From:	Phil Laird
To:	IPCN Enquiries Mailbox
Subject:	Narrabri gas project: Additional information - Legal Advice re the attachment of Insurance Conditions to new CSG production determinations
Date:	Friday, 7 August 2020 9:48:08 AM
Attachments:	170316 - Letter to LtG re EPBC Insurance No 4 - NSW - FINAL.pdf 170316 - Letter to LtG re EPBC Insurance No 4 - NSW - Annexures - FINAL.pdf MCCC IPC Speach 22.7.2020.pdf

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Dear Commissioners;

As promised in my recent verbal submission to the Commission, please find attached legal advice that I have obtained regarding the State's ability to attach Comprehensive Environmental Insurance Conditions to new CSG approvals.

The advice from the Environmental Defenders Office was provided in 2017 and consists of two documents:

1. A letter of advice that summarises the scope of the advice and its findings
2. Annexures A, B and C which considers the legality of Comprehensive Environmental Insurance Conditions under the EP&A Act, the Petroleum and Onshore Act and the Protection of the Environment Operations Act

In essence the advice says;

> *"Subject to analysis of the relevant project and the proposed condition, we think that, in theory, a condition requiring approval holders to obtain comprehensive environmental insurance could be attached to approvals under any or all of the EPAA, the PO Act, or the POEO Act."*

I would ask that you carefully consider this advice and if it is your determination that the Narrabri Gasfield should be approved that you attach the Comprehensive Environmental Insurance Conditions and other protections as described in the Chief Scientists Recommendation 9 and the accompanying report from the Chief Scientist: *"Environmental risk & responsibility and insurance arrangements for the NSW CSG industry"*.

In addition I would ask that to ensure consistency and to avoid loopholes, that you ensure consistent Comprehensive Environmental Insurance Conditions are required in relation to each of the three Acts mentioned above.

Also I have attached the text of my short verbal submission on behalf of the Maules Creek Community Council (which also refers to Health Impact Assessments to manage residual risk) to provide the context for my obtaining and providing the attached advice.

Thank you Commissions for your involvement and commitment to transparency in the final stages of this 10 year planning process. If you have any questions in relation to the above, please do not hesitate to contact me.

Your sincerely,

Phil Laird

Annexure A. Attaching an environmental insurance condition to approvals under the *Environmental Planning and Assessment Act 1979* (NSW)

(i) The power to attach conditions to an approval under the EPAA

1. If a proposed CSG activity requires development consent under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPAA**), then approval must be obtained under the EPAA before a production lease can be issued under the *Petroleum (Onshore) Act 1991* (NSW) (**PO Act**).[1]
2. Two State Environmental Planning Policies are of direct relevance to applications for petroleum production:
   (a) *State Environmental Planning Policy (State and Regional Development)* (**SRD SEPP**); and
   (b) *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**).
3. Under the SRD SEPP,[2] 'Development for the purpose of petroleum production' is classified as State Significant Development (**SSD**).[3] Note that 'petroleum production' is not defined in the SRD SEPP or in the EPAA itself. However, it is defined in the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* cl 3 as:

> *the recovery, obtaining or removal of petroleum pursuant to a production lease under the* Petroleum (Onshore) Act 1991 *or a production licence under the* Petroleum (Submerged Lands) Act 1982) *and includes:*
>
> *(a) the construction, operation and decommissioning of associated petroleum related works, and*
>
> *(b) the drilling and operating of wells, and*
>
> *(c) the rehabilitation of lands affected by petroleum production*

4. The significance of classifying petroleum production as SSD is that the SSD approval process will apply to applications for consent.[4]
5. The approval authority for SSD development is the Minister for Planning and Environment. However, the Minister has delegated the power to make certain decisions either to the Department of Planning & Environment or to the Planning Assessment Commission.[5]
6. For SSD, s 89E of the EPAA gives the Minister (or the delegated approving authority) the following power (emphasis added):

> *(1) The Minister is to determine a development application in respect of State significant development by:*

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[1] PO Act s 67.
[2] *SEPP (State and Regional Development) 2011*
[3] SRD SEPP Sch 1 Cl 6.
[4] This advice does not go into detail about the approval processes for SSD projects, although you can obtain general information from the EDO NSW Fact Sheet on this topic: EDO NSW Fact Sheet, *State Significant Development and State Significant Infrastructure*, available for download from here: http://www.edonsw.org.au/planning_development_heritage.
[5] EPAA ss 89D, 23; http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Systems/Delegated-Decisions.

> *(a) granting consent to the application with such modifications of the proposed development or on such conditions as the Minister may determine; or*
>
> *(b) refusing consent to the application.*

7. For the following reasons, we think that the power under s 89E is likely to be interpreted broadly and would capture a condition that requires a CSG operator to obtain comprehensive environmental insurance:
   (a) On its face, the power to impose conditions on SSD development approvals is very broad.
   (b) There is no case law that specifically considers the scope of this power. However, there is case law on the scope of the condition-making power under the now repealed s 75J of the EPAA, which was in former Part 3A of the EPAA. The terms of the Minister's power to approve projects and impose conditions under former s 74J was in very similar terms to the power under s 89E(1). The case law concerning s 75J described the condition-making power as a wide power.[6] Similar reasoning is likely to apply to s 89E.
   (c) The terms of the power under s 89E are broader than the power to impose conditions on non-SSD development consents.[7]

      Note: Although we have not considered it in any detail, we think that the power to impose conditions on non-SSD development consents may also support imposing an environmental insurance condition.

   (d) If a court was asked to assess whether a condition was valid, it would apply the common law test of validity as outlined in *Newbury District Council v Secretary for the Environment* [1981] AC 578. The '*Newbury Test'* provides that, for a condition to be valid, it must:[8]
      (i) be imposed for a planning purpose;
      (ii) fairly and reasonably relate to the development for which permission is given; and
      (iii) be reasonable in the sense that it must be a condition which a reasonable local authority properly advised might impose.

   In *Bulga v Minister for Planning and Warkworth Mining Ltd*[9] the NSW LEC characterised the Newbury Test, as applied to conditions imposed for approvals under the now repealed Part 3A of the EPAA, as follows:[10]

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[6] *Community Action for Windsor Bridge Inc v NSW Roads and Maritime Services* [2015] NSWLEC 167 at [69]-[70], referring to *Ulan Coal Mines Ltd v Minister for Planning* [2008] NSWLEC 185 at [74]-[75].
[7] EPAA s 80A. Section 80A states that a condition may be imposed on a development consent if it falls within the scope of the matters listed in subparagraphs ((a)-(h)). This advice does not consider in any detail whether an environmental insurance condition is likely to fall within the scope of s 80A. However, on initial review, we think it is likely that it would, noting in particular s 80A(1)(a) which enables a condition to be imposed if it 'relates to any matter referred to in section 79C(1) of relevance to the development the subject of the consent).
[8] See, e.g.,
[9] *Bulga v Minister for Planning and Warkworth Mining Ltd* [2013] NSWLEC 48.
[10] *Bulga v Minister for Planning and Warkworth Mining Ltd* [2013] NSWLEC 48 at [73].

> *The power to attach conditions to an approval requires that a condition be for a purpose for which the power to grant approval under Part 3A is conferred, as ascertained by a consideration of the scope and purpose of the Act, and not for an ulterior purpose; reasonably and fairly relate to the project permitted by the approval; and not be so unreasonable that no reasonable approval authority could have imposed it.*

Similarly, in *Hunter Environment Lobby Inc v Minister for Planning* Pain J stated the following:[11]

> *The power to impose conditions under s 75J(4) is wide but must be within the objects and purposes of the EPA Act. …* Newbury District Council v Secretary of State for Environment *[1981] AC 578; [1980] 1 All ER 731 identifies that there are limits on an unlimited statutory power to impose planning conditions including that it must have a planning purpose, which was described by McHugh J in* Western Australian Planning Commission v Temwood Holdings Pty Ltd *[2004] HCA 63; (2004) 221 CLR 30 as requiring that it implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions; it must fairly and reasonably relate to the permitted development to which it is annexed; and it must not be so unreasonable that no planning authority could have imposed it. Whilst cases challenging Pt 3A decisions have not explicitly raised the* Newbury *principles, there is no reason as a matter of principle why they would not apply with respect to conditions imposed pursuant to project approvals under that part.*

In our view, a condition requiring comprehensive environmental insurance conditions would very likely satisfy each of the three elements of the Newbury Test. We note in particular that we think that the purpose of a comprehensive environmental insurance condition aligns with the objects of the EPAA (set out in s 5) including, among other things,

> *the proper management, development, and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment*[12]

and

> *the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats*[13]

and

> *ecologically sustainable development*[14]

[11] *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [65].
[12] EPAA s 5(a)(i).
[13] EPAA s 5(a)(vi).
[14] EPAA s 5(a)(vii).

(ii) Penalties for breach of a condition under an EPAA development approval

8. In relation to penalties, s 125(1) of the EPAA provides that a failure to do something that is directed by or under the EPAA is an offence. This would include a failure to comply with a condition to obtain comprehensive environmental insurance.

9. This advice does not comprehensively consider enforcement and compliance measures under the EPAA for a failure to comply with a condition of approval. However, it is useful to be aware of the maximum penalties available for failure to comply with an environmental insurance condition.

10. The maximum penalty applicable for an offence under s 125(1) depends on whether the offence is classified as a Tier 1, Tier 2, or Tier 3 offence. The table below sets out in brief when a breach will be characterised as Tier 1, Tier 2, or Tier 3, as well as the maximum penalties applicable. To summarise, noting that the bar set for Tier 1 offences is very high, a failure to obtain or maintain comprehensive environmental insurance in breach of a condition of approval under the EPAA is most likely to be a Tier 2 offence and attract a maximum penalty of $2 million dollars with an additional $20,000 per day for ongoing offences.

Penalties for Tier 1, Tier 2 and Tier 3 offences under the EPAA			
	Description	**Single offence**	**Ongoing offence**
Tier 1 (s 125A)	An offence will be a Tier 1 offence if the prosecution establish, applying the criminal standard of proof: (1) That the offence was committed intentionally (2) The offence: a. Caused or was likely to cause significant harm to the environment; or b. Caused the death of or serious injury or illness to a person	$5 million	A further $50,000 for each day the offence continues
Tier 2 (s 125B)	An offence will be a Tier 2 offence if it is not a Tier 1 or Tier 3 offence	$2 million	A further $20,000 for each day the offence continues
Tier 3 (s 125C)	An offence will be a Tier 3 offence if it is a 'certificate-related offence'[15] or it is another offence which the Act specifically states is a Tier 3 offence.	$1 million	A further $10,000 for each day the offence continues

[15] This is an offence arising under s 125 under certain identified sections of the EPAA. It is not relevant to this advice.

(iii) EPAA Standard and Model Conditions

11. The DPE has prepared draft Standard and Model Conditions for identified industries, including for the *Mining and Extractive Industry (Petrochemical and Gas Production)*. DPE is not currently publishing these conditions online due to a review of mining policy. However, there may be scope for the DPE to include a model environmental insurance condition in the standard and model conditions for petroleum and gas production approvals.[16]

12. In light of the above, Lock the Gate may wish to consider whether the DPE should be encouraged to amend its Petroleum and Gas Production Standard Conditions to incorporate a standard condition requiring proponents to obtain comprehensive environmental insurance for petroleum production.

[16] See https://www.planningportal.nsw.gov.au/understanding-planning/assessment-systems/state-significant-development.

Annexure B. Attaching an environmental insurance condition to approvals under the *Petroleum (Onshore) Act 1991 (NSW)* (PO Act)

(i) The power to attach conditions to an approval under the PO Act

1. Schedule 1B to the *Petroleum (Onshore) Act 1991* (NSW) (**PO Act**) addresses, among other things, the imposition, variation, or suspension of conditions on a petroleum title.[17]

2. Clause 7 of Schedule 1B empowers the Minister to impose conditions on a petroleum title either at the time of the grant of the title or at any later time, as permitted by Schedule 1B.

3. Clause 6 addresses conditions that may be attached to petroleum titles and, relevantly, says the following:

> *(1) A petroleum title is subject to:*
>
> *(a) any condition imposed by the Minister under this schedule …, and*
>
> *(b) any condition imposed by or under section … 106B, and*
>
> *(c) any condition prescribed by the regulations.*
>
> *(2) Without limiting the generality of subclause (1), conditions imposed by the Minister or prescribed by the regulations may include conditions relating to the following:*
>
> *(a) the development and conduct of petroleum operations,*
>
> *(b) environmental management, protection and rehabilitation, including requiring the holder of the title:*
>
> *(i) to carry out activities or not to carry out activities in order to protect, prevent, control or mitigate harm to the environment, and*
>
> *(ii) to rehabilitate land or water that is or may be affected by activities under the petroleum title,*
>
> *…*
>
> *(3) Any obligation imposed on the holder of a petroleum title in relation to environmental management, protection and rehabilitation:*
>
> *(a) continues to have effect despite the cancellation of the petroleum title or it ceasing to have effect, and*
>
> *….*

4. We have not identified any case law that considers the scope of the power to impose conditions under s 6 of the PO Act. However, we are of the view that the power is sufficiently broad such that it would most likely empower the Minister to attach an environmental insurance condition to a petroleum title granted under the PO Act. However, this may depend to some extent on the proposed terms of such an environmental insurance condition.

[17] PO Act Sch 1B cl 1(b).

(ii) Compliance and enforcement: Breach of conditions of a petroleum title

5. In relation to compliance and enforcement, there are two aspects that are of relevance:
   (a) cancellation of a title; and
   (b) penalties for failure to comply.

6. In relation to cancellation of a petroleum title, s 22(1)(c) of the PO Act gives the Minister the discretion to cancel a petroleum title as to the whole or any part of the land to which it relates:

> *(c) if the Minister is satisfied that the person has contravened a condition of the petroleum title (whether or not the person is prosecuted or convicted of any offence arising from the contravention)*

7. Before cancelling a petroleum title for this reason, the Minister is required to follow the processes set out in the PO Act. This includes giving notice to the title holder, accepting and taking into consideration any representations from the title holder. If a petroleum title is cancelled for this reason, the title holder can appeal to the Land and Environmental Court which will hear the appeal by way of a new hearing and make a fresh and final decision on the matter.[18]

8. In relation to penalties, if a condition of a petroleum title is contravened by any person, each holder of the title is guilty of an offence. The maximum penalty for a corporation is currently $1.1 million (10,000 penalty units).[19] In determining an appropriate penalty, s 125E(2) sets out a range of factors that the court is required to take into account.

(iii) Interaction between approvals under the EPAA and the PO Act

9. The EPAA interacts with the grant of petroleum production leases under the PO Act in two important ways:
   (a) a production lease cannot be granted under the PO Act if it would contravene the EPAA;[20] and
   (b) if a development consent has been granted under the EPAA for SSD, certain authorisations – including production leases under the PO Act – cannot be refused if they are necessary for carrying out the authorised SSD. The petroleum title must also be 'substantially consistent' with the EPAA development consent.[21]

(iv) Conditions prescribed by the Regulations

10. Petroleum title conditions can be prescribed by the *Petroleum (Onshore) Regulation 2016* (**PO Regulation**).[22] Consideration could be given, for example, to setting out certain minimum content for an environmental insurance condition in the PO Regulation.

[18] PO Act s 22B.
[19] PO Act s 125E(1) provides that the maximum penalty for a corporation is 10,000 penalty units. A 'penalty unit' is currently worth $110: *Crimes* (*Sentencing Procedure) Act 1999* s 17.
[20] PO Act s 42(2)(b).
[21] EPAA s 89K(d)-(e).
[22] PO Act Sch 1B cl 6(1)(c).

(v) Condition requiring security

11. It is notable that Part 10A of the PO Act also empowers the Minister to:

> *impose a condition requiring the holder of the title to give and maintain a security deposit … for the fulfilment of the holder's obligations under this Act in respect of the title (including obligations that may arise in the future) and to maintain that security deposit until those obligations are fulfilled.*[23]

12. If a petroleum title approval is subject to such a condition, the Minister can require security to be given before the title is granted.[24] The amount of a security deposit is either assessed by the Secretary or is the 'minimum deposit' amount identified in the Regulations.[25]

[23] PO Act s 106B(1).
[24] PO Act s 106C(1)(b).
[25] The minimum deposit for a petroleum title is $10,000: *Petroleum (Onshore) Regulation 2016* cl 49.

Annexure C. Attaching an environmental insurance condition to approvals under the *Protection of the Environment Operations Act 1997* (NSW)

(i) EPL's under the POEO Act

1. 'Petroleum exploration, assessment and production' is a scheduled activity under the POEO Act.[26] This means that petroleum extraction activities require an environmental protection licence (**EPL**) under the POEO Act.[27]

2. Part 3.4 of the POEO Act addresses licence conditions, and Part 3.5 addresses 'Particular licence conditions'. Notably, s 72 in Part 3.5 specifically refers to conditions requiring insurance cover. It reads as follows:

> *The conditions of a licence may require the holder of the licence to take out and maintain a policy of insurance for the payment of costs for clean-up action, and for claims for compensation or damage, resulting from pollution in connection with the activity or work authorised or controlled by the licence.*

3. 'Pollution' is defined in the Dictionary to the POEO Act to mean:

> *(a) water pollution; or*
>
> *(b) air pollution; or*
>
> *(c) noise pollution; or*
>
> *(d) land pollution.*

4. Each of these types of pollution are individually defined in the Dictionary to the POEO Act.

(ii) Compliance and enforcement: Penalties for breach of conditions

5. Failure to comply with a condition of a licence is an offence and, for a corporation, attracts a maximum penalty of $1 million. In the case of continuing offences, the maximum penalty is an additional $120,000 for each day that the offence continues.[28]

(iii) Interaction between the EPAA Act and the POEO Act

6. The EPAA interacts with the grant of environmental petroleum production leases under the PO Act in two important ways:
   (a) a production lease cannot be granted under the PO Act if it would contravene the EPAA;[29] and
   (b) if a development consent has been granted under the EPAA for SSD, certain authorisations – including EPLs issued under the POEO Act– cannot be refused if they are necessary for carrying out the authorised SSD. The EPL must also be 'substantially consistent' with the development consent.[30]

[26] POEO Act s 5, Schedule 1 cl 31.
[27] POEO Act ss 48.
[28] POEO Act s 64.
[29] PO Act s 42(2)(b).
[30] EPAA s 89K(d)-(e).

Annexure D. The Independent Review of Coal Seam Gas Activities in NSW

1. We have previously referred to the NSW Chief Scientist and Engineer (**CSE**)'s Final Report of the *Independent Review of Coal Seam Gas Activities in NSW*.[31]

2. It is relevant to note that requiring environmental insurance for CSG activities aligns with Recommendation 9 of the Final Report of the Independent Review, which reads as follows:

> *That Government consider a robust and comprehensive policy of appropriate insurance and environmental risk coverage of the CSG industry to ensure financial protection short and long term. The Government should examine the potential option of a three-layered policy of security deposits, enhanced insurance coverage, and an environmental rehabilitation fund.*[32]

3. Prior to preparing the Final Report, the NSW CSE released a discussion paper titled *Environmental risk & responsibility and insurance arrangements for the NSW CSG industry*.[33] That paper concluded as follows:

> *In light of the work undertaken the Review suggests it is in the best interests of the State and its people to ensure the appropriate levels of industry coverage are available and taken up by industry. Based on a better understanding of international practices and the apparent gaps in the system in NSW the Review notes that there are three primary levels of risk which need to be addressed in this regard:*
>
> 1. ***Expected Costs***
>
>   *Security deposit (industry to Government) – upfront cash/bank guarantee*
>
> 2. ***Sudden accidental pollution***
>
>   *Insurance coverage (industry) e.g. so-called 'cover of well' insurance*
>
> 3. ***Unforeseen and long term costs***
>
>   *Environmental fund (industry to Government) – addresses government cost associated with unforeseen and long term impacts including in the event of well abandonment or company insolvency.*

4. The paper made the following recommendation:

> *It is recommended the NSW Government notes the attached reports and refers the matter to NSW Treasury for further examination, in consultation with NSW Trade & Investment and the NSW Department of Planning and Environment, to consider a robust and comprehensive policy of appropriate insurance and environmental risk coverage for the CSG industry. This consideration should examine the potential adoption of a 3-layered policy of security, deposits, enhanced insurance coverage and an environmental rehabilitation fund administered by government. Consideration of how any additional insurance or levy is calculated*

[31] Our advice to you, dated 15 November 2016, titled 'Comprehensive environmental insurance for CSG projects: Basic information about what it is and some example practices in other jurisdictions'.
[32] NSW Chief Scientist & Engineer, *Final Report of the Independent Review of Coal Seam Gas Activities in NSW* (September 2014), 13.
[33] Available here: http://www.chiefscientist.nsw.gov.au/__data/assets/pdf_file/0009/44469/150530-CSG-Review-Report-on-Environmental-Risk-and-Insurance-Arrangements-FINAL.pdf

would need to take into account the level of risk associated with the different stages of any proposed coal seam gas development activity.[34]

[34] Ibid, p 8.

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16 March 2017

Phil Laird
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By email only: wplaird@bigpond.com

Dear Phil

Scope for attaching a condition requiring new CSG activities (petroleum production) to obtain comprehensive environment insurance: NSW laws

1. We refer to our letter to you, dated 22 February 2017, outlining the scope of work in this matter. We also refer to our previous advices, dated 15 November 2016 (two advices) and 18 January 2017 (one advice).

2. This advice considers whether there is the power under NSW state laws for an approving authority to attach conditions to a CSG approval that would require the approval holder to obtain comprehensive environmental insurance (**environmental insurance condition**). This advice only considers scope for attaching an environmental insurance condition to *new* CSG production approvals.

3. This advice does not consider scope for attaching an environmental insurance condition to existing petroleum exploration approvals (i.e. by varying or adding to the existing conditions of approval). It also does not consider scope for attaching a comprehensive environmental insurance condition to CSG *exploration* or *prospecting* approvals. If you would like to consider either of these issues, please let us know.

4. We have set out our advice, in summary form, in the main body of this letter. We have set out a more detailed analysis of the relevant statutory provisions in Annexures to this advice, as follows:
   (a) Annexure A: Attaching an environmental insurance condition to approvals under the *Environmental Planning and Assessment Act 1979* (NSW)
   (b) Annexure B: Attaching an environmental insurance condition to approvals under the *Petroleum (Onshore) Act 1991* (NSW)
   (c) Annexure C: Attaching an environmental insurance condition to approvals under the *Protection of the Environment Operations Act 1997* (NSW)

(d) Appendix D: The Independent Review of Coal Seam Gas Activities in NSW

Our advice

5. Relevant for the purpose of this advice, petroleum production in NSW requires approval under three main statutes:
   (a) *Environmental Planning and Assessment Act 1979* (NSW) (**EPAA**);
   (b) *Petroleum (Onshore) Act 1991* (NSW) (**PO Act**); and
   (c) *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).
6. Subject to analysis of the relevant project and the proposed condition, we think that, in theory, a condition requiring approval holders to obtain comprehensive environmental insurance could be attached to approvals under any or all of the EPAA, the PO Act, or the POEO Act.
7. Importantly however, because petroleum exploration activities are classified as State Significant Development (**SSD**) under the EPAA, there are some limits placed on the grant of approvals under the PO Act and the POEO Act:
   (a) If a development consent has been granted under the EPAA for petroleum production:
      (i) Neither an application for a petroleum title under the PO Act nor an application for an Environmental Protection Licence (**EPL**) under the POEO Act can be refused.
      (ii) The petroleum title granted under the PO Act and Environmental Protection Licence (**EPL**) granted under the POEO Act must be 'substantially consistent' with the development consent granted under the EPAA.
   (b) A production lease granted under the PO Act must not contravene the EPAA (or any other Act).
8. Because of these limits, if an environmental insurance condition is not imposed under the EPAA but is imposed under the PO Act or the POEO Act, there may be an argument that the petroleum title or EPL is not 'substantially consistent' with the development consent. The likelihood and strength of such an argument will depend on the terms of the development consent and the terms of the environmental insurance condition.
9. For this reason, we think it would be preferable to impose an environmental insurance condition under the EPAA.
10. Imposing an environmental insurance condition under the EPAA is also attractive because the maximum penalties available for breach of approval conditions are higher under the EPAA than the PO Act and the POEO Act.

11. Nevertheless, there may be benefits to including environmental insurance conditions in approvals granted under the PO Act and the POEO Act (preferably in addition to an equivalent condition attached to an EPAA approval). In particular:
    (a) breach of a condition under the PO Act enlivens the Minister for Industry, Resources and Energy's discretion to cancel a petroleum production licence; and
    (b) the POEO Act specifically provides for EPLs to include a condition requiring proponents to obtain insurance. This differs from the power to impose environmental insurance conditions under the EPAA and the PO Act: for those Acts, we have inferred that attaching an environmental insurance condition would most likely fall within the scope of broad condition-making powers.
12. For these reasons, we think that the best approach may be for environmental insurance conditions to be included, in identical or equivalent terms, in approvals under each of the EPAA, PO Act and POEO Act.
13. We note that there are mechanisms available that could support the implementation of a broad policy decision that environmental insurance conditions will be attached to petroleum production approvals. They include the following:
    (a) Petroleum title conditions can be prescribed by the *Petroleum (Onshore) Regulation 2016* (**PO Regulation**). Consideration could be given, for example, to setting out certain minimum content for an environmental insurance condition in the PO Regulation.
    (b) The NSW Department of Planning and Environment (**DPE**) has prepared draft Standard and Model Conditions for identified industries, including for the *Mining and Extractive Industry (Petrochemical and Gas Production)*. The DPE website indicates that the standard and model conditions are not currently being published due to a review of mining policy. However, there may be scope for DPE to include a model environmental insurance condition in the standard and model conditions for petroleum and gas production approvals.
14. We also note that a recommendation that policies be adopted requiring environmental insurance conditions for petroleum production as a general rule would align well with Recommendation 9 in the Chief Scientist and Engineer's 2014 Final Report of the *Independent Review of Coal Seam Gas Activities in NSW*, which recommended that Government:

> *consider a robust and comprehensive policy of appropriate insurance and environmental risk coverage of the CSG industry to ensure financial protection short and long term. The Government should examine the potential option of a three-layered policy of security deposits, enhanced insurance coverage, and an environmental rehabilitation fund.*[1]

[1] NSW Chief Scientist & Engineer, *Final Report of the Independent Review of Coal Seam Gas Activities in NSW* (September 2014), 13.

15. If you have any questions about the content of this letter, you can reach me on (02) 9262 6989 or by email emily.long@edonsw.org.au

Yours sincerely,
EDO NSW

Emily Long
Solicitor

Our ref: 1724722

Maules Creek Community Council Verbal Submission to the IPC Hearing re proposed Santos Narrabri Gasfield

Good afternoon commissioners. Thank you for this brief opportunity to object to the proposed Narrabri Gas Project on behalf of the Maules Creek Community Council.

The MCCC has been very concerned for many years regarding the reckless track record of the Narrabri Gasfield Project proponent and the potential precedent that an approval determination could mean for the farms and environment at Maules Creek which is included in PEL 1 which is presided over by the same company.

As is typical of the establishment of the CSG industry in Queensland, the Narrabri Gasfield aims to setup its infrastructure and gain a foothold on public land and expand from there.

If the experience that we at Maules Creek have had with the coal industry serves as a guide, this proposal if approved will be followed by many modifications and expansions, and unending management plan changes when the proponent can't meet its conditions. All this with no merit appeal rights, though it is hard to see how this project can be approved on merit.

Despite the reams of EIS paper and the years of delay by the proponent to put the project forward due to economic circumstances we are none the wiser as to where the wells will be drilled, what the chemicals to be used are, how the salt will be treated and how the ground water will be protected.

We don't know the contracting companies, the subsidiaries that will be used or the work practices that will be undertaken.

And this is normal for the oil and gas industry as noted by the NSW Chief Scientist when she said that "traditionally oil and gas companies have a higher risk appetite than other large industries and they generally take on their own risk, that is, self-insure or underinsure."

In my former role as a National Coordinator for the Lock the Gate Alliance I took a particular interest in Insurance for coal seam gas. I've met with State and Federal Ministers, the head of the NSW EPA, the bureaucrat in the NSW EPA charged with implementing the Chief Scientists Recommendation 9, insurance underwriters, actuaries, lawyers, AgForce in Qld, local farmers and insurance brokers and agents. I've written briefers, submissions, proposals, Glovebox Guides for farmers on insurance and spoken about the need for comprehensive environmental insurance in 4 states.

I've done all this with the experience of my insurance for my own farm.

When I wrote to my broker about whether I was covered by my Elders Farmpack insurance which is underwritten by QBE they said "CSG is not mentioned specifically in the policy, so read the Product Disclosure Statement". When I looked at page 76 of the PDS there is an exclusion for "damage caused intentionally or incurred by a person acting with your express or implied consent". This seems reasonable in normal circumstances, however it would include a CSG company such as Santos who has a land access agreement with the policy holder obtained under a state significant project approval.

What I can tell you from all my meetings and travels is that the only ones who don't want the Chief Scientists Recommendation 9 that requires environmental insurance, security deposits and a environmental rehabilitation fund to be implemented is the proponent and the government.

One suspects that this is due to the poor financial prospects of the project. Better to transfer the risk from the project to the landholder and the environment rather than have to internalise the cost.

The Actuary that I spoke to told me he would be happy to design and market a policy, the underwriter told me that he was writing policies in Asia, the insurance company executives and brokers said they would be happy to sell the policies to the gas companies and the farmers said they would be happy to be covered by the policies, when they were unable to obtain such policies themselves.

One young Libertarian Federal MP from Victoria said to me when I was lobbying in Canberra "I love it when you come to me with a solution, makes total sense."

Even the lawyers agree. The MCCC would like to point out to the IPC that we have legal advice provided by EDO NSW that indicates that insurance conditions can be legally attached to approvals provided under the:

(a) Environmental Planning and Assessment Act 1979 (NSW) (EPAA);
(b) Petroleum (Onshore) Act 1991 (NSW) (PO Act); and
(c) Protection of the Environment Operations Act 1997 (NSW) (POEO Act).

The advice states, and we recommend the advice to the commission, that insurance conditions under all the Acts should be required in order to ensure consistency.

Of note, the Chief Scientist did not recommend preparation of a Health Impact Assessment (HIA) prior to any work being undertaken and the MCCC believes that this is a key element of managing the health risk to the community beyond environmental insurance. We do not believe that a requirement to develop a HIA should be ignored.

We ask that if the IPC approves this project key requirements to manage "residual risk" is that comprehensive environmental insurance and a HIA must be in place before any stone is turned.

Thank you.

Phil Laird
22.7.2020