



Submission to the
NSW Independent Pricing and Regulatory Tribunal
Landholder benchmark compensation rates
Gas exploration and production in NSW

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1. Introduction, policy context and preliminary comments

NSW Farmers are not against mining or coal seam gas development in NSW. Central to our policy position on extractive industries is , however, that these resources must be developed strategically and not at the expense of our agricultural land and water. Another key component to our policy position is advocating for strong landholder rights which includes the landholder ability to say yes or no to proposed developments on private land.

We are calling for balanced land access and compensation laws, which set a more even playing field. In many cases landholders are not as experienced in negotiation of the kind that is required of them when approached by a gas company, and will end up with access agreements and compensation that is not of an appropriate standard. To achieve a more even playing field, we advocate for a significant increase in transparency on negotiated matters such as compensation and so we welcome the review currently being led by the NSW Independent Pricing and Regulatory Tribunal (IPART). NSW Farmers' members know that setting benchmark compensation rates is not the panacea for the prudent regulation of a gas industry in NSW , but it will contribute to improving the transparency and certainty of the current system.

In 2014, NSW Farmers , Cotton Australia and NSW Irrigators Council, and two of NSW largest coal seam gas companies signed a Principles of Land Access¹ document which set out those companies' agreement to respect a landholder's wishes to deny access. NSW Farmers' members were pleased with this progression however we acknowledge there is a long way to go in repairing the legislation in the protection of landholder rights.

NSW Farmers welcomed all of the Chief Scientist and Engineer of NSW's recommendations contained in her independent report on coal seam gas (CSG) activities in NSW² released in September 2014. In November 2014, the NSW Government released its *NSW Gas Plan*³ which is a document outlining future intentions of acting upon the independent advice of the Chief Scientist and Engineer.

The document currently on exhibition compiled by IPART is an action in the *NSW Gas Plan* and of course, was a recommendation for policy improvement in the Chief Scientist and Engineer's report. It is important to revisit these findings and recommendations in order to fully appreciate why these changes are required and how best they are to be addressed.

¹Santos, AGL, NSW Farmers' Association, NSW Irrigators' Council, Cotton Australia, *Agreed Principles of Land Access* available at http://www.nswfarmers.org.au/_data/assets/pdf_file/0008/35567/Agreed-Principles-of-Land-Access-280314.pdf .

² NSW Government Chief Scientist and Engineer *Final Report of the Independent Review of Coal Seam Gas Activities in NSW* September 2014 available at <http://www.chiefscientist.nsw.gov.au> .

³ NSW Government *NSW Gas Plan Protecting what's valuable Securing our future* available at <http://www.resourcesandenergy.nsw.gov.au> .

1.1 Affected communities

The *NSW Gas Plan* makes 17 key actions under 5 broader headings. The relevant *Gas Plan* action pertaining to benchmark compensation rates is as follows :

Sharing the benefits

11. *Legislation will be introduced to ensure that landholders share in the financial benefits of gas exploration and production*
12. *Landholders will receive independent expert advice on benchmark compensation rates for gas exploration and production from the Independent Pricing and Regulatory Tribunal*
13. *A Community Benefits Fund with contributions from both gas companies and the NSW Government will be established to fund local projects in communities where gas exploration and production occurs⁴.*

The corresponding Chief Scientist and Engineer's recommendation reads as follows:

Recommendation 3

That Government investigate as a priority a range of practical measures for implementation (or extension of current measures) to allow affected communities to have strengthened protections and benefits including fair and appropriate:

- *Land access arrangements, including land valuation and compensation for landholders*
- *Compensation for other local residents impacted (above threshold levels) by extraction activities*
- *Funding (derived from the fees and levies paid by CSG companies) for local councils to enable them to fund, in a transparent manner, infrastructure and repairs required as a consequence of the CSG industry⁵*

The recommendations and actions pertaining to landholder compensation are designed to go hand in hand with wider measures to improve the overall community benefits of developing CSG in any given area. The Chief Scientist also included a discussion on royalty information, with a consideration point of:

Ensure the royalty framework is strong, and that the quantum of royalties is appropriately publicised.

⁴ NSW Government *NSW Gas Plan Protecting what's valuable Securing our future* page 6 available at <http://www.resourcesandenergy.nsw.gov.au>

⁵ NSW Government Chief Scientist & Engineer *Final Report of the Independent Review of Coal Seam Gas Activities in NSW* September 2014, Recommendation 3, page 12 available at <http://www.chiefscientist.nsw.gov.au> .

NSW Farmers submits that strengthening and increasing the transparency of royalty information is crucial to enabling the affected community/communities to not only understand the royalty collection quantum but to aid in ensuring the right people and places benefit from the funds collected by Government.

For this reason, NSW Farmers submits that setting compensation benchmarks is but one piece of the puzzle in improving communication and transparency and importantly, certainty, around coal seam gas in NSW. The improvements to the royalty information and distribution of community benefits via the community benefits fund as proposed in the Gas Plan are just as important and must be formulated ASAP.

NSW Farmers' recommendation 1: That the royalty and community benefits fund information be released as soon as possible to complete the Chief Scientist's recommendation.

1.2 Exploration vs. Production

The Chief Scientist and Engineer report also makes a number of points relating to the importance of clarifying the exploration versus the production of coal seam gas and stated that the transition from exploration to production was a level of concern apparent throughout the review⁶. The report states that 'there was wide acknowledgement that gas exploration is less 'invasive' than full scale production, both in the nature of the activity and its duration, given that exploration generally involves seismic surveying and limited drilling of wells, while production tends to involve substantially more wells, equipment, storage facilities, pipelines, roads processing plants, people and related activities.'

The IPART paper does not make clear the distinction and rather talks about impacts generally. Whilst this is most likely acceptable in many other contexts of compensation given the differences in impact, it is the experience of the NSW Farmers Association, that extractive industries will negotiate an agreement for compensation with the landholder based on one type of activity, and then when moving to production, carry over the compensation despite the activity increasing in intensity and impact.

It would be worth uncovering the specific changes from exploration to production so that companies, landholders and communities are clear on what to expect throughout the various stages of the coal seam gas development cycle, chiefly what impacts can be benchmarked at a compensation amount so as to avoid the situation where a landholder accepts exploration amounts for what will eventually become 'production' type impact.

⁶ NSW Government Chief Scientist & Engineer *Final Report of the Independent Review of Coal Seam Gas Activities in NSW* September 2014, Recommendation 3, page A -16 available at <http://www.chiefscientist.nsw.gov.au>

NSW Farmers recommendation 2: That compensation for exploration and production activities be clearly distinguished in benchmarked rates.

1.3 Neighbours

NSW Farmers supports the principle that affected neighbours should also receive compensation, from loss of visual amenity, to noise and dust affects. Unfortunately, the policy settings, particularly with coal mining, do not pick up what occurs in practice and neighbours are affected but not compensated or even able to negotiate the mitigation of impacts.

NSW Farmers recommendation 3: Impacts on neighbours should be considered in the formulation of benchmark compensation rates

2. Heads of Compensation

NSW Farmers supports the IPART's proposed 'heads of compensation' (value of land occupied, loss due to severance, injurious affection and disturbance), drawn from section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (not including solatium) however, the Association submits that certain heads will need to be expanded.

NSW Farmers speculates this could be because using compulsory acquisition principles requires a different approach to that of applying principles to the use of privately held farm land, although it is an understandable starting point when addressing compensation for the use of land given the new area of law being explored, particularly when legal and other professionals are familiar with the use of this Act. This section of the submission will go through each 'heads of compensation' to explore areas where NSW Farmers believes it can be expanded or unpacked.

2.1 The value of the land occupied

NSW Farmers submits that the 'value of the land occupied' needs to include the productive value, and not merely the amount of land and the market value. To take a simplistic example, where there is loss of access to land for grazing or cropping purposes, the amount of production that would normally be available to the landholder but for the CSG activity.

NSW Farmers recommends that value of land occupied includes market value (the rent payable for use of that land) **plus** the loss of productive value (the area that would otherwise be in production). We are aware that companies attempt to negotiate so as to avoid direct impacts on cropping or grazing activities , however it could still include

compensation for loss of access to or convenience in accessing such areas of the landholding.

This head of compensation could be broadened to include special value, namely productive value, of land and loss of opportunity to make improvements on the land, a concept included in Queensland, Victorian and Tasmanian legislation.

NSW Farmers recommendation 4: That value of the land occupied includes a special value of the land – the productive value, being an additional consideration to that of the market value.

2.2 Loss due to severance

As the IPART Issues Paper points out, severance loss is also an important compensation consideration. To NSW Farmers this captures loss suffered as a result of the land no longer operating as a whole. It is separate from productive value, as severance considers the impact on the value of the remaining land and not the land being used.

2.3 Loss due to injurious affection

Similarly to severance loss, NSW Farmers supports the inclusion of loss due to injurious affection, meaning loss suffered as a result of direct impacts from the CSG activity on the residual land. For example, noise or dust affects on farming operations. This could include neighbouring lands also, as mentioned in the preliminary notes. This may be minimal for the actual CSG operation itself, but could be most appropriate for machinery access, and relevant impacts due to infrastructure and/or pipeline construction.

2.4 Loss due to disturbance

NSW Farmers supports the inclusion of loss due to disturbance, although submits that it would be difficult to set a benchmark rate for some of the examples given by IPART in the Issues Paper. Physical damage to the landholder's property, the landholder's time in engaging with the gas company on the access agreement, lost production, and legal and professional fees, are all matters which may fluctuate throughout the negotiation, exploration and potentially production phases.

They are also considerations that could be picked up in other policy controls, for example, the Code of Practice for Land Access, currently being developed by the Land and Water Commissioner and representative groups. The most recent version of the Code to endure

public consultation⁷ contained the mandatory provision for inclusion in access agreements that the company pay the reasonable legal fees of the landholder in negotiating the agreement. NSW Farmers' position is that that these costs should be borne by the company although NSW Farmers is not convinced that benchmark compensation rates issues by IPART is the most appropriate place to do this. In the example of legal costs, the regulation of the legal profession fees would be a more suitable forum to discuss the appropriateness or otherwise of particular amounts, and likewise for accountant fees, technical experts etc.

Whilst NSW Farmers strongly supports compensation for these items, we warn against setting a benchmark amount for 'disturbance' as a whole, as the amount as to what disturbance will occur will vary, and in any case, our preference is that it is required to be paid by the company through a more certain means, i.e. amendment of the *Petroleum (Onshore) Act 1991*. The concern here is that the companies will use this amount as a 'catch-all' believing they have covered off on disturbances in a wider context, when these encumbrances may over the life of the project, actually result in a much larger extent.

NSW Farmers recommends that loss due to disturbance is included in compensation, however, setting benchmark rates for disturbance generally would not necessarily be of use for particular disturbances such as legal or professional fees, and presents a risk that companies will seek to cover off on a lot of considerations when in reality, each disturbance should be taken on its own merits.

NSW Farmers recommendation 5: That compensation for disturbance is made mandatory through changes to the Act, and benchmark rates for disturbance are divided into distinct elements.

2.5 Permanent impacts on landholders

As to the question raised in the IPART Issues Paper, whether there are permanent changes to the market value of the land as a result of CSG activities, NSW Farmers submits that in the absence of certain knowledge either way, it would be best for IPART to assume that there are long term impacts on the value of the land (negative) and to therefore set benchmark compensation accordingly.

As outlined in the IPART Issues Paper⁸, a recent study undertaken by Land & Property Information for the NSW Valuer General⁹ which found no impact on land values because

⁷NSW Government Code of Practice for Land Access Made under Section 69DB of the Petroleum (Onshore) Act 1991 available via <http://www.haveyoursay.nsw.gov.au/assets/premier-and-cabinet/cal-gray/Code-of-Practice-for-Land-Access-1.pdf>

⁸Independent Pricing and Regulatory Tribunal *Landholder benchmark compensation rates – gas exploration and production in NSW- Energy - Issues Paper* April 2015, page 21.

⁹NSW Land & Property Information (2014) , *Study on the impact of the Coal Seam Gas Industry on land values in NSW – Report for NSW Valuer General*, February 2014, available at http://www.valuergeneral.nsw.gov.au/about_us/announcements/a=197003 as extracted by IPART, above n 7.

of CSG activities, expressed that the finding was based on a small number of transactions and so this limits the conclusions to be drawn from the study.

Given the strong community opposition to CSG as evidenced in many parts of NSW currently, there is a case for erring on the side of caution. Not only has there been limited amount of practical examples of which to take evidence of long term impact on land value, the coal seam gas industry faces a significant upward battle and the threat of ongoing stigma attached to the land is real. NSW Farmers recommends including long term permanent impacts to be included in the compensation considerations.

This could include as well, neighbouring lands who suffer a similar fate, if for example, they are connected to the same ground or surface water source, or are in close enough proximity to face the perception of run-off and contamination.

NSW Farmers recommendation 6: That a negative permanent impact be included in compensation calculations.

2.6 Benefit payments

NSW Farmers agrees with the proposition that benefit payments, beyond that of compensation, are important in the context of 'sharing the benefits' as stipulated in the NSW Government's Gas Plan. However, we do not agree that benefits should extend only to the production stage of CSG.

Some exploration can take place for many years and can involve fully productive wells. In the eyes of the landholder, surely, the issue of benefits is surely addressed at the outset, when the development is new to the area and new to the landholder.

NSW Farmers is a strong supporter of community benefits and takes this opportunity to again stress the importance of returning advantages to the communities who are suffering the direct disadvantage because of these industries.

NSW Farmers recommendation 7: That benchmark benefit rates be recommended for both exploration and production phases.

3. Conclusion

NSW Farmers' welcomes the current NSW Government initiatives under the Gas Plan , however it is worth remembering the original recommendations to ensure that particular outcomes are not cherry picked the end result is more bureaucracy that does not make the improvements envisaged at the outset. This area of reform is for both improvements

to the royalty information system so that communities and individuals can see the benefits flowing back to affected communities.

NSW Farmers agrees with the intent and overall direction of IPART's Issues Paper, including using legislation that many in our community are familiar with. However, we feel that some of the 'heads of compensation' drawn from the Just Terms legislation is not adequate in addressing the unique and contentious situation of CSG development on private land, and the difference is very important in the context of the reform needed.