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Review of hydraulic fracturing in Tasmania: Issues paper and invitation to comment

EDO Tasmania welcomes the opportunity to provide a submission on the *Review of hydraulic fracturing in Tasmania: Issues paper and invitation to comment* (the Issues Paper). We commend the government for undertaking this review, and for seeking public involvement in this process.

There is a considerable degree of community concern regarding the unconventional gas industry and the practice of hydraulic fracturing ("fracking") in Tasmania. Given the issues associated with unconventional gas activities and fracking on the mainland, in particular Queensland and New South Wales, it is important to be transparent, listen to and address concerns at an early stage and to encourage community involvement. The Issues Paper is an important step in that process.

EDO Tasmania is a community legal centre specialising in environment and planning law. We provide legal representation and advice on planning and environment law reform and policy formulation. We also undertake community legal education designed to facilitate public participation in environment and planning decision making.

In this regard, EDO Tasmania recently published the *Community Guide to Mining Law*. The Guide aims to assist the community to understand their rights and responsibilities and to engage effectively in the decision-making process for mining in Tasmania. We also conducted a series of community workshops to support the Guide.

This submission draws on those experiences and community concerns raised in the workshops. We have restricted our comments to issues associated with the legal framework, rather than scientific or technical issues regarding the impacts associated with fracking. Consequently, this submission will focus on Terms of Reference 3 and 4:

3. Developments and experiences in the regulation of hydraulic fracturing nationally and internationally.
4. The robustness and operation of the current laws governing exploration licences and any future extraction licences in Tasmania, and consider whether any changes are required to improve protections for land users and industry engagement with landholders and local community.

While the Issues paper outlines other types of fracking (non-hydrocarbon fracking uses),[1] this submission and associated recommendations relate to fracking associated with unconventional gas activities only.

[1] Issues paper, p. 10

At the outset, we note that Tasmania has committed to achieving at least 60% reduction from 1990 emissions by 2050.[2] Particularly given Tasmania's relative advantages in respect of renewable energies (also acknowledged in the Economic Development Plan), facilitating new fossil fuel extracting activities is not an economically or environmentally sound strategy. Renewable energy investment will better position Tasmania to meet the needs of a low carbon economy. Government efforts should be directed to exploring options to facilitate and attract investment in renewable energy technology (including clearer planning rules for small – medium scale wind projects), rather than unconventional gas.

Overall Recommendation

EDO Tasmania's experience with communities affected by proposed unconventional gas activities suggests the current laws and policies that regulate exploration and production are in need of significant reform. Generally speaking, the legal framework does **NOT**:

- Adequately protect the environment and achieve sustainable development, therefore improvements in the environmental impact assessment framework are necessary;
- Provide for equitable community participation in land-use decisions or sufficient landowners' rights regarding fracking; or
- Provide for sufficient monitoring, enforcement or reporting requirements.

We recommend that the Tasmanian government take a precautionary approach to the development of unconventional gas extraction and associated fracking in Tasmania.

We commend the government for the current moratorium, but do not believe that 12 months is sufficient time for a comprehensive review of the likely impacts of fracking (environmental, social & human health). We recommend that the moratorium remain in place until a comprehensive, independent review of shale gas activities in Tasmania has been completed and the outcomes of the review considered by government.

Developments and Experience in Australia and Internationally

Tasmania is at the very early stages of unconventional gas exploration and, as outlined in the Issues Paper, fracking has not been, and may never be, carried out. This provides an excellent opportunity for Tasmania to learn from the experiences of other States, particularly Queensland and New South Wales, and to implement a best practice framework for the assessment and regulation of any future activities.

EDO Tasmania urges the Tasmanian government to take a precautionary approach and to refuse to authorise fracking activities where doubt exists regarding the likely impacts.

We do not believe that the current moratorium period allows enough time for a comprehensive study of the impacts of fracking on the environment to be adequately assessed. In September, the NSW Chief Scientist released the 'Independent Review into Coal Seam Gas Activities in NSW'.[3] We recommend that a similar, independent review of shale gas activities in Tasmania be undertaken by the State government before the current moratorium is lifted. The Review would be a scientific assessment of the potential environmental, social and human health impacts of shale gas extraction in Tasmania.

[2] See The State's 2050 target under *Climate Change (State Actions) Act* 2008 is to reduce, by 31 December 2050, greenhouse gas emissions in Tasmania to at least 60% below 1990 levels.

[3] NSW Chief Scientist and Engineer, Final Report: Independent Review into Coal Seam Gas Activities in NSW (2014): http://www.chiefscientist.nsw.gov.au/__data/assets/pdf_file/0005/56912/140930-CSG-Final-Report.pdf

New South Wales[4]

Recommendation 2

We recommend that the Tasmanian government develop a *Code of Practice for Unconventional Gas Fracture Stimulation Activities* and a *Code of Practice for Shale Gas Well Integrity*. These would be similar to Codes adopted in NSW and should be approved under s204 MRDA.

We also recommend that compliance with the Codes should be a legislative requirement, rather than simply being included as a licence condition (see MECOP recommendations below).

The New South Wales Coal Seam Gas regulatory framework provides a good reference point against which the Tasmanian framework might be reviewed. The NSW framework for fracking activities is significantly more comprehensive than the current Tasmanian framework. It is our view that the Tasmanian government adopt a number of additional regulatory tools to bring it into line with NSW standards before any future fracking activities be considered.

The legal regime regulating 'fracking' activities in NSW is regulated by three pieces of legislation:

1. The *Petroleum (Onshore) Act* 1991 and *Petroleum (Onshore) Regulation* 2007 and Codes of Practice made under the Act.
2. The *Environment Planning and Assessment Act* 1979.
3. The *Water Management Act* 2000, specifically via the *Aquifer Interference Policy*.[5]

In NSW, two codes of practice apply as conditions imposed on titles:

- NSW Code of Practice for Coal Seam Gas Fracture Stimulation Activities (**the Fracking Code**);
- NSW Code of Practice for Coal Seam Gas Well Integrity (**Integrity Code**).

The Fracking Code sets out mandatory requirements for Management Plans, Stakeholder Consultation, Fracture Stimulation Design, Risk Assessment, Safety, Use of Chemicals in Fracture Stimulation, Water Resource Protection, Management of Flowback water, Monitoring, Incident and Emergency Response, Completion Reports and Record Keeping.[6]

The Integrity Code sets out specific design requirements for construction, production, maintenance and ultimate abandonment of CSG wells in NSW.[7] The Integrity Code provides minimum requirements for well design, casing, cementing, wellheads, drilling fluids, monitoring and maintenance and abandonment of wells.

EDO Tasmania recommends that, prior to any fracking activities being authorised, a Fracking Code and an Integrity Code be developed to guide how the activities are assessed, monitored and regulated. In particular, the Codes should include:

- stakeholder consultation requirements;
- a complete ban on use of additives containing BTEX compounds;
- groundwater modelling and potential impacts (see NSW Aquifer Interference Policy)
- well construction, integrity and maintenance;
- requirements to adhere to national and international standards;[8] and
- consistent definitions.

[4] EDO NT (2014) EDO Northern Territory Report: Best Practice Regulatory Frameworks for Hydraulic Fracturing Operations.
[5] NSW Aquifer Interference Policy: http://www.water.nsw.gov.au/Water-management/Law-and-policy/Key-policies/Aquifer-interference/Aquifer-interference
[6] https://www.nsw.gov.au/sites/default/files/csg-fracturestimulation_sd_v01.pdf
[7] https://www.nsw.gov.au/sites/default/files/csg-wellintegrity_sd_v01.pdf
[8] For example: AS/NZS ISO 31000:2009 Risk management -Principles and Guidelines; ANZECC 2000 guidelines.

Robustness and Operation of current laws

Improvement of Environment Assessment

Recommendation 3

We recommend the development of a Planning Directive for Unconventional Gas activities including fracking to ensure that such activities are not permitted in sensitive areas (that is, a directive which identifies no-go areas in which fracking activities will be prohibited) and which clearly sets out requirements for assessing applications outside those areas.

We recommend the *Mineral Resource Development Act 1995* be amended to require decision decision-makers to further the objectives of the Resource Management and Planning System when making any decisions to grant licences or leases, suspend operations or require bonds.

Planning framework

Evidence-based land use planning must be the basis upon which any assessment of fracking is based. To provide a more strategic assessment of capacity, catchment management issues and fragmentation of habitat, we recommend that a Planning Directive for Unconventional Gas activities including fracking be developed. The Planning Directive should identify sensitive areas (e.g. no-go zones) in which fracking activities will be prohibited, and clearly set out information requirements and assessment criteria for applications to undertake fracking activities outside those areas.[9] The planning directive should be developed on the basis of a comprehensive, independent study of the environmental impacts (e.g. catchment capacity, sensitive areas etc. – see overall recommendation), with a particular emphasis on the precautionary principle.

The legislative framework must regulate fracking activities to achieve sustainable development; and decision makers must exercise their functions and powers consistently with the sustainable development objectives. This is not currently the situation as the *Mineral Resources Development Act 1995* does not incorporate the Resource Management and Planning System (***RMPS***) objectives. This is out of step with mining legislation in other states.[10]

Decisions made under the *Land Use Planning Approvals Act 1993* (***LUPAA***) and *Environmental Management and Pollution Control Act 1994* (***EMPCA***) relating to mining activities will be subject to the RMPS objectives. However, exploration activities are generally not subject to these Acts.

We recommend that the *Mineral Resource Development Act 1995* (***MRDA***) should be amended to come within the RMPS to ensure decision makers are legislatively required to further sustainable development objectives.

Level 2 Activity

Recommendation 4

We recommend that the *Environmental Management and Pollution Control Act 1994*, Schedule 2 be amended to explicitly include the following as Level 2 activities:

- unconventional gas activities (pursuant to a production licence)
- any hydraulic fracking be classified

Under EMPCA there is no explicit legislative requirement for fracking activities to be subject to an environmental impact assessment.

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[9] See NSW's *State Environmental Planning Policies (Mining, Petroleum Production and Extractive Industries) 2007*; NSW *Strategic Regional Land Use Policy:* http://www.planning.nsw.gov.au/en-us/planningyourregion/strategicregionallanduse/gatewayassessmentandsiteverification.aspx

[10] For example, the *Petroleum and Gas (Production and Safety) Act 2004* (QLD); the *Petroleum Onshore Act 1992* (NSW); the *Mining Act 1992* (NSW); the *Environmental Planning and Assessment Act 1979* (NSW).

EMPCA, Schedule 2 does not make it clear whether an environmental assessment would be required for production licences for unconventional gas projects. The EPA have indicated in previous discussions that they believe these activities are likely to fall within existing categories in Schedule 2 or otherwise may be 'called in' by the EPA for assessment. For clarity and consistency of application, we recommend the legislation be amended to explicitly reflect that extraction pursuant to a production licence is a Level 2 activity.

The Issues Paper notes, "if fracking takes place at all, it only occurs during the latter stages of an exploration program, and in any subsequent pre-production phase if the resource is proven".[11] Therefore, the Issues Paper acknowledges that in some instances fracking may be undertaken at the exploration stage. Exploration activities do not require a planning permit[12] and are generally not assessed by the EPA. While the EPA has the power to 'call in' such activities for assessment, considering the potential impacts, we recommend that EMPCA be amended to clearly require environmental impact assessment of all proposed fracking activities.

Groundwater

Recommendation 5

We recommend that the Standard DPEMP Guidelines be amended to require the assessment of groundwater impacts associated with hydraulic fracking.

We also recommend that the minimum standards for information provided in the DPEMP be set out in regulation, rather than the Guidelines only (consistent with the approach taken under the EPBC Act).

Groundwater contamination is a major concern in relation to fracking for unconventional gas extraction.[13] As outlined in the Issues paper, the risks of aquifer contamination as a result of shale gas extraction are lower than the risks associated with coal seam gas extraction.[14] However, the risks of contamination from well failure, stimulating fractures/faults and poor handling of produced water remain.[15] Consequently, it is critical that environmental impact assessments in respect of fracking activities specifically address groundwater impacts.

Currently, the Environmental Impact Assessment principles in s.74 of EMPCA are implemented through published guidelines for the preparation of a DPEMP. These provide standard and site-specific guidance as to the issues that must be addressed by a proponent. We suggest that the Standard DPEMP Guidelines be amended to require the assessment of groundwater impacts specifically from fracking (in line with our recommendations that both hydraulic fracturing and unconventional gas activities should be separate triggers under schedule 2, EMPCA). While groundwater impacts are already addressed under the Standard DPEMP Guidelines, we recommend that more specific standards be adopted for fracking activities[16] and that compliance with any requirements of a Fracking Code (as above) be mandatory.[17]

We also recommend that the minimum standards for information to be addressed in the DPEMP be adopted by way of regulation, rather than a stand-alone guidance document. This is consistent with the approach taken under the EPBC Act, whereby minimum information requirements are set out in the *Environment Protection and Biodiversity Conservation Regulations 2000*.

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[11] Issues Paper, p. 13
[12] Section 20(7)(b) LUPAA
[13] Australian Council of Learned Academies (2013) Engineering Energy: Unconventional Gas Production, p. 125: http://acola.org.au/PDF/SAF06FINAL/Final%20Report%20Engineering%20Energy%20June%202013.pdf
[14] Issues Paper, p. 22
[15] Australian Council of Learned Academies (2013) Potential Geological Risks Associated with Shale Gas Production in Australia, p. 4: http://www.acola.org.au/PDF/SAF06FINAL/Frogtech_Shale_Gas_Geology_and_Risks%20Jan2013.pdf
[16] See, for example, standards set out in the NSW Aquifer Interference Policy: http://www.water.nsw.gov.au/Water-management/Law-and-policy/Key-policies/Aquifer-interference/Aquifer-interference
[17] NWQMS Guidelines for Groundwater Protection in Australia (AGRMC and ANZECC,1995) www.daff.gov.au/__data/assets/pdf_file/0010/316099/guidelines-for-groundwater-protection.pdf

Under the *Environment Protection and Biodiversity Conservation Act 1999,* the 'water trigger' requires coal mining and coal seam gas developments that are likely to have a significant impact on a water resource to be referred to the Federal government for assessment. The 'water trigger' was introduced in 2013 in response to public concern about the groundwater impacts of Coal Seam Gas and large coal mine projects.[18] The water trigger is supported by the establishment of an Independent Expert Scientific Committee to assess the impact of such projects on water resources. Whilst the 'water trigger' will not apply to shale gas extraction in Tasmania, it stands as a good example of how impacts on water from unconventional gas extraction have been regulated at a national level and the important role that independent scientific information has played in decision making.

We recommend that an independent scientific committee be established within the EPA, and that all applications in relation to fracking activities be referred to the committee for review.

Climate change

Recommendation 6

Climate change considerations should run through all decisions made by the Tasmanian government. The Issues Paper needs to seriously consider the impact of large scale unconventional gas activities on anthropocentric climate change (e.g. fugitive emissions) and where uncertainty exists, the burden should be on the operator to satisfy the regulator that the impact is negligible.

We recommend that government efforts be directed to exploring options to facilitate and attract investment in renewable energy technology (including clearer planning rules for small – medium scale wind projects), rather than unconventional gas.

Climate change is recognised as one of the most significant threats to the world economy.[19] As stated above, the government should prioritise efforts to facilitate renewable energy over investment in fossil fuel extraction. However, if fracking is to be pursued, Tasmania's mining laws need to require adequate assessment, monitoring and regulation of greenhouse gas emissions and climate change impacts of unconventional gas activities.

Chapter 10 of the Australian Council of Learned Academies Report[20] outlines in detail the potential greenhouse gas emissions that can result from shale gas extraction. The Reports concludes that "Like all other natural gas activities, the production, processing, transport and distribution of shale gas results in greenhouse gas (GHG) emissions." The Report also notes that "shale gas can also generate emissions associated with the hydraulic fracturing".

Despite this, the only reference to these concerns in the Issues Paper is a brief mention in relation to 'fugitive and other emissions' which states "whilst there is potential for fracking activities to contribute to carbon emissions, **such potential impacts lie outside the scope of this review**".[21]

Climate change considerations should run through all decisions made by the Tasmanian government. The Issues Paper needs to seriously consider the climate change impact of large scale unconventional gas activities and, where uncertainty exists, the burden should be on the operator to satisfy the regulator that the impact is negligible (pursuant to the precautionary approach recommended above). The standard DPEMP guidelines should require proponents to outline the anticipated emissions from any fracking activities as part of the application and assessment process.[22]

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[18] The Commonwealth government released a draft Approval Bilateral Agreement for public comment in August / September 2014. However, the water trigger is unique in it is the only trigger that the EPBC Act specifically states cannot be handed over to the States. Therefore the Commonwealth government needs to pass the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014* .

[19] See for example, World Bank, *Turn Down the Heat: Why a 4C Warmer World Must Be Avoided* (2012).

[20] Australian Council of Learned Academies (2013) Potential Geological Risks Associated with Shale Gas Production in Australia, p. 4: http://www.acola.org.au/PDF/SAF06FINAL/Frogtech_Shale_Gas_Geology_and_Risks%20Jan2013.pdf

[21] Issues Paper, p. 23

[22] We note that the Standard Guideline reference the need to address climate change. However, there is no mention of fugitive emissions.

Aboriginal Heritage

Recommendation 7

We recommend that the MRDA be amended to require notification of applications to be given to Aboriginal representative bodies.

The Tasmanian legislative framework does not currently require impacts on Aboriginal cultural heritage to be considered as part of an environmental impact assessment, although such impacts are included in the Standard Guidelines.[23]

The MRDA includes "native title holders" in the definition of owners. This is not a definition which covers most Tasmanian Aboriginal representative bodies. In order to ensure that there is appropriate consultation with affected Aboriginal communities, we recommend that the relevant Tasmanian Aboriginal representative bodies be notified of all applications. This will provide an opportunity for potential impacts on Aboriginal cultural heritage to be identified early on and appropriate measures taken to avoid such impacts.

Public Participation

The framework regulating fracking and unconventional gas activities needs to be fairer to local communities, by improving notification, public participation and appeal rights. Land access and consultation regarding Coal Seam Gas in other states of Australia has been very controversial and given rise to the 'Lock the Gate' movement and others. This has resulted largely from the uncertainty regarding the impacts, a lack of public participation and consultation of communities and limited landowners' rights. Tasmania is now in a position to learn from that experience by ensuring genuine community engagement.

EDO Tasmania has just recently completed a series of workshops focusing on mining law as a result of an identified need for greater awareness of the legal framework and community rights. In recent years, EDO Tasmania has noticed an increase in requests for information on mining laws.

Some key concerns that community members have raised at our recent workshops include:

- Lack of notification and consultation regarding exploration licences;
- Difficulty obtaining information about mining activities;
- Concerns about environmental, social and economic impacts associated with exploration and production, especially on groundwater, health and property values;
- Confusion and concern about environmental assessment and development approval processes and how they relate to one another, and landholders' (often limited) ability to influence them;
- Concern about negotiating access arrangements, and the ability to protect properties from damage caused by unconventional gas activities.

The following recommendations are based on these concerns.

Notification

Recommendation 8

We recommend that landholders and adjacent neighbours should be personally notified of any exploration or production licence that covers their property or an adjacent property.

The notice should also be placed on MRT's website so that it is easily accessible to members of the public throughout the duration of the objection period.

The legislative framework should ensure that all mining activities include comprehensive rights to **public access to information, notification and consultation** at all stages.

[23] The *Aboriginal Relics Act 1975* protects relics only, not areas of significance or landscapes that can have particular cultural relevance for Tasmanian Aboriginal peoples.

Landholders and adjacent neighbours should be personally notified of an exploration or production licence application that covers their property or an adjacent property. Under the MRDA, there is no requirement for landowners or occupiers to be personally notified in such a situation. All that is required is for a notice to be placed in the paper circulating in the relevant area.[24]

Personal notification to affected landowners and occupiers is a requirement in other states and territories (including Victoria, Western Australia and the Northern Territory). This is important to ensure landowners and affected persons have a genuine opportunity to participate in the decision making process. Not requiring personal notification is out-of-step with practice in other States.

Personal notification should not replace the need for public notification. Indeed, MRDA should be amended to require notice to be placed in the local newspaper **and** accessible on the MRT website for the duration of the objection period.

Access to information

Recommendation 9

We recommend that the MRDA be amended to require greater access to information for members of the public. MRT should establish:

- an easily accessible, user-friendly database of maps and other information for members of the public (upgrading the existing TIGER database);
- a publically accessible register of mineral tenement applications, including all supporting materials;
- a publically accessible register of relevant documents, such as work programs / field development plans etc.

Access to information is fundamental to a functioning democracy.[25] One of the major concerns raised during our recent workshop series was the difficulty in accessing information about proposed or existing mining activities, including:

- Maps showing the boundaries of the mineral tenement area;
- The application documents;
- Current licences, work program, field development plan;

The Tasmanian Information on Geoscience and Exploration Resources (TIGER) database on MRT's website is an industry tool. It is not easy for members of the public to navigate or to locate information required to effectively participate in the decision making process. It generally presupposes that you have some preliminary information about what you are looking for (e.g. exploration licence number, mining company details, location etc.). We appreciate that consultation was recently undertaken regarding the new website, and recommend more targeted consultation to develop a more user-friendly database.

Application documents for mineral tenements are not publically available for interested parties to inspect. This can make it difficult to fully understand proposals and their potential impacts. We recommend that all application material be readily available on the MRT website, along with a clear list of current applications and deadlines for objections. This is standard practice in other States, and would be consistent with the practice of local councils and the EPA.[26]

[24] Exploration - Section14(2(b) MRDA; Production licence - Section 67D(2)(b) MRDA

[25] The general requirement to allow the public to access information in the process of preparing an EIA can be discerned from several existing international legal instruments on EIAs, which demonstrate the participatory character of environment and resource decision making, e.g. the 1998 Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice.

[26] In NSW, current coal and petroleum (including CSG) exploration licence applications and approvals are available on the government website: http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/current-coal-and-petroleum-exploration-licence-applications

The *Mineral Exploration Code of Practice* (MECOP) relies heavily on the development and approval of a work program to implement a number of conditions and regulations of exploration activities. Despite the significance of these documents, it is very difficult for community members to access current licences and work programs to see what conditions an operator is required to comply with. Making this information publically available would allow people to make more informed objections, raise concerns regarding missing information and monitor compliance. We recommend that MRT develop a publically accessible register of currently licences, work programmes and field development plans (if required).

Objection Rights

Recommendation 10

We recommend broadening objection rights under the *Mineral Resources Development Act 1995* to allow 'any person' to make an objection to a mineral tenement.

EDO Tasmania is a strong advocate for public participation in resource management decisions, and believes that such participation leads to better, fairer and more sustainable decisions. Importantly for fracking and unconventional gas activities, it can also play an important role in community acceptance of such activities.

> ***EXAMPLE**: A farmer from the Southern Midlands was concerned about an application for exploration for unconventional gas is his area. His property was adjacent to the exploration licence area but did not fall within it. He filed an objection, seeking an opportunity to discuss his concerns with the company and MRT regarding impacts on water sources used to irrigate his property and water stock. However, he was advised that he did not have an "interest or estate" and was therefore unable to make an objection.*

Under the MRDA, the right to object to an application for an exploration or production licence is limited to a person with an "interest or estate in land" in the area subject to the application.[27] The Courts have taken a narrow view on who has an interest or estate, limiting it to people with direct proprietary or financial interests.[28] This can make it difficult for community groups, neighbours, downstream landowners or conservation organisations to object to exploration licences.[29]

Tasmania is currently out-of-step with mining regulation in other state jurisdictions. Under the Victorian and Western Australian mining legislation any person can lodge objections to the granting of any mining tenement. Similarly in South Australia any member of the public can make representations under the legislation which must be considered by the Minister in determining the application.

Given the community concern and potentially broad, off-site environmental impacts of unconventional mining activities, we recommend broader objection rights under the *Mineral Resources Development Act 1995*. Similarly to LUPAA, the MRDA should allow 'any person' to make an objection to an application for a mineral tenement.

We acknowledge that where a planning permit and an environmental authority is required (generally, at the extraction stage), any person can make a representation.[30] However, it is essential that communities have a say at the exploration stage and broadening objection rights to "any person" under the MRDA would allow that. This would also give MRT and the mining company the

[27] Exploration - Section 15(1) MRDA; Production - Section 67E MRDA

[28] Stow v Mineral Holdings (Australia) [1979] HCA 30

[29] The Supreme Court of Tasmania has recently recognised that conservation organisations and the broader community have a proper interest in regards to environmental authorities for mining development: see TARKINE NATIONAL COALITION INC v ALEX SCHAAP: http://www.edotas.org.au/wp-content/uploads/2014/06/Tarkine-National-Coalition-v-Enviornment-Protection-Authority-Oral.pdf. It is yet to be determined whether this broader interpretation would be applied in respect of the decision to grant a mining tenement.

[30] It is important to acknowledge that the State Government has promised to limit third party appeal rights under LUPAA.

opportunity to identify and address community concerns at an early stage. As outlined above, we strongly recommend developing a Fracking Code of Practice that sets clear guidance for broad stakeholder consultation.

Can private property owners prevent mining companies from coming onto their property?

Under the current legislation, the following consent requirements are dealt with separately:

- Consent to enter private property
- Consent to drill on private property

Consent to Drill

Recommendation 11

We recommend that the MRDA be amended to explicitly require landholders' consent to drill a well prior to the granting of an **exploration licence** and a **production licence**.

On the last page of the MECOP, the "Onshore Wells: Approval to Drill Checklist" includes "Landowner's consent". The Code provides for all checklist items to be provided before approval to drill an onshore well can be given.[31]

As outlined in the Issues Paper, section 29(b) of the MRDA requires exploration to be carried out in accordance with the standards specified in the MECOP. The MECOP is an approved Code under section 204 MRDA and must be adhered to for the planning permit exemption under LUPAA to apply.[32] MRT have indicated they will strictly enforce this requirement, which we welcome.

However, it would be preferable for this obligation to be incorporated into the legislation, rather than in the MECOP alone. Providing for landowner consent as part of the MRDA promotes certainty, transparency, accountability and public confidence. Setting out such processes in the MECOP alone risks uncertainty (because the Code can be changed without parliamentary scrutiny), 'practical obscurity' (where obligations are hard to find), and non-compliance (because they are harder to enforce[33]).

While the MECOP is an authorised Code, and compliance with it is included as a licence condition, there are limited avenues for addressing breaches of licence conditions as it is not an offence under the MRDA to breach a licence condition. The Minister has powers to suspend or revoke the licence,[34] but revocation or suspension would only occur in very serious situations (see below). This leaves the regulator with limited options to deal with a licensee who has proceeded with drilling without landholder consent. As discussed below, we recommend amendments to introduce a broader suite of enforcement options.

Rather than relying on enforcement of licence conditions by way of revocation or suspension, we recommend that the MRDA be amended to explicitly provide that landholder consent is a prerequisite for applying for an exploration licence. This is consistent with requirements under LUPAA for Crown consent to apply for planning permits on Crown land. This approach would address concerns the landowner may have from the outset, and provide greater certainty to the mine operator as to whether drilling operations will ultimately be allowed to proceed.

On our interpretation, landowners consent to drill an onshore well is only required for exploration licences (pursuant to the MECOP). If the intention is for that requirement to extend to drilling under production licences, which we would welcome, the MRDA should also be amended to require consent prior to the granting of a production licence.

[31] MECOP, p. 54
[32] Section 20(7)(b) LUPAA
[33] As recommended, it would be much easy to enforce if it was made an offence under the MRDA.
[34] Exploration – s34; Production – s674Y MRDA

Mining companies entering private property

Recommendation 12

We recommend that the requirement for landholders consent to **enter** private property under either an exploration licence OR a production licence be legislatively enshrined in the *Mineral Resource Development Act 1995.* As the legislation currently stands, no consent is required to enter property for the purposes of exploration or production (if the Mineral Tribunal has made a compensation determination).

For exploration activities, a licence holder can only enter private property if the landowner is given at least 14 days written notice (unless the owner has agreed to allow earlier access).[35] No exploration activities can occur within 100 metres of any dwelling, substantial building, well or water body without the consent of the landowner.[36]

For production licences, the Minister can only grant a licence over private property if the Minister is satisfied that:[37]

- there is a negotiated compensation agreement in place between the owner and the mining company; or
- the Mining Tribunal has made a compensation determination.

A landowner may refuse to negotiate a compensation agreement and may also object to a compensation determination being made. However, if the Mining Tribunal makes a compensation determination, the mining company will be able to enter private land to carry out mining activities, despite the landowner's objection.

For production activities, a licence holder can only enter private property:

- If the landowner at least 14 days written notice before entering their property (unless the landowner has agreed to allow earlier access);[38] and
- No exploration activities can occur within 100 metres of dwellings, buildings, wells or water bodies.[39] However, it is unclear what 'explore' means in the context of a production licence and whether it would include the drilling of new production wells.

We recommend that the requirement for landholders consent to enter private property under either an exploration licence or a production licence be legislatively enshrined in the *Mineral Resource Development Act 1995.* As the legislation currently stands, no consent is required to enter property for the purposes of exploration, or for production if the Mineral Tribunal has made a compensation determination.

Improved monitoring & enforcement and regular reporting and review

Recommendation 13

We recommend that the MRDA be amended to include the following:

- a broader suite of enforcement tools to ensure an appropriate level of deterrence;
- requirements for regular, independent audits of compliance; and
- broader powers for the regulator to require strong enforceable site rehabilitation conditions, particularly in regards to well integrity.

We also recommend adequate funding be provided to allow MRT to effectively monitor, implement and enforce the MRDA.

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[35] Section 23 MRDA; Mineral Resources Tasmania, 2012. Minerals Exploration Code of Practice p. 10

[36] Section 19 MRDA

[37] See Section 67I(4) MRDA

[38] Section 67N(2) MRDA

[39] Section 67K MRDA – states only exploration is prohibited without consent. This does not mean that production, undertaken in accordance with the licence cannot be undertaken.

Regulation of fracking associated with unconventional gas activities must incorporate effective compliance monitoring, enforcement and reporting. Monitoring and enforcement against breaches by Coal Seam Gas operators on the mainland continues to be a significant issue associated with the industry.[40] This provides an opportunity for Tasmania to learn from that experience.

This can be achieved by a number of methods:

- frequent, **independent audits of compliance** with licensing and development conditions for all fracking activities, funded by the operator;[41]
- **accurate, transparent and publicly accessible** information and pre- and post-approval of fracking activities (see access to information above); and
- effective **site rehabilitation** conditions, adequate security deposits, and enduring responsibilities for future impacts and rehabilitation goals, particular in regards to well integrity;
- additional funding for the regulatory body to allow for effective monitoring, enforcement and compliance.

There are limited enforcement powers under the MRDA, unlike EMPCA. As stated above, the Minister may revoke an exploration licence, a mining lease or a production licence if the mining company fails to comply with, or contravenes any provision of the MRDA or any condition of the lease. However, in many instances this will not be a proportionate response to the breach and therefore will only be used in limited circumstances. In the absence of alternative enforcement options, many breaches will go un-penalised.

The MRDA needs to be amended to incorporate a greater suite of enforcement tools to ensure an appropriate level of deterrence, including:

- Provision making it an offence to breach a licence condition;
- Provision making it an offence to breach the Code of Practice (MECOP, Fracking. Well Integrety etc);
- Provision for a range of enforcement options, including stop work orders, rehabilitation orders and enforceable undertakings[42]; and
- Provision for civil enforcement by any interested persons.[43]

Offence for obstructing mining operations

Recommendation 14

We recommend that the offence provisions in relation to obstruction not apply to landowners, occupiers or their agents.

It is an offence under the MRDA to attempt to obstruct a mining company from carrying out authorised activities, even where the activities occur on your own or immediately adjoining property.[44]

Given the lack of personal notification, restricted objection rights and limited consent requirements, it is a disproportionate response to place a property owner concerned about the impacts of exploration or production activities at risk of significant penalties.

Under the new the *Workplaces (Protection from Protesters) Act 2014,* protesters may also face large fines for trying to prevent exploration and mining activities from being undertaken.

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[40] Australian Council of Learned Academies (2013) Engineering Energy: Unconventional Gas Production: http://acola.org.au/PDF/SAF06FINAL/Final%20Report%20Engineering%20Energy%20June%202013.pdf

[41] See MRT reporting guidelines: http://www.mrt.tas.gov.au/portal/documents/10184/28203/GUIDELINES_REPORTING_2014.pdf/1786c9c7-0cd2-45bb-95c4-b268b572dd10

[42] See Sections 486DA and 486DB *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

[43] Section 48 EMPCA; Section 64 LUPAA

[44] Section 23(3) MRDA exploration; Section 84(2) MRDA mining lease; Section 67N(3) MRDA production licence

EXAMPLE: *A resident of a small rural area in central Tasmania was worried about shale gas extraction in her community. Although her property was within the licence area, she was not personally notified of the application so had failed to make an objection in time and a licence was granted over her property (and others in the region). When the mining company started preliminary ground works on her neighbour's property, she became concerned and tried to stop the works commencing until she was able to find out more.*

By seeking to prevent the drilling operations, she was charged with obstructing an authorised activity. While she wants to prevent any further drilling, she is concerned that she will face significant penalties under the new Workplaces (Protection from Protesters) Act 2014 if she takes any action to stop the mining company from coming onto her property to do preparatory work.

Thank you for the opportunity to make these comments. We would be pleased to meet with the review team to discuss any of the recommendations in more detail.

Kind regards,

EDO Tasmania

S. Wilson

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