleum exploration licences at the end of their respective term unless renewed, as well as the cancellation of exploration licences remaining in force due to a pending renewal application, as proposed by the Petroleum (Onshore) Amendment (Cancellation of Zombie Petroleum Exploration Licences) Bill 2021, is a necessary first step to the protection of agricultural land. However, such an approach would not provide effective long-term outcomes for the protection of agricultural land. The only agricultural industries that currently fall under an exclusion zone for petroleum activities are viticulture and equine critical industry clusters. Therefore, while the proposed Bill provides protection for Biophysical Strategic Agricultural Land and other prime agricultural tenures in NSW in cancelling petroleum exploration license ending renewal, such protection is passing. Indeed, 33% of Australia's grazing land is subject to petroleum exploration licences. In NSW, 5% of grazing land, 15% of cropping land and 13% of irrigated cropping land is currently subject to a petroleum exploration licence.[8]

Agricultural land that does not fall within the excluded industry clusters, can fall under renewed petroleum tenures should the NSW Government wish to allocate new petroleum exploration licences and corresponding production leases pursuant to the *Petroleum (Onshore) Act 1991* (NSW). Rather, all BSAL should be excluded permanently from any gas activity to ensure future food security and protect our vital agricultural industries. Such an exclusion has been legally enshrined a number of jurisdictions including, France.

Agricultural land is finite and must be safeguarded as a public good. In assigning proprietary rights to the private sector for resource exploitation in return for royalties as capital to be expended for the public good, the State owes a duty of development in the public interest. The core objective of a public resource system is for the State to encourage stability of supply and, in so doing, minimise conflicting interests and satisfy public interest duties. Under these circumstances, the challenge for the State as regulator is the allocation and management of resources in the public interest for financial and economic returns whilst protecting natural resources on an ongoing basis. Petroleum licencing systems, therefore, require regulators to assess the risk posed by a petroleum activity and differing levels of licenses and exclusions

[7] Nicole Gurran, *Australian Urban Land Use Planning Introducing Statutory Planning Practice in New South Wales* (Sydney University Press, 2007).

[8] Australian Farm Institute, *Foot Off The Gas* (2020) < https://farmersforclimateaction.org.au/wp-content/uploads/2020/12/FCA_AFI_GASreport_Revised_FINALFA_WEB_2020.pdf>.

applicable based on the level of risk identified. The consequences of discrete risk levels relate to different regulatory oversight measures on the basis of land sensitivity.

Legal entrenchment of this recognition in amending coal seam gas exclusion areas to incorporate all BSAL is urgently needed. Avoiding alienation and fragmentation of agricultural land to signal the importance of agricultural land and the recognition that coal seam gas development poses a risk to existing agricultural operations and its future productivity is crucial. As the coal seam gas industry is still comparatively immature in NSW, there is potential production of permanent damage to non-renewable fertile soils spoiling the underground water table and threatening food security. Indeed, pursuant to s 107A of the *Petroleum (Onshore) Act 1991* (NSW), compensable loss means damage to the land, depreciation of the possession of the use of the surface of the land and destruction or disturbance with stock. Cumulative impacts are therefore not necessarily compensable such as permanent damage to aquifers or soil fertility.

Collective bargaining is traditionally founded on competition law exemption, establishing where two or more competitors come together to negotiate with a supplier or a customer over terms, conditions and prices.[9] The theory of collectivisation as a response to resource development, as employed in New York, also provides a viable socio-legal path that could be applied systematically to transform the top-down and linear relationship of unconventional gas exploitation. Typically, this linear relationship starts with the granting of an authorisation to a petroleum licenceholder by the State, the company exploring for unconventional gas, and culminates in the landholder authorising the extraction (either under law or negotiation) prior to resource exploitation commencing. The public interest in preserving agricultural land provides a unified platform and need for an alternative vehicle and theory to transform this linear relationship between State, landholder, and unconventional gas licenceholder.

Therefore, if unconventional gas activities were permitted on agricultural land, collective bargaining could provide a flexible and transparent legal vehicle that has been used successfully in different contexts in the agricultural and unconventional gas sectors. When monitored and regulated by an appropriate governance body such as the ACCC, collective bargaining could provide a vehicle for landholders to form a collaborative body and increase 'good faith' bargaining when reaching land access agreements. In applying a principles-based regulatory approach, collective bargaining may be an effective transactional regulatory tool in negotiating land access agreements.

[9] William Breen Creighton and Anthony Forsyth, *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012).