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Submission to IPART: Landholder Benchmark Compensation Rates

Negotiation between Miners¹ and Landholders

Any negotiations between miners and landholders are a very unequal contest. Even if there is a framework for this negotiation there is ample motivation for miners to control the process towards their own ends. The miner has the following advantages that the landholder very probably does not have:

- Professional negotiators and lawyers experienced in the specific business.
- Huge funds available.
- Knowledge of their future plans and so the value and timing of the use of lands. These plans are often revealed only after land deals are done.
- Knowledge of the market, that is past deals and going rates. Miners typically keep this information very close.
- An objective commercial attitude compared to the landholder who may be in fear of the unknown, believing they have no chance against the authority of miner and government or feeling an emotional attachment to lands the family has owned for generations.
- The legal power for a court to enforce access. Some, but by no means all, miners have promised that they will not exercise this power. Even so landholders' rights are not preserved in law and the possibility of having to go to court and of being out of pocket is another source of anxiety for the landholder. It is interesting that the state will not change the law to give landholders certainty of tenure while promising outside of the law that they can have it.
- Miners gain other benefits by picking and choosing who to pay off and who to ignore. One benefit is the chosen one may become a 'poster child', willing to serve the miner's PR machine by endorsing CSG and the benefits of taking the money. Another is part of a program to sow dissension within the community and to punish vocal objectors. Separating landholders from activists is an aim dear to the heart of the gas industry as is anything that appears to be a social licence for their projects.

The terms of reference say that agreements will be negotiated on a commercial basis.

¹ Technically CSG exploration and extraction may not be classed as mining but 'mining' and 'miner' will be used here for brevity.

Having no intermediary or moderator allows a very unequal contest to take place. With no agency acting as champion for the landholders they will be thrown on to their own resources whether it is negotiating for compensation or benefits.

The miner may well ignore the framework set up by IPART as there is no legal compulsion for them to adhere to even that small constraint towards just settlements.

If there is no alternative to direct negotiation then at least the overwhelming power of the miners should be reduced. Some means of doing this are as follows.

- Provide expert advice and legal assistance to landholders at no cost to them.
- Ensure that the IPART framework is used in all cases.
- Ensure that processes are open and public. As far as can be done, while preserving privacy, ensure that the outcomes of previous deals are revealed to all parties. Forbid confidentiality clauses in contracts that do nothing for the landholder and a great deal for miners.
- Prevent miners from playing favourites and strengthen the landholders' position by permitting collective bargaining.
- Make the right of landholders to refuse access law.

Clearly not all of these provisions are within the powers of IPART but they could be recommendations to government. If the power imbalance cannot be addressed then IPART should consider if direct negotiation with individuals is appropriate at all.

Determining Compensation

Determining CSG compensation fits well within IPART's role as it has precedent in other legislation and in common law. The community at large accepts, even expects, that where for the greater good some individuals may suffer loss it is entirely reasonable for them to be given monetary compensation. Having a framework to help determine compensation to landholders is certainly better than the present situation.

We support the broad approach to compensation and the draft heads of compensation.

There is no perfect solution to modelling the losses of a landholder hosting an extractive industry however having a framework for computation supplied by an independent body will assist in achieving fairness to some degree. In the interests of brevity, and to allow bigger issues to be covered, we will leave comment on the exact formulation of the compensation framework to others.

There are several areas other than the formulation of the framework that are of concern regarding the compensation mechanism as it has been outlined.

Duration of Compensation

Proposing that compensation is only payable during the production phase leads to two problems:

- 1) No compensation during exploration is inequitable, as landholders would probably suffer the loss or inconvenience during that time as during production. There is no reason why the framework cannot be applied during exploration as the miner would be conducting many of the same activities as during production with the same consequences.

- 2) If there is no compensation for consequences that extend after production ceases this leaves the landholder having the options to endure the problem or taking the miner to court which is another very unequal contest.

Indemnity for Contamination

Food contamination is not always detected at the time that it occurs. At present farmers must make a declaration concerning the history and management of cattle so that problems with food contamination can be traced and dealt with. Regardless of the source of contamination, the farmer is responsible for their National Vendor Declaration (NVD). Similarly, those growing produce have a responsibility to ensure the food they produce is not contaminated. Those farmers are in the difficult position that if there are CSG activities on their property, nearby or upstream they may know nothing about possible contamination.

It can be argued that it is not IPART's responsibility to enforce environmental protection and monitoring but what happens if at some time in future it is discovered that pollution has occurred despite the best efforts of the agencies responsible? It is unrealistic to assume that environmental controls will be perfect so the possibility must be addressed at the time of negotiation for compensation.

If the industry is as safe and low risk as the proponents claim then the miners should have no hesitation indemnifying farmers against future loss or prosecution over NVDs. Consideration of such indemnities should be part of the negotiation framework.

Scope of Compensation

Ignoring the wider community pretends that all the harm and losses will be experience only by hosts and those nearby. This is patently untrue where extractive industries (including more than one in the same district) are in conflict with other land uses. Tourists and tree-changers will not come to see fields of gas structures nor do they want to hear compression plants running constantly. Ignoring this issue fits in well with the public position of miners that there is no such thing as land-use conflict.

Even if all landholders are compensated adequately those nearby whose businesses depend on quiet enjoyment, the views, vistas, and the clean-green image will get nothing.

Distribution of 'Benefits'

This component of the project is fraught. Unlike the compensation part there is no precedent for this kind of payment. The big question is why should CSG hosts receive any money above fair compensation?

By law all minerals in the ground are owned by the crown. You would think therefore that any distribution of the value of those minerals when they are extracted should go equally to all Australians. This is how the current royalty system works for energy sources such as coal, conventional gas and petroleum and, until now, for CSG. In what way is CSG so different that a new model for distribution is warranted? The Gas Plan gives no answer to this question.

There is nothing inherently different about CSG as a fuel to warrant landholders getting a bigger slice of the proceeds. There are differences in comparison to other fuels though.

CSG infrastructure is more distributed than conventional gas and coal. The coal industry typically buys the land where they want to dig. A CSG field (to take the Gloucester example) requires many hundreds of wells spread over thousands of hectares. The miner would have to buy the whole valley. This is commercially impossible as while they will spend millions on key land parcels they will not spend billions. Clearly the public outcry over such a purchase, even if it was profitable, would be prohibitive. Thus the miners need access to as much land as possible without purchasing it.

The second difference is that CSG is new. While coal may not be popular with landholders the industry has been prominent for so long that people treat as normal being rendered impotent by law and common practice and often accept that in the face of King Coal they have few rights. Given that the need for and the safety of CSG production are both unproven assertions and that there is no history of submission people are less inclined to submit. This resistance has been acknowledged by the deal between government and some miners in NSW who have promised faithfully not to enforce their legal right to land access.

The third difference is that CSG is very unpopular. Miners would like to think that they have a social licence for their projects but all evidence is to the contrary. In the last five years industry arrogance and mismanagement has resulted in a hardening of attitudes against them when, if the industry was as bounteous and benign as claimed, and if the millions spent of public relations was any guide, they ought to loved.

Thus the state government is caught in a powerful bind. They dare not offend either the powerful energy industry or the growing public sentiment against CSG. Having incautiously got on the CSG bandwagon years ago, and now starting to repent of their haste, both sides of politics don't know how to dismount gracefully.

Which leads us to the Gas Plan, a plan to get out of the whole gluey mess and buy back public opinion. This plan somehow needs to persuade hundreds of landholders to give access to large areas of land without biting the political cyanide pill of taking them to court to do it.

One of the key features, which was very prominent in government publicity for the Gas Plan, is 'sharing the benefits'. No matter that there is no logic, precedent or equity in it, this promise has a function. That function is that of the pork barrel, the time honoured way to change opinion by throwing money towards vested interest.

In our view it is improper for IPART to participate in such a blatantly political process that has no demonstrated economic value and instead of contributing towards balance and fairness in society does the reverse.

If such payments are to be made they should not compound the inequity by reducing royalties available for state-wide purposes, so the miner should pay. If there are such payments then they should be made to the elected council of the district not individuals. This would go some way towards relieving obvious inequities, the gross imbalance of negotiating position between miners and individuals and towards preventing, to a degree, the miners from manipulating the system for their own benefits by choosing favourites.

Benefits Distribution Conflict with IPART's goals

Some of the published goals of IPART are directly in conflict with the government requirement for IPART to distribute benefits.

θ Be a key economic and policy think-tank and provide high quality and impartial advice to the NSW Government.

IPART is not being impartial as it is aiding a government in furthering political goals through pork barrelling to overcome opposition to a stated government position. By enabling the state to buy off landholders with payments that have no economic benefit IPART is abandoning any claim to think-tank status and joining the biased agencies such as OCSG who unquestioningly promote CSG.

θ Promote secure and sustainable energy and water supplies and reliable public transport services.

θ Encourage environmental sustainability.

Furthering CSG development is quite contrary to these two goals.

CSG is a fossil fuel that the world does not need to burn. In the case of CSG on the east coast, the cost in greenhouse gases of fugitive emissions is unknown. In that market CSG development may have the perverse consequence of increasing CO2 production due to electricity generation because if the price of gas rises enough coal will be burnt instead while gas-fired generators are shut down.

CSG is not sustainable by any definition and has risks for water supplies, which in the case of complex geology such as Gloucester, are not quantifiable. The final report of the NSW Chief Scientist and Engineer identifies there are some situations where risks may be too great.

θ Encourage prudent and efficient investment in water, public transport and local government infrastructure.

Money going towards arbitrary benefits to landholders would be better directed to communities via elected local government to be spent for the benefit of the whole community.

θ Deliver best-practice regulation and promote a consistent, predictable regulatory environment.

It is neither consistent nor best practice to pay off landholders hosting CSG beyond just compensation when landholders affected by coal or any other mineral get no such benefit.

Conclusion

In framing their demands very narrowly and excluding many issues, government is attempting to force IPART to take part in a political process that is inconsistent with IPART's established principles and rules of corporate governance.

In being agnostic about the community, health and environmental consequences of CSG and enabling inequitable 'benefit' payments the tribunal is abandoning its independent and ethical status.

The Tribunal is expected to conduct itself having loyalty to the public interest. By agreeing to distribute largess for political purposes that loyalty has been abandoned.

It is recommended that:

1. Compensation payments should be expanded to be available to all those who may suffer loss and to any time that such loss might be experienced.
2. All possible steps should be taken to redress the gross inequality in bargaining position between individuals and miners.
3. IPART should refuse to distribute benefits on the grounds that doing so would create community inequity and severely compromise IPART's published goals and its independence from politics.
4. If IPART is compelled to distribute benefits then it should be done so that payments cannot be used by miners to further their own ends but for the benefit of the community affected by CSG extraction.
The most equitable allocation of benefits would be to local government who is already charged with spending community money for its benefit. Such payment should come from the miners so that the wider NSW community is not losing royalties because of a pork-barrel policy.

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