AUSTRALIAN PROPERTY INSTITUTE INC.

AND

SPATIAL INDUSTRIES BUSINESS ASSOCIATION AUSTRALIA

JOINT SUBMISSION TO

INDEPENDENT PRICING AND REGULATORY TRIBUNAL (IPART)

ON

LANDHOLDER BENCHMARK COMPENSATION RATES GAS EXPLORATION AND PRODUCTION IN NSW

ENERGY ISSUES PAPER

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1. PREFACE

This joint submission to Independent Pricing and Regulatory Tribunal (IPART) has been prepared by the Australian Property Institute, NSW Division (API) and the Spatial Industries Business Association, NSW Regional Management Group (SIBA), as part of ongoing joint collaborative research efforts and dissemination of factual and dispassionate information about property rights and spatial information in Australia.

This close disciplinary collaboration between the property profession and spatial science professionals has been further strengthened through the preparation of this joint submission to IPART. In addition, API and SIBA record their appreciation for the invaluable and numerous discussions that occurred during the preparation of the submission with members of the Submission Committee. This submission however does not necessarily represent the views of any of the individual members of the Submission Committee.

2. PRELIMINARY COMMENTS

2.1. This submission constitutes a response by API and SIBA to the document entitled *Landholder benchmark compensation rates: Gas exploration and production in NSW, Energy - Issues Paper* (*Issues Paper*) released by IPART in April 2015 for public consultation and input.

2.2. In analysing the content of the *Issues Paper*, API and SIBA have formed the view that there are two distinct elements embedded within the various matters discussed, firstly garnering an understanding of the impact upon surface land holders when subsurface gas exploration and production occurs, and secondly whether the existing body of legislation provides surface land holders with benchmark compensation. With such understanding, this submission has been prepared recognising these two elements have a number of aspects that require careful consideration. These aspects are dealt with in the main body of this submission following the introductory comments below.

2.3. API and SIBA consider that care has to be evident in the conceiving of compensation for surface landholders impacted by subsurface gas exploration and/or production. While appearing a trite observation, API and SIBA consider that surface landholders should not be unnecessarily disturbed by subsurface gas exploration and production, however when such disturbance is inevitable any compensation should evidence benchmark approaches which mirror other compensation regimes in existing NSW legislation. When private property rights are commuted or impaired through compulsory processes in other NSW legislation, the *Land Acquisition (Just Terms Compensation) Act 1991* provides the standard whereby compensation is assessed and paid to the affected landholder. For example, the *Environmental Planning and Assessment Act 1979* and the *Pipelines Act 1967* provide for compensation to be assessed pursuant to s.*55 Land Acquisition (Just Terms Compensation) Act 1991*. In particular, *s.22A (2) Pipelines Act* 1967 states as follows:

The Land Acquisition (Just Terms Compensation) Act 1991 applies (with such modifications as may be prescribed by the regulations) to the payment of any such compensation as if the vesting of lands or easements under section 21 were affected by an acquisition notice under that Act.

2.4. Importantly the granting of a licence by the Minister for a land acquisition or easement for a proposed pipeline, ancillary works or access thereto can be held not only by a public body, but also by a private corporation or private individual. It is the view of the API and SIBA that the NSW Parliament passed the *Pipelines Act 1967* as currently drafted recognised that disputation as regard compensation for impacted surface land owners ought to be dealt with fairly and justly, hence the inclusion of *s.22A (2)* which provides an understanding for all parties of how the compensation for an impacted land owner is to be assessed.

2.5. Crucially, if the pipeline licensee and the impacted land owner do not agree on the compensation assessed utilising the methodology at s.*55 Land Acquisition (Just Terms Compensation) Act 1991*, it is provided for at *s.22A (4) Pipelines Act 1967* that the Land

and Environment Court can hear the compensation, and resolve the matter. The Land and Environment Court as a specialist jurisdiction has significant expertise in the area of compensation assessment, and hence the involvement of the Court allows parties the comfort of knowing the compensation will be assessed in neutral and consistent manner.

2.6. However API and SIBA recognise the rights accruing to surface landholders do not generally include rights to subsurface minerals. In a paper on coal seam gas compensation presented to the 9th annual conference of the International Academic Association for Planning Law and Property Rights in February 2015[1], it was observed that mineral property rights were not created at the tenurial level of indefeasible real property but as a Crown leasehold for a defined term. Mineral property rights were usefully described by the High Court *in ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51 (9 December 2009)* as follows:

…a species of property in the land and in the minerals which, when the rights under the mining tenements came to an end, enlarged the Commonwealth's radical title to the land.[2]

2.7. Given surface landholders generally have no proprietorial rights to the subsurface mineral property rights, it is the view of API and SIBA any compensation regime cannot reasonably include an uplift from the value of the subsurface mineral property rights. Any compensation regime which were to include access to the worth of subsurface mineral property rights would necessarily require the recasting of the historic property rights milieu, a task which would be enormously difficult.

2.8. Nevertheless, compensation at *s.107 Petroleum (Onshore) Act 1991* and *s.141 (1) (f) Mining Act 1992* stand at a significant shortfall to *s.55 Land Acquisition (Just Terms Compensation) Act 1991,* which sets out the relevant matters in determining compensation as follows:

(a) the market value of the land on the date of its acquisition,

(b) any special value of the land to the person on the date of its acquisition,

(c) any loss attributable to severance,

(d) any loss attributable to disturbance,

(e) solatium,

(f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the

[1] Sheehan, J B (2015) "Conflicted property rights: assessing compensation for surface land holders impacted by subsurface coals seam gas exploration and mining right", Paper presented to 9th Annual Conference of the International Academic Association for Planning Law and Property Rights, University of Thessaly, Volos, Greece (February), 4.

[2] *ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51 (9 December 2009)* at [152].

carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

2.9. Clearly the compendium of compensation at *s.55* is comprehensive and whilst not intended to match the Australian Constitutional guarantee of 'just terms'[3], it nevertheless certainly approaches the view of the High Court in *ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51 (9 December 2009)* wherein 'full compensation' or 'full value' was favoured.[4]

2.10. It is noted by API and SIBA that the 2014 *Independent Report to NSW Government* (known as the Walker Report) stated in respect to compensation:

For a landholder this is a forced arrangement. It is not a commercial arbitration where there are willing participants and mutual benefits to be achieved from arbitration. In this context, the argument that a landholder should be compensated for these costs is attractive as part of the trade-off for their private property rights being overridden and is similar to comparable legislative schemes where private rights are being overridden and those affected are compensated (e.g. the Land Acquisition (Just Terms Compensation) Act 1991). Further, it has been submitted that the compensation payable should include the cost of negotiating and arbitrating an access arrangement, including legal and expert fees and to compensate landholders for the time taken away from their business.[5]

2.11. Furthermore, the scarcity of arable land in Australia[6] strongly suggests subsurface gas exploration production ought not be encouraged on such lands. In the 2010 API and SIBA submission to the Productivity Commission Issues Paper *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* that such scarce arable land ought to be more adequately protected through state and territory heritage legislation[7]. Indeed, the 2014 *Agricultural Competitiveness Green Paper* supported the above view stating:

"The Australian Government is committed to protecting the rights of farmers and the

[3] *S.51 (xxxi) Australian Constitution.*

[4] *ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51 (9 December 2009)* at [193].

[5] Walker, Bret (2014) *Examination of the Land Access Arbitration Framework: mining Act 1992 and Petroleum (Onshore) Act 199.* Independent Report to NSW Government (Walker Report) (Sydney) 20 June, 28.

[6] Estimated in 1994 at 22 million hectares *cf.* Flannery, T F (1994) *The Future Eaters: An ecological history of the Australasian lands and people* (Sydney: Reed Books), 367.

[7] API and SIBA (2010) *Joint submission to Productivity Commission on Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (Sydney Deakin), 11.

integrity of prime agricultural land and water resources. Farmers are entitled to a fair return for access to their land"[8].

2.12. SIBA notes impacted surface landholders and their advisors have little or limited access to the leases for exploration and production beneath their property, contrary to the material held by the explorers or producers which is based upon high end mapping systems. The limitation in access to this material significantly impairs the land owners capacity to correctly assess the impact of the exploration or production and hence the compensation due. It is further noted that the high end mapping system holding the sources of data within the Department of Trade and Investment, Resources and Energy is designed for access by professionals of the resources sector. This mapping system, known as MinView, is not readily accessible or understandable by impacted surface landholders and/or their advisors. This issue is further compounded by other rights or proposals on a surface landholders rights, such as vegetation maps, native title, indigenous cultural heritage, contamination records, and ground and surface water licences. SIBA notes there is no single mapping enquiry gateway which permits an interrogation of these layers of rights and hence permitting more fulsome assessments of compensation arising from the impact of subsurface gas exploration and production.

2.13. Of particular concern to SIBA is the impact on surface land holders participating in the NSW Bio-banking market, and is regarded as an often overlooked compensation factor in compensation assessments arising from gas exploration and production. This is due to indicating a vegetation community, situated on land suitable for bio-banking accreditation, and which can only be accessed with great difficulty from professional mapping systems.

2.14. It is evident to API and SIBA that gas exploration and production conducted beneath arable land significantly increases the potential for compensation where there is surface disturbance and further demonstrates the shortfall in compensation as currently set out at *s.107 Petroleum (Onshore) Act 1991* and *s.141 (1) (f) Mining Act 1992.* Hence it is a reasonable proposition the compensation provisions in these two pieces of legislation could, if significantly improved, assist the acceptance of gas exploration and production in rural and regional areas of NSW.

2.15. Finally, API and SIBA would be pleased to discuss any of the matters raised in this submission or provide any additional information that may be requested. Arrangements can be made by contacting Ms. Gail Sanders OAM, API NSW Divisional Executive Officer on 02 9299 1811, or Mr. Francisco Urbina, SIBA NSW Regional Management Group Chair on 0412 311 439.

[8] Department of the Prime Minister and Cabinet (2014) *Agricultural Competitiveness Green Paper* (Canberra: October), 78.

3. QUESTION RESPONSES

The following comments are provided in response and in sequence to the issues provided in the *Issues Paper.*

Do you agree with our proposed principles of transparency, adaptability and practicability to guide our recommendations for this review? Are there other principles that we should apply in making our recommendations?

API and SIBA agree with the proposed principles, however as stated in our preliminary comments crucial issues in transparency and practicably can be found in the utilisation of the methodology at *s.55 Land Acquisition (Just Terms Compensation) Act 1991* (see preliminary comment 2.3).

Do you agree with the four key steps in our proposed approach for this review (identify impacts, estimate compensation for these impacts, estimate benefit payments and make recommendations)? If not, what are your concerns?

API and SIBA consider that the identification of impacts of gas exploration production upon surface lands is a task which requires firstly a recognition of those matters set out at *s.55 Land Acquisition (Just Terms Compensation) Act 1991* (see preliminary comment 2.8), and hence the estimate of compensation will flow from this process. As stated in our preliminary comments, the current compensation regimes at *s.107 Petroleum (Onshore Act) 1991* and *s.141 (1) (f) Mining Act 1992* do not mirror the fulsome compensation provisions as set out at *s.55 Land Acquisition (Just Terms Compensation) Act 1991* (see preliminary comment 2.8).

Do you agree with our preliminary view on the relevant heads of compensation for hosting CSG exploration and production (value of land occupied and loss due to severance, injurious affection and disturbance)?

API and SIBA consider that the relevant heads of compensation should be those as set out at *s.55 Land Acquisition (Just Terms Compensation) Act 1991.*

Are there other temporary impacts of CSG exploration and production on landholders that we should consider?

API and SIBA note that the exploration and proving of a mooted gas well site can often involve significant disruption to agricultural activities being conducted on impacted land. The residual effects of “temporary” access roads constructed at a standard greatly in excess to that ordinarily required on an agricultural holding represents a temporary impact which may have significant long lasting implications for the use of the property. The placing of gravel and other material on site to enable vehicular access to a mooted well site may remove permanently the land beneath from any future agricultural production.

Should we consider any 'special value' of land and 'loss of opportunity to make planned improvements on the land' in recommending compensation for CSG exploration and production?

API and SIBA consider that these matters are adequately covered at *s.55 Land Acquisition (Just Terms Compensation) Act 1991,* and that any novel definition of 'special value' or 'loss of opportunity to make planned improvements to the land' (potentiality) would be a undesirable legislative and methodological construct.

Are there any permanent impacts on the market value of land arising from hosting gas exploration and production that we should consider?

API and SIBA note that the presence of gas exploration production on a rural property could in some circumstances have a positive impact on the market value, especially where a well site is located away from arable land. The income gained by the surface landholder from a ground rent from the well site would constitute a passive income adding to the overall farm income. However where a number of wells are located on a property clearly the permanent impact involves just not the location of inappropriate access roads, possibly pumping stations and other surface facilities, but also the prospect of seismic instability. SIBA notes that subsurface wastewater injection in central Oklahoma since 2008 has arguably created seismic active areas[9], and in the NSW milieu such an event would also represent a permanent impact.

Do you agree with our preliminary view that NSW legislative provisions for landholder compensation for gas exploration and production should be broadened? If so, how? If not, why?

API and SIBA concur the current legislative provisions for landholder compensation should be broadened (see 2 Preliminary Comments overall).

Do you agree with our preliminary view that our recommendations on compensation should be limited to landholders who host CSG activities and their neighbours who are directly affected? If not, why?

API and SIBA consider that settled property compensation law necessarily limits compensation to parties having an interest in a parcel of land which is impacted by gas exploration and/or production. Any extension of this principle to land not directly by the well site would represent a novel approach to compensation.

Are gross margin and market rental approaches appropriate for estimating compensation for the value of land occupied? Are there other approaches that we should consider?

API and SIBA consider the approach set out at *s.55 Land Acquisition (Just Terms Compensation) Act 1991* is the only appropriate methodology.

[9] Keranen K M, Weingarten M, Abers G and Belkins B (2014) "Sharp increase in central Oklahoma seismicity since 2008 induced by massive wastewater injection", *Science* 345 (6195) (25 July), 448-451.

Do you agree with our preliminary view that because severance is site specific and highly variable, providing benchmark compensation would be of limited use to landholders? If not, how should we estimate and structure compensation for severance?

Severance is dealt with at *s.55 Land Acquisition (Just Terms Compensation) Act 1991.*

Do you agree with non-market valuation and relocation cost approaches for estimating compensation for injurious affection? Are there other approaches that we should consider?

Compensation at s.55 Land Acquisition (Just Terms Compensation) Act 1991 is not limited to the market value of the land at *s.55 (a)* and the subsequent sections *s.55 (b) – (f)* provide an avenue for non-market approaches to estimating compensation which can include injurious affection.

Do you agree with our proposed approaches for estimating compensation, or passing through costs, for disturbance? Are there other approaches that we should consider?

API and SIBA consider that disturbance is adequately covered at *s.55 Land Acquisition (Just Terms Compensation) Act 1991.*

Do you agree with our preliminary view that benefit payments should apply during the production phase for those landholders hosting gas development on their land? If not, why?

Any benefit payments which may be sourced from the value of the subsurface mineral property rights cannot currently be included in the compensation methodology at *s.55 Land Acquisition (Just Terms Compensation) Act 1991.*If such benefit payments during the production stage were sourced from the value of the subsurface mineral property rights this would require a recasting of settled property law (see preliminary comment 2.7).

Do you agree that the costs of benefit payments should be shared between the gas company and the NSW Government? If so how? If not, why?

No – see comment above.

Should funds for benefit payments be pooled and divided among a group of landholders that have signed access agreements? If so, how?

No – see comment above.

APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history. Originally formed in South Australia over 87 years ago in 1926, the Institute today represents the interests of nearly 8,000 property experts throughout Australia.

The API, the nation's peak professional property organisation and learned society, has been pivotal in providing factual, independent and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments and their agencies since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by international bodies such as the United Nations, the Food and Agriculture Organisation (FAO) and the World Bank, evidencing a level of expertise within the API and its membership, which is recognised regionally and globally.

As a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, property investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, research and education.

Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and lifelong continuing professional development.

APPENDIX 2

SPATIAL INDUSTRIES BUSINESS ASSOCIATION LIMITED

In September 2001, the then Minister for Industry, Science and Resources, Senator Nick Minchin, released the Spatial Industry Action Agenda Report, *Positioning for Growth*.

One of the first things the Action Agenda process created was the (now) Spatial Industries Business Association, which represents the business interests of some 400 companies throughout Australia.

SIBA is an important contributor to key national government policy initiatives, in particular. In 2003 the then Deputy Prime Minister, John Anderson, commissioned SIBA, together with the NSW Division of the Australian Property Institute (API), to develop a definition for a property right in water. In March 2004, SIBA presented to the Deputy Prime Minister the final report titled *An Effective System of Defining Water Property Titles,* which was the foundation for the National Water Initiative. Recently, the OECD has referred to this work as "world leading".

Throughout its short life, SIBA has contributed to policy debate on water, salinity science, bushfires and security. Governments now consider spatial information and technology to be essential infrastructure and management tools. SIBA has also been a leader in bridging the web services gap with its recently completed and much lauded Spatial Interoperability Demonstration Project (SIDP). This Project produced technical documentation to support spatial interoperability solutions for emergency management and the insurance and utilities sectors.

Much of SIBA's work in delivering the SIDP has already been acclaimed around the world. The international standards body for spatial information, the Open Geospatial Consortium (OGC), has asked permission to use one of our documents as an international White Paper on interoperability. The Project is a tribute to cooperation across the public and private sectors, the states, territories and commonwealth.

As the premier business representative body in the spatial information arena, SIBA speaks for its member firms in a range of forums on land and land-legal matters. SIBA also contributes significant public comment through its awareness programs in the Australian popular press.

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APPENDIX 3

SUBMISSION COMMITTEE

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