Unconventional Gas Mining

Land access and farmers’ rights

Onshore gas deposits are often located under farms. By law, the Crown owns the gas and groundwater under privately owned land and the State Government (on behalf of the Crown) licenses companies to explore for and extract gas.

Gas companies negotiate access agreements with landholders and provide compensation for the disruption to and impact on the property. Ultimately, landowners have no legal right to refuse the gas company access to their land.

However, today, substantial engagement between the lead agricultural organisations and major gas companies has increased understanding between both sectors. This has led to companies wanting to work in collaboration with landholders, in a more respectful and understanding manner than has been experienced in the past. Some large mining companies, such as Santos and AGL, have publicly committed not to enforce their right to access against a landholder’s will.

Companies now generally understand that dollars alone will not earn landholder and community support. Community acceptance requires a combination of providing trusted and easily understood information, addressing perceived risks, communicating the safeguards available and being more accepting of social responsibility in rural and regional areas.

On this basis, gas companies, governments and agencies have made a concerted effort in recent times to more adequately consult with, and provide information to, the community with the aim of building open and transparent relationships.

Representation for Landholders

The NSW Land and Water Commissioner, together with the Office of Coal Seam Gas, provides guidance to landholders and the community on mineral and petroleum licences and activities; regulatory approval and assessment processes; compliance and enforcement; landholder rights; access agreements and compensation; and, the rights and responsibilities of exploration companies.

Similarly, in Queensland, the Gas Fields Commission is an independent statutory body that manages and improves the sustainable coexistence of landholders, regional communities and the onshore gas industry through provision of advice and facilitation.

In Victoria, the Gas Market Task Report (Reith, 2013) recommends that the Government appoint a Gas Commissioner (like Queensland has done) to consult with landholders and build community confidence in the unconventional gas industry.

Legal Advice

Farmers are urged to seek immediate legal advice and representation when they receive a notice of intent from a gas mining company to seek land access, as there are specified timeframes in which a farmer must respond and begin negotiations (ie. 28 days in NSW).

Legal representation is the best way to ensure all rights and interests are protected. By law, the company is required to pay reasonable costs for farmers getting such initial advice.

More recently, the NSW Government made a commitment under the NSW Gas Plan (NSW Government, 2015) to amend the law to require a gas company to pay reasonable legal costs for the entire land access negotiation period (See Fact Sheet Unconventional gas mining – Overview of regulatory safeguarding and research). Lawyers hired by farmers should be experienced in negotiations, and environmental or land law.
Industry organisation memberships may also include access to limited legal services. Some experienced community organisations provide free legal advice, such as the Environmental Defenders Office (EDO).

If an arrangement cannot be agreed within a specified period, independent arbitration can be undertaken. If access is granted, as it usually is in most situations, the arbitrator will attempt to facilitate agreement on a land access arrangement between the farmer and the gas company. If agreement cannot be reached, the arbitrator can decide on the arrangement.

If the outcome still does not satisfy a party, they can take the matter to the relevant State court dealing with planning, environment and land matters. Time restrictions usually apply to taking court action.

Gas company access rights

For a company to explore privately owned or public land, it must obtain a title and relevant licence. The process and provision of any work program to obtain such permissions varies across States.

In Queensland and NSW, gas companies are legally required to negotiate access agreements with landowners and compensate for the disruption to, and impact, on the property. This is a legally binding document between a farmer and a gas company. It needs to be comprehensive and cover ALL access arrangements agreed between the two parties.

Victorian’s legislative frameworks do not extend this far at present. Gas companies must obtain the consent of the owners and occupiers of the land affected; make and register a compensation agreement; obtain a compensation determination from VCAT or purchase the land. For ‘low impact exploration work’, an informal verbal consent from the owner or occupier will suffice; this can be waived where all ‘reasonable efforts’ have been undertaken to find the owner or occupier.

Tasmanian law requires that all private land owners are provided with written notification of the company’s intent to enter private land to undertake an approved exploration program at least 14 days prior to entry. If the intended exploration activities include drilling a well, the company is to first obtain the land owner’s consent before seeking approval of the proposed work program.

South Australian landholders must receive a formal notice of entry at least 21 days prior to access or negotiate an agreement that includes conditions of entry. An agreement is mandatory if a company wants to explore areas proclaimed as “exempt land”, including mapped cropping land or land close to a residence. There are more stringent requirements if drilling or earth moving equipment is to be used. A farmer has up to three months to formally object (DMITRE, 2012).

In summary, gas mining companies must provide notification to enter private land, but notification periods and how the notification is communicated to a farmer differs from State to State.

Diagram 1 (below) demonstrates the anticipated process where a company is committed to the principle of not enforcing its legal rights to access land against a landholder’s will.

Diagram 1: Generalised land access process where legal right to access is not enforced

Source: Adapted from NFA (2014a)
Land access codes of practice

NSW and Queensland have developed Codes of Practice for Land Access in consultation with stakeholders, including farmer representative groups.

The codes cover matters such as access points, track maintenance, biosecurity, notice of intent to access the property, water regulations, pest and weeds control, livestock management, management of fences and gates, and any items brought onto the property such as chemicals.

Land Access Agreements, Arrangements or Plans

A written Land Access Agreement (LAA) is a legally binding document between a farmer and a gas company. It needs to be comprehensive and cover all access arrangements agreed between the parties. The gas company will pay some costs for farmers obtaining legal advice on preparing an LAA.

Although draft templates for general LAAs have been prepared in NSW and Queensland, there is a reluctance to standardise the process as often no “blanket answer” can address all landholder, site characteristics and mining activity requirements across an entire project area.

At present, a LAA provided by a gas company will generally cover:

Access – determine the best access to and across the property, and where possible, specify use of and upgrading existing access roads.

Use of land – demonstrate an understanding of the farming and other activities on the property, so that the company can respect and work around current land use practices.

Timing – notice periods before access (many mandatory by law) and expected duration of activities.

Location – agree the location of pads, wells, pipes and associated equipment.

Contact – Key contact information and staff. Determine how the farmer wants to be updated (for example, regular on site meetings or phone calls/emails).

Visitors – develop a protocol for gates, fences, stock interaction, operating hours, vehicle movements and any other requirements relating to property management.

Rehabilitation – agree a rehabilitation plan for the areas that are disturbed.

Landholder requirements – any matters important to the farmer and the opportunity to provide comprehensive, detailed specifications to the fullest extent possible. This should also include baseline condition reports on farm assets, including physical features. For more detail on what a dairy farmer should consider in LAA negotiations, see Fact Sheet Unconventional gas mining – Planning and managing in a coexistence scenario.

It is recommended that the LAA specifies every company employee and contractor must adhere to the LAA.

Compensation

By law, companies must pay landholders for ‘reasonable’ legal costs in obtaining initial advice about an LAA and compensation. There is no overarching capped compensation rate in NSW, Queensland and Victoria, though limits may apply to specific categories within an overall compensation package.

In Queensland and NSW, compensation will usually form part of the LAA. In Victoria, where an LAA to explore is not necessary, a compensation agreement must be in place before any production activities take place.

Compensation can be negotiated for baseline assessments and any independent expert advice sought in this process. Landowners are entitled to compensation for the activity on their land and any loss experienced as a result of these activities, including payments to offset the inconvenience of noise, dust and deprivation of access to land.

No State has a formula to calculate compensation. Guidelines for compensation outline a ‘good faith’ approach to a level that recognises the impact of exploration and production activities on the landholder. For anticipated loss, damage or inconvenience, an agreed amount if a certain event occurs can be negotiated; for example, where milk may have to be disposed of due to an untreated produced water overspill and possible contamination. This formula may be linked to the milk price at the time of the possible incident rather than milk price at the time of negotiating the agreement.

Compensation may also be linked to drill hole numbers or other activities. If loss or damage occurs for something that was not expected, landholders can still ask for additional compensation.

For example, under the NSW Petroleum (Onshore) Act landholders are entitled to compensation for:

- Damage to land surface, crops, trees and other vegetation, and buildings and structures;
- Deprivation of the use of surface land, or blocked access;
- Loss of right of way or easement;
- Destruction, injury or disturbance to stock; and,
- Damage which is a consequence of any of the above.

The landholder and company must sign an agreement that specifies the payable compensation.

In-kind support from the gas company can also be written into any agreement. For example, additional earthworks for an effluent pond, laneways or sludge pit, while the equipment is on-site.

In all States, the gas company must pay appropriate security deposits/bonds to the State (either in cash or as a bank guarantee) to ensure funding is available in the event that damage to a property or the environment is not made good. Adversely affected land owners (including loss of property or amenity, damage to property or stock), who have had gas activity on their property, can make a claim for compensation via relevant tribunals.
Document and communicate

Farmers should make sure they document all conversations in their diary and, whenever possible, undertake negotiations and discussion in writing. It is important to keep dialogue open and transparent, and include your neighbours or key community stakeholders when opportune.

For further information

A full set of dairy fact sheets and a comprehensive contact list for each State is at www.dairyaustralia.com.au.

References


