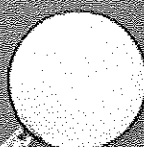




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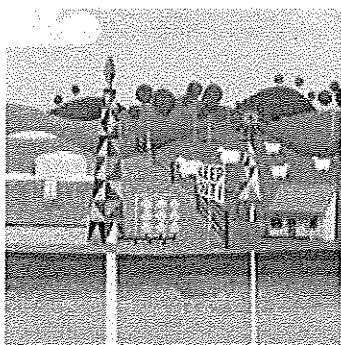
Fracking concerns

Feature Articles

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A Victorian parliamentary inquiry will determine how and when onshore unconventional gas exploration and development proceeds. Land access arrangements and compensation models will be tested on both sides of landowners' gates.

By Steve Chambers



Currently there is no shale gas exploration or production in Victoria but this could change with regard to exploration in the foreseeable future. Although no confirmed sources of shale gas have been identified, significant potential exists in the Gippsland and Otway basins.¹ On 24 August 2012, the Victorian government implemented a moratorium on fracking, the process required to commercially access shale gas and other unconventional resources such as coal seam gas (CSG); this hold also applies to new CSG exploration permits and certain chemicals used in fracking.² The moratorium, at least in respect of fracking, was to remain in place until at least July 2015,³ but may now extend into 2016.⁴ In its October 2013 final report, the Victorian Gas Taskforce (the taskforce) recommended the

moratoriums on fracking and CSG be lifted but that a permanent ban on the use of benzene, toluene, ethylbenzene and xylene chemicals (BTEX) in the fracking process be introduced.⁵ This, together with proposed legislation that does not implement a total ban on the use of BTEX chemicals,⁶ is of considerable concern for both owners and occupiers of relevant land.⁷

Shale gas is an unconventional gas that cannot be extracted by conventional means and always requires fracking to produce commercially viable flows. CSG, also an unconventional gas, does not always require fracking in order to be extracted.⁸ As social licences to operate (SLTO) for large industry are becoming more determinative of an industry's ability to reach its full potential, relevant parties have an elephant in the room in the shape of hydraulic fracturing, or fracking. SLTO occur where industry participants, government and the community reach mutual ground and are each comfortable with the progression of the industry. Before fracking can be carried out, land access and compensation arrangements must be in place. Understandably, courts and practitioners have only recently started to address the appropriate framework to apply.

Fracking is an extraction process that facilitates the release of unconventional oil and gas by pumping fluid containing water, sand and chemicals down the well at high pressure to produce small cracks in target reservoir rocks. It is a technique that has been used in oil and gas production for longer than 65 years and in more than 2 million wells worldwide.⁹ Notwithstanding the frequency of approved fracking operations, concerns abound regarding its use, including water and ground contamination, the use of toxic chemicals and chemical

spills, earthquakes and subsidence of land.¹⁰ The moratoriums of 24 August 2012 were a direct response to these concerns. Prevention of contamination and pollution of land is further supported by the Victorian State Environmental Protection Policy (Prevention and Management of Contamination of Land),¹¹ and the State Environment Protection Policy (Groundwaters of Victoria).¹²

However, the taskforce in its supplementary report of October 2013 (p44) reported that: there have been around 2500 fracking treatments in Australia, predominately in Queensland although 23 were carried out in Victoria prior to the moratorium;
 "in Australia, there have so far been no reported cases of seismicity from CSG or tight gas operations";¹³ and "recent investigations of reported incidents in Queensland did not find any evidence of risks to the environment or to public or animal welfare".¹⁴

Accordingly, in its final report and recommendations of October 2013, the taskforce recommended:

"The Victorian Government:

proactively support the development of the onshore industry in Victoria to create a safe and efficient onshore gas industry, underpinned by leading practice regulation and community engagement; and remove the holds on the issuing of new exploration licences for coal seam gas (CSG) and hydraulic fracturing, subject to a package of reforms being adopted, including leading practice regulation, community engagement, information and science to underpin the management of the onshore gas industry in Victoria".¹⁵

Leading practice regulation¹⁶ may require "a legislative base that provides for revision of compensation over time".¹⁷ The taskforce further recommended¹⁸ that leading practices laid down in the National Harmonised Regulatory Framework for natural gas from coal seams be viewed as minimum levels to be applied across all fracking activities, including:

the development of new legislation, regulations and supporting guidelines;
 a statutory ban on the use of BTEX chemicals in fracking and the promotion of "environmentally benign" chemicals;
 public disclosure of chemicals used in fracking; and
 independent monitoring of impacts and seeking best practice advice so as to inform legislative and regulatory amendments.¹⁹

On 6 August 2014 the Coalition government introduced the Resources Legislation Amendment (BTEX Prohibition and Other Matters) Bill 2014 into the Victorian Legislative Assembly. The main purpose of the Bill was to implement a statutory restriction on the use of BTEX compounds in fracking that was seen by certain parties²⁰ as the precursor to the approval of fracking in Victoria. The Bill was assented to on 23 September 2014, however sections in respect of the prohibition of BTEX chemicals, other than in accordance with levels provided for in applicable regulations, have not yet come into force.

Shale gas and land access

Shale gas in Victoria is regulated by the *Petroleum Act 1998* (Vic) (*PA*). Petroleum is defined in the *PA* as a naturally occurring hydrocarbon, or a mixture of hydrocarbons, including both oil and gas (s6).

Section 3 of the *PA* provides numerous objectives including "fiscal regimes that offer petroleum exporters a fair return while benefiting all Victorians" and "regard to economic, social and environmental interests by ensuring:

a) the safe and efficient exploration for, and production of, petroleum; b) that the impacts on individuals, public amenity and the environment as a result of petroleum activities will be minimised as far as is practicable; c) that land affected by petroleum activities is rehabilitated; d) that there will be just compensation for access to, and the use of, land; and e) that petroleum explorers and producers will comply with all authority conditions that apply to them".

It is fundamental to note the Crown owns all petroleum "on or below the surface of any land in Victoria that came to be on or below that surface without human assistance" (s13). Accordingly, no compensation is payable to owners or occupiers for petroleum that is extracted from their land (s131).

In Victoria, where an exploration permit, retention lease, production licence or special access authorisation is issued to an authority holder in respect of private land, any petroleum operation cannot be carried out on such land without:

consent of the owner and occupier (s128(1)(a)); or
 a compensation agreement being entered into with the owner and occupier of the land (s128(1)(b)); or
 the Victorian Civil and Administrative Tribunal (VCAT) determining the compensation payable to the owners

and occupiers of the land (s128(1)(c)); and the written consent of the Minister (s138(1)).

Compensation

Compensation is payable under the *PA* by the authority holder to the owner and occupier of private or native title land "for any loss or damage that has been, or will be, sustained in relation to the land as a direct, natural and reasonable consequence of the approval of any petroleum operation or the carrying out of any petroleum operation under the authority, including for:

deprivation of the possession of the whole, or any part of the surface, of the land; and damage to the surface of the land; and damage to any improvements on the land; and severance of the land from other land of the owner or occupier; and loss of amenity, including recreation and conservation values; and loss of opportunity to make any planned improvement on the land; and any decrease in the market value of the owner or occupier's interest in the land" (s129).

Litigation in Queensland regarding compensation for land access pursuant to CSG operations may provide some initial guidance regarding exploration. The Queensland Land Court in *Peabody West Burton Pty Ltd & Ors v Mason & Ors*,²¹ the first such matter to proceed to a full hearing and decision in that court, awarded \$3220 compensation to pastoral landowners whose 15,000 ha property was to be accessed for CSG exploration requiring approximately 3.4 ha over a maximum period of 12 days. Diminution of value of the property formed the principal issue for determination (see s129(1)(g) for the Victorian equivalent). Member Smith, after citing *R v The Land Court; ex parte Kennecott Explorations (Australia) Ltd*,²² stated "the question [then] falls to be asked: what are the acts or events which give rise to a claim for diminution of value in the case at hand?"²³ Diminution in the value of the land due to a prudent purchaser perceiving a future risk of mining on the property was not compensable as it was held to be beyond the scope of an explorer's general liability to compensate landholder's under the *Mineral Resources Act 1989* (Qld). The amount awarded comprised \$2050 for other costs (landholders' time and valuation fees), \$790 for diminution of the use of the land and \$380 for deprivation of possession of the surface of the land.

CSG

Hydrocarbons found in coal or oil shale deposits such as CSG are excluded from the ambit of the *PA* (s6(2)(b)) and are instead regulated as minerals by the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (*MRSDA*) where like, but not exact, provisions exist. For example, under the *MRSDA*, the Crown owns all minerals except where a current minerals exemption exists or ownership passes from the Crown when the minerals are extracted from the ground in accordance with permitted licences, miner's right or tourist fossicking authority (ss9, 11). Compensation "is not payable for the value of any mineral in or under the surface of the land covered by a licence" (s85(3)). The *MRSDA* leaves it open to landholders to negotiate compensation with those who wish to enter their land subject to a miner's right or tourist fossicking authority, although in all likelihood this would be minimal.

The Minister, under s7 of the *MRSDA* and s12 of the *PA*, may exempt land from the application of the Acts. This may become more difficult for landowners and occupiers regarding CSG as the *Mineral Resources (Sustainable Development) Amendment Act 2014* provides the Minister must now take into account the "known or potential value of the mineral resources and the impact that the proposed exemption may have on that value" as well as social and economic implications (s5(2)).

Conclusion

Notwithstanding an earlier Coalition government community and stakeholder engagement program regarding the onshore development of shale gas and CSG,²⁴ the current Victorian government is maintaining the moratorium on fracking and new exploration licences in respect of CSG until a parliamentary inquiry hands down its findings.²⁵ Victorian Energy

Minister Lily D'Ambrosio says such an inquiry will be "quickly established".²⁶ Fracking will not be green lit without associated BTEX chemical usage being resolved.

The US White Paper "Analysis of Litigation Involving Shale & Hydraulic Fracturing" states that "as at the date of this White Paper, the authors have not located any judgment against a well operator, drilling contractor, or service company for the contamination of groundwater resulting from hydraulic fracturing".²⁷ This is despite many of the cases cited in the paper seeking damages for matters such as "noxious and harmful nuisance, contamination, physical harm, trespass, property damage, and diminution of property values".²⁸ How such matters play out in Australian courts will be of great interest to all SLTO participants.

Snapshot

Shale and further coal seam gas exploration on hold in Victoria notwithstanding the recommendation of the Victorian Gas Taskforce.

Compensation to landholders, at least in respect of land access associated with exploration activities, to be limited.

Victorian parliamentary inquiry to determine if the current moratorium in respect of fracking, the chemicals used in fracking and new coal seam gas exploration permits to remain in place.

Energy and resources law

Steve Chambers is a barrister at the Victorian Bar specialising in mining and energy law and associated land access and compensation matters. **1.** Dr Catriona Ross & Paige Darby, *Unconventional Gas: Coal Seam Gas, Shale Gas and Tight Gas*, Parliament of Victoria; www.parliament.vic.gov.au/publications/research-papers/8927-unconventional-gas-coal-seam-gas-shale-gas-and-tight-gas. **2.** Media release, Reforms to strengthen Victoria's coal seam gas regulation and protect communities, The Hon Michael O'Brien MP, State Government of Victoria, Friday 24 August 2012; www.premier.vic.gov.au/images/stories/documents/mediareleases/2012/August/120824_O'Brien_-_New_reforms_to_protect_communities_and_strengthen_Victorias_coal_seam_gas_regulation.pdf. **3.** www.abc.net.au/news/2013-11-21/nrn-fracking-moratorium-extended/5107780. **4.** www.miningaustralia.com.au/news/victorian-csg-moratorium-extended-to-2016. **5.** Gas Market Taskforce, *Final Report and Recommendations*, Vic, October 2013 at pp4-5. **6.** *Resources Legislation Amendment (BTEX Prohibition and Other Matters) Act 2014*. **7.** For example: www.lockthegate.org.au. **8.** J. Rutovitz, S. Harris, N. Kuruppu & C. Dunstan, *Drilling Down. Coal Seam Gas: A Background Paper*, prepared by the Institute for Sustainable Futures UTS for the City of Sydney Council, November 2011, p4, <http://cfsites1.uts.edu.au/find/isf/publications/rutovitzetal2011sydneycoalseamgasbkgd.pdf>. **9.** Hydraulic fracturing (fracking), APPEA, The Voice of Australia's Oil and Gas Industry, www.appea.com.au/oil-gas-explained/operation/hydraulic-fracturing-fracking. **10.** See Gas Market Taskforce, *Supplementary Report*, Vic, October 2013, at p44. **11.** No. S 95, Tuesday 4 June 2002. **12.** No. S 160, Wednesday 17 December 1997. **13.** Australian Council of Learned Academies (ACOLA), *Engineering Energy: Unconventional Gas Production, A study of shale gas in Australia, Final Report*, May 2013, p133. **14.** Minister for Natural Resources and Mines, *Plan to remediate coal bore on Darling Downs Media Release*, 21 August 2012; Queensland Government *Condamine River Gas Seep Investigation*, January 2013; Queensland Government *Gas Monitoring at Tara Gas Field*, 7 May 2010. **15.** Gas Market Taskforce, *Final Report and Recommendations*, Vic, October 2013 at p4. **16.** As proposed in *Compensation for coal seam gas occupation: assessing the harms*, 20th Pacific Rim Real Estate Society Conference, Lincoln University, Christchurch, New Zealand, Michael Fibbens and Michael Y Mak, January 2014. **17.** Note 16 above, p11. **18.** Gas Market Taskforce, *Supplementary Report*, Vic, October 2013, p57. **19.** For a summary of all leading practices see Table 2.1, The National Harmonised Regulatory Framework For Natural Gas from Coal Seams, 2013. **20.** For example: Ashurst Australia, *Energy and Resources Alert, Victorian Government takes first steps towards lifting its CSG moratorium?* 14 August 2014. **21.** [2012] QLC 0023. **22.** [1989] 1 Qd R 335. **23.** *Peabody West Burton Pty Ltd & Ors v Mason & Ors* [2012] QLC 0023 at [29]. **24.** Onshore natural gas engagement gets underway, Premier of Victoria, Wednesday 30 April 2014; <http://archive.premier.vic.gov.au/2014/media-centre/media-releases/9767-onshore-natural-gas-engagement-gets-underway.html>. **25.** www.abc.net.au/news/2015-01-28/victorias-fracking-ban-to-remain-as-parliament-probes-regulation/6051092. **26.** www.abc.net.au/local/stories/2015/01/28/4169827.htm. **27.** Norton Rose Fulbright, Barclay R. Nicholson, Partner, Fulbright & Jaworski LLP, 1 June 2014, p2. **28.** See *Scoggin, et al v Southwestern Energy Company*, No 4:12-cv-763 (ED Ark, 7 December 2012).

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