Submission to the Chief Scientist on CSG legislation and its pitfalls

marylou potts to: csg.review 29/04/2013 07:30 AM

History: This message has been replied to and forwarded.

Dear Chief Scientist,

Unfortunately, given time constraints and work commitments, we have been unable to cast a submission specifically for your terms of reference.

We have however, a submission cast for the NSW Inquiry into CSG which we attach.

This submission was made before the SRLUP policy was finalised in September 2012. However we note, that policy is yet to be implemented. Further, that policy is primarily applicable to CSG production, i.e. it does not protect the land from the damage done in exploration, which is when the most profound damage is done, particularly as pilot production is currently seen to be permissible by the NSW government in the exploration phase [without any of the environmental scrutiny applicable to production i.e. an EIS and public scrutiny objector rights etc.]

We hope this is useful to your enquiry. We remain available should you have any queries in relation to the attached submission or the points made in this email.

Sincerely,

Marylou Potts

Sumission FINALPDF to the NSW LC Inquiry into CSG 6 October 2011.pdf

Director & Principal

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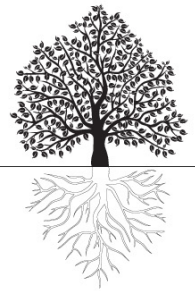

Submission to the NSW Legislative Council General Purpose Standing Committee No 5

Inquiry concerning coal seam gas in NSW

"Along with air, water is one of the most fundamental requirements for the survival of living things. No other single substance has a greater impact on the environment and the uses to which it is put"[1]

by Marylou Potts Pty Ltd
an incorporated legal practice
6 October 2011

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[1] Pigram JJ, 2006 *Australia's Water Resources* CSIRO Publishing p.1

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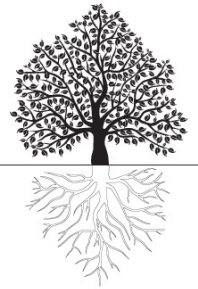

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Executive summary

This submission reviews and suggests amendments to the *Petroleum (Onshore) Act 1991 (NSW)* (**POA or Act**) for the purpose of:

(a) ensuring protection and conservation of water in petroleum exploration and production activities; and

(b) establishing a better balance of rights and powers between the landholder and the miner in the Act.

The submission draws from recent investigations into:

(c) a review of AGL Upstream Investments Pty Ltd's (**AGLUI**) Camden Gas Project (**CGP**) groundwater obligations under its Petroleum Exploration Licence 2 (PEL2) and Petroleum Production Leases (PPL's 1, 2 and 4), and its breach of those obligations[2] and the Government's apparent failure to require AGLUI to remedy those breaches[3];

(d) landholder rights to protect groundwater under the Act, related legislation and at common law. This demonstrates that without provisions in an access arrangement for the protection and conservation of water, a landholder has few other actions and difficulties in establishing those actions (if any), in relation to the protection of water;

(e) a review of current drafts of access arrangements. This reveals that the miner has the dominant drafting hand, often writing off the landholder's legislative protections in the Act;

(f) drafting access arrangements which include landholder protections; and

(g) anecdotal evidence given by members of Government of the severe lack of resources within Government to police and enforce the provisions of the petroleum titles issued, leaving landholders, the environment and the water in a particularly vulnerable position.

2 The breach being failure to monitor groundwater. This information was made known to the DPI in May 2011. To our knowledge AGLUI has not been directed to remedy these breaches in Stages 1 and 2 PPL's.

3 Marylou Potts Pty Ltd 2011 Submission to the NSW Department of Planning and Infrastructure objecting to the AGLUI Northern Expansion of the CGP until it had fulfilled it's groundwater obligations for stages 1 and 2.

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1 Introduction

1.1 Water

Australia is the world's driest continent, water is scarce and unreliable. Drought, coupled with fire, and flood are among the most recurrent natural hazards in Australia"[4]. Between 2000 and 2009 Australia experienced its worst ever drought conditions. In February 2007, towns in SE QLD were declared without water and Goulburn almost reached the same position. 96.3% of NSW was declared drought affected and another 2.7% declared marginal. All of the worst droughts in Australia are thought to be the result of intercontinental weather systems, and on the east coast of Australia, El Nino[5] with its nemesis, la Nina. Australia is now, in 2011, at the height of la Nina, with the possibility, that in less than 7 years, it will return to the height of el Nino drought conditions. Destruction of the integrity of groundwater systems, water wastage, pollution and or contamination now, will have serious, if not catastrophic, effects in el Nino conditions in 2016 and thereafter.

Clearly Government needs to make strategic decisions in relation to the prioritisation of its natural resources. The amendments sought to the *Petroleum (Onshore) Act 1991 (NSW)* in this submission are based upon building into the *Petroleum (Onshore) Act 1991 (NSW)* a regime for the protection and conservation of water. Potentially irreparably destroying groundwater aquifer integrity in the eastern states would appear to be absurd when there is sufficient gas off the Western Australian coast to supply demand in the east, and where fresh water is more valuable to the sustainability of the NSW economy than gas exploration and production could ever be. Any argument that CSG mining is required for the NSW economy loses force when one considers a cost benefit analysis which accounts for the loss of fresh water and groundwater systems.

It is widely known that groundwater, once polluted or contaminated, cannot easily be rehabilitated, and once lost, not quickly recharged. As most of Australia's fresh water is found in the ground and it is widely recognised that "groundwater is a more important resource over much of the arid interior than sparse and unreliable surface water"[6], any activity that threatens the integrity of this resource must be seriously considered and regulated to ensure minimum loss or damage. As a public good, water needs to be protected by responsible governments in their allocation of resources to commercial entities, particularly miners,

4 Pigram JJ, 2006 *Australia's Water Resources* CSIRO Publishing p.28
5 *Pigram JJ, 2006 Australia's Water Resources CSIRO Publishing p.30*
6 Pigram JJ, 2006 *Australia's Water Resources* CSIRO Publishing p.24

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whose interests are clearly in conflict. Protection of the integrity of aquifers should be a fundamental priority in any coal seam gas exploration and production activities and built into the *Petroleum (Onshore) Act 1992 (NSW)* regime.

This submission seeks to protect and conserve water by building protections into the Act such as:

(a) including a definition of water which is consistent with the definition in the *Contaminated Land Management Act 1997 (NSW)* and the *Protection of the Environment Operations Act 1997 (NSW);*
(b) including water in the sections concerned with environmental and natural resource conservation and protection;
(c) protecting cultivated land in the exploration phase;
(d) extension of exempted areas to include water catchment areas and urban and town zones and a development buffer;
(e) suggesting that landholders undertake a baseline study of the water on the property and thereafter monitoring, mitigation measures and rehabilitation measures and denial of access when safe levels have been breached until safe levels have been restored; and
(f) allowing landholders to successfully object to the grant of applications and renewals on the basis of vulnerable aquifers, water catchment areas or other important water sources.

1.2 Re-establish a balance in landholder miner rights and powers

A significant concern in the *Petroleum (Onshore) Act 1991 (NSW)* is the imbalance in rights and powers between the miner and the landholder. While is it accepted that the State Government wishes to encourage onshore petroleum mining, it is submitted that it should not do so at the expense of the landholder's existing operations, the wider public interest in preservation of fresh water or so as to pit a landholder against a substantially greater resourced and sophisticated miner.

There are several methods of establishing a fairer balance of power in the Act. One of those methods, which would provide greater transparency and involvement of a landholder in the process, is simply to adopt the processes already utilised in the *Mining Act 1992 (NSW)* and the *Environmental Planning and Assessment Act 1979 (NSW)* and require the Minister to notify landholders, and allow landholder involvement in the pre-application, application, grant and renewal process.

Other methods include:

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(a) compensating the landholder for all expenses incurred. This will ensure a landholder can continue negotiation of an access arrangement until all matters are settled, rather than until it runs out of funds;

(b) allowing the landholder legal representation in the arbitration process, and not subject to the consent of the arbitrator or the miner;

(c) compensating the landholder for expenses of specialists, the landholder's own time and any loss sustained as a consequence of coal seam gas (**CSG**) mining, including diminution of land value;

(d) clarifying the term of the access arrangement to ensure it continues for as long as the miner has a petroleum title over the landholder's land;

(e) expanding the scope of the subject matter suggested by the Act for inclusion in an access arrangement, to allow the landholder to argue for their inclusion and guide arbitrators on what can be included;

(f) guidance to arbitrators on circumstances in which they may refuse access, such as has been suggested by Mrs Justice Schmidt[7], where there is inadequate protection of the land;

(g) notify the landholders potentially affected by a petroleum title in the pre-application phase and allowing them to object on specified grounds with rights of appeal to the LEC;

(h) requiring Government to notify affected landholders of a grant of a petroleum title and provide them with a copy of the title granted; and

(i) include provisions for false or misleading conduct, such as had in the *Mining Act 1992 (NSW),* and unconscionable conduct, such as is provided for consumer protection in the *Competition and Consumer Act 2011 (Cth)* to protect landholders, to ensure uninformed consent is unenforceable.

1.3 Miscellaneous amendments

There are also a number of other matters which, given this opportunity, have been highlighted for consideration and amendment by Government. These include:

(a) resolution of inconsistencies between instruments, such that an instrument issued under the POA prevails over any approval/consent issued under the *Environmental Planning and Assessment Act 1979 (NSW) (**EP&A Act**);*

(b) clarification in the POA of the application of the EP&A Act, given the repeal of Part 3A and the new provisions in Part 4 of the EP&A Act;

(c) replacement of references to the NSW Minerals Council with the Australian Petroleum Production and Exploration Association;

[7] Brown v CMA Pty Ltd [2010] 76 NSWLR 473

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(d) removal or amendment of miner favourable provisions which result in significant detriment to either Government or landholders;

(e) suggesting inclusion of false or misleading conduct provisions, with penalties similar to that found in the *Mining Act 1992 (NSW)*; and

(f) suggesting recording of the petroleum title on the land title register to alert unsuspecting purchasers of land of the petroleum title.

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2 Table of suggested amendments to *Petroleum (Onshore) Act 1992 (NSW) (POA)*

The following table of the *Petroleum (Onshore) Act* 1991 (NSW) is made up of 4 columns: column 1 listing the section of the Act; column 2 the section name; column 3 the issue of concern; and in column 4, if possible, the suggested amendment.

The table does not purport to be an exhaustive review of the Act, nor does it purport to be internally consistent, it does however attempt to highlight issues in the Act and provide possible remedies for the lack of protection and conservation of water, and to rebalance the substantial imbalance of power between the miner and the landholder.

Section	Name	Issue	Recommended change
Part 1	**Preliminary**		
3	Definitions		
	Cultivated land	There is currently no definition of "cultivated land" in the Act. This leaves the interpretation open to its ordinary meaning. It is submitted that references to "cultivated land" be replaced with "agricultural land" and insert in the definitions section, the definition of "agricultural land" found in Schedule 2 of the *Mining Act* 1992 (NSW).	Replace references to "cultivated land" with "agricultural land" throughout the Act. Insert a definition *"**agricultural land** has the meaning given in Schedule 2 of the Mining Act 1992 (NSW)."*
	Environment	There is currently no definition of "environment" in the Act. It is submitted that a definition of "environment" be included and that the definition be the same as in the *Protection of the Environment Operations Act 1997 (NSW)*.	Insert a definition *"**environment** has the meaning given in the Protection of the Environment Operations Act 1997 (NSW)."*
	Land	The current definition of "land" appears to exclude water. Related legislation such as the *Contaminated Land Management Act 1997 (NSW)* has a definition of "land " which includes water. It is submitted the definition of "land" be consistent with the definition of "land" in the *Contaminated*	Replace the definition of "land" with the following definition *"**land** has the meaning given in the Contaminated Land Management Act 1997 (NSW)."*

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		Land Management Act 1997 (NSW). In the *Contaminated Land Management Act 1997 (NSW)* is *"*land" includes water on or below the surface of land and the bed of such water". The purpose of this insertion is to ensure all provisions in the Act relating to protection, conservation, rehabilitation and compensation of "land", also relate to water.	
	Rehabilitate	There is currently no definition of "rehabilitate" in the Act. It is submitted a definition which requires "rehabilitation" to restore to original, or better, condition, will be more likely to ensure sustainable land use into the future.	Insert a definition *"**rehabilitate** means to restore to original, or better than original, condition."*
	Restricted area	There is no definition of "restricted area" in the Act. Section 72 of the Act sets out the restricted areas. For ease of reference it is submitted that a definition be given to "restricted area" as the areas defined in the section 72(1) of the Act.	Insert a definition *"**restricted areas** are defined in section 72 of the Act."*
	Water	There is currently no definition of "water" in the Act. It is widely acknowledged that water, particularly groundwater, is the most vulnerable resource in relation to coal seam gas (**CSG**) mining. It is submitted that the Act needs to make express provision for protection, conservation and compensation for loss of access to water, and recommends that a definition of water be inserted into the definitions section of the Act. That definition should be consistent with other related legislation, such as the *Contaminated Land Management Act 1997 (NSW)* and the *Protection of the Environment Operations Act 1997 (NSW)*. It is recommended that the definition utilised be the same as that used in the *Contaminated Land*	Insert a definition *"**water** has the meaning given in the Contaminated Land Management Act 1997 (NSW)."*

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		Management Act 1997 (NSW). That definition is as follows: *"**waters** means the whole or any part of:* *(a) any river, stream, lake, lagoon, swamp, wetlands, unconfined surface water, natural or artificial watercourse, dam or tidal waters (including the sea), or* *(b) any underground or artesian water."*	
Part 3	**Petroleum titles**	**Recommendation to establish a fairer balance between landholders and miners by increasing transparency and landholder involvement in the pre application, application, grant, cancellation and suspension, and renewal process**	
8	Invitation of applications	Currently the Act does not provide for landholder input in the pre application or application stage for a petroleum title. **Pre application stage: Notice from Minister** Landholders, as interested persons, have invested substantial sums in acquiring their land, more often than not, have invested significant amounts of time running a business from their land and are often intimately aware of the nature and significance of their land, its geology, its agricultural potential and its groundwater. It is submitted, before the Minister invites applications for petroleum titles over a specified area of land, that the Minister first cause a notice to be served on the potentially affected landholders, allowing them to object to an invitation for applications over land which is: (i) cultivated land [currently protected in the production phase (s71 of the Act)]; (ii) restricted areas [currently protected in all petroleum titles (s72 of the Act) [for example urban or	**Pre application stage: Notice from Minister** Insert a new section 8A Objections which provides *"Before the Minister invites applications for petroleum titles, the Minister must cause notice of the proposal to be served on any landholder of the land concerned.* *The notice must state that the Minister proposes to invite applications, describe the land to which the invitation will relate and state that objections may be made within 60 days of the date the notice is*

[8] Schedule 1 Division 4 clause 21(1) and (2) Mining Act 1992 (NSW)
[9] Atkinson 2002
[10] For mining leases, see s21 Schedule 1 of the Mining Act 1992 (NSW).
[11] Not simply placed in a news paper, in a 2cmx2cm advertisement.
[12] Schedule 1 Division 4 clause 21(3), (4) and (5) Mining Act 1992 (NSW)

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		town development area]], and (iii) sensitive areas [currently protected in the petroleum titles (eg Second Schedule PEL2) [in relation to flora or fauna]]. It is submitted that these protections all apply from the pre application stage, rather than at various stages in the petroleum mining process, and form the bases upon which landholders can successfully object to the Minister inviting applications. It is further submitted that this set of protections also include protection of water. Requesting input from landholders and interested persons, who have intimate knowledge of the land concerned, allows the Government to properly assess the potentially affected landholder concerns before creating legitimate expectations in miners. Inserting this additional step of notifying the landholder before applications are sought and setting out those matters upon which a landholder may successfully object, will allay much of the shock, frustration and angst of the landholder, the miner and inevitably, the Government, currently experienced with the existing process. The *Mining Act 1992 (NSW)* and the *Environmental Planning & Assessment Act 1979 (NSW)* (**EP&A Act**) already utilise these processes to allow for persons to have access to information and object and appeal. This pre application notification of landholders process is already utilised in the *Mining Act* 1992 (NSW)[8] at the application for mining lease stage. It is submitted that because CSG exploration is as damaging as production[9], that protection be brought forward to the pre exploration phase of the process and include protection of water. Carving out these matters for protection from the beginning, will undoubtedly result in less concern about water security [because it will allow for protection of aquifers and catchment areas], food security [because it will protect cultivated land], landholder rights [because landholders will have the right to object before applications are sought] and bio-security [because sensitive areas can be	*served to the granting of the title on the grounds that:* *- the land is cultivated land*[13] *- the land overlies vulnerable aquifers, water catchment areas and or fresh water sources,* *- the land is in a restricted area as defined in s72(1)* *- the land is defined as a sensitive area,* *The objections must be taken into account by the Minister.* *The Minister may not seek applications if the landholders can substantiate their objections on the grounds provided.* *Objectors have the right of appeal to the Land and Environment Court (**LEC**).”* **Application stage** Insert a new section 8B Notice to be given to landholders as follows: *“An applicant for a petroleum title must, within 21 days of lodging an application,*

[13] Schedule 1 Division 4 clause 22 Mining Act 1992 (NSW), landholders can object on the basis that the land is agricultural land.

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		protected from the outset rather than in retrospect] in onshore petroleum mining. **Application stage: Applicant to provide notice** Currently an applicant for a petroleum title, which includes exploration licences and production leases, is not required to notify the landholders concerned directly that an application is being made. It is submitted an applicant for a petroleum title should be required, as one is under the Mining Act 1992 (NSW)[10], within 21 days of lodging an application, to cause notice of that application to be properly served on the landholders of the land concerned.[11] That notice must state that the applicant for the petroleum title has lodged an application, describe the land in sufficient detail to enable a landholder to determine how and the extent to which the application affects their land, state that objections may be made and lodge a copy of the notice with the Director General. These requirements are already in the *Mining Act 1992 (NSW)*[12]. It is submitted that they also be included in the POA, for applications for all petroleum titles.	*cause notice of that application to be served on the landholders of the land concerned.* *That notice must state that the applicant has lodged an application, describe the land, state that objections may be made within 60 days of the date the notice is served and lodge a copy of the notice with the Director General.* *The objections must be taken into account by the Minister.* *The Minister may not grant applications if the landholders can substantiate their objections on the grounds provided.* *Objectors have the right of appeal to the LEC."*
9(1)(a)	Grant	Currently this section provides that the Minister may grant a petroleum title over any onshore land within the State except in those areas listed where the Minister may not grant a petroleum title. Those "no go" zones include areas gazetted by the Minister. It is submitted that recognition be given to the importance of water catchment areas and significant groundwater basins as areas in which no petroleum title may be granted due to the potential detrimental geomechanical effects[14] of CSG mining to onshore fresh water resources, particularly aquifers, and the consequential irreparable damage.	Minister to gazette as no go zones for the granting of petroleum titles: - water catchment areas - significant groundwater basins - urban and town zones + sufficient buffer for future development

14 Dusseault 2010

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		It is further submitted that no petroleum title be granted in any urban or town zone or within, as has been touted in QLD, at least 2km [or a 10 year buffer zone for future development] of any urban or town zone.	
9(5)	Notification of grant or refusal	Currently notification of the grant or refusal of a petroleum title is made in the Gazette. From experience the Gazette is a clumsy and awkward database which is difficult to navigate and even more difficult to access information from.. To expect landholders to have their eyes on the Gazette in order to determine if a title has or has not been granted over their land is unreasonable. **Notify landholders of grant or refusal** It is submitted the Minister notify affected landholders directly of the grant or refusal. If there has been a grant, the Minister must provide those landholders directly affected with a copy of the title and easy access to an electronic copy of the title. Anecdotally, there have been occasions in the Southern Highlands when landholders have had miners turning up on their door step declaring they had title to explore and did not. Further, it is the standard position that miners do not provide copies of their titles to landholders leaving landholders with no idea what rights the miner actually has in relation to the landholder's land. This is an untenable position for a landholder to be placed in and should be remedied by the entity that places the landholder in that position, the Government. The Government should provide the landholder with a copy of the title.	Insert the *words "and given to the landholders affected, including if granted, a copy of the petroleum title and easy access to an electronic copy"* at the end of this subsection 9(5). Insert a new paragraph *"(f) the decision maker reasonably considers that the applicant provided false or misleading information in or in connection with the application."*
13, 14, 15, 16	Applications	Currently the information attached to applications is not transparent to the public. It is submitted all information required to be provided by an applicant in relation to the making of an application for a petroleum title or its renewal be made available on a Government website [similar	See suggestions in this column for ss8 and 9 of the Act

15 There are no references at all in the POA to false or misleading information. However, throughout the Mining Act 1992 (NSW) there are consequences for providing false or misleading information. Note Mining Act 1992 (NSW) sss22(2)(b) in relation to licences, 41(2)(b), 63(2)(b) in relation to mining leases, 64(3)(b) in relation to tenders, 114(2)(c) in relation to renewal applications, 121(2)(b) in relation to transfer approvals, 125(b2) in relation to grounds of cancellation of authority, 190(2)(b) in relation to mineral claims, 198(2)(c), 201(2)(b), 203(1)(c2), 228(2)(b) in relation to opals, 233(1)(b2), s246Q Certification of audit report, 246R offences relating to audit information, s289(3)(b) Returns, s378C False or misleading information.

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		to that for planning applications] and provisions be inserted in the POA similar to those in the *Environmental Planning and Assessment Act 1979 (NSW)* [former s75H(3)] which require an application and all its accompanying documentation be made publicly available, together with the right of objection and the right to appeal any decision of the decision maker to the LEC. **False or misleading information** Unlike s22(2)(b)[15] and many other provisions of the *Mining Act 1992 (NSW),* the POA does not allow the decision maker to refuse applications or impose penalties if the applicant provides false or misleading information in connection with an application for a petroleum title. It is submitted that this section be amended to provide the Minister with the power to refuse applications or renewals where the miner has provided false or misleading information.	
20	Continuation pending renewal	Currently a petroleum title continues in force beyond its expiration date indefinitely if an application for renewal has been made within time. It is submitted that there needs to be a cut off date beyond which a determination on a renewal of a petroleum title can no longer be made. Other similar Acts provide time limits. Section 29(2) of the *Mining Act 1992 (NSW)* sets a time limit on the determination of an application for a mining lease from the exploration licence as being 2 years. It is submitted that this concept be imported into the POA with a significantly shorter time limit, of say 6 months. This allows the landholder and the miner some certainty in knowing whether or not the title will be renewed. Allowing the title to simply continue indefinitely without certainty of timing fails to consider the substantial sums outlaid by the miner and the inability of the landholder to plan it's use of the land. It is recommended that an application for renewal expire, along with the title, if not granted within 6 months of the date on which it would otherwise expire. Need to explain why 6 months?	Insert a new subsection 20(2)as follows: *"(2) Section 20(1) does not operate to extend the term of the petroleum title by more than 6 months after the date on which it would otherwise expire."*

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20A	Waiver of minor procedural matters	This section requires significant overhaul or deletion. It does not relate to minor procedural matters and allows major breaches by the miner to be waived. Subsection 20A(1) allows a miner to fail to comply with the Act or the regulations or be late in doing so and to fail to furnish documents and information. As a consequence the miner may fail to furnish a work program, fail to establish its financial credentials, fail to notify the Minister of the discovery of petroleum. Section 20A(2) is ineffective to protect either the Government or the landholder from these failings of the miner. The miner holds a privileged position which should not be able to be abused by the provision of such a legislative waiver of obligations. It is submitted that this section be deleted, or in the least, amended to reflect the title, that is, relate solely to minor procedural matters.	Delete this section. Alternatively, amend the section to reflect the title, so that it relates solely to minor procedural matters.
21(c)	Grounds on which an application may be refused	Currently the Act provides that the Minister may refuse to grant an application or renewal if a miner fails to meet minimum standards for a work program, technical capability or financial capability or ability to meet the terms of a tenement. It is submitted the Minister's minimum standards be readily available to the public, that is, its minimum work program standards, financial or technical requirements, and its parameters on the public interest be publicly available on a website. Further, these standards should include minimum standards for the protection and conservation of water.	Add a new subsection "*21(2) The Minister must make its minimum standards and public interest considerations available to the public."* Insert a new subsection "*21(f) the applicant does not meet the Minister's minimum standards in relation to the protection and conservation of water."*
21	Grounds on	Currently the Act provides no grounds for refusal to grant an application for a petroleum title based	Insert a new paragraph 21(f) *"the*

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	which an application may be refused – objections based on previous conduct	on previous breaches of title. It is submitted the section be amended to allow for any person to object to a grant or renewal of a petroleum title, on the basis that the miner has: (a) failed to satisfy the Minister's minimum standards; (b) previously breached provisions of the title, the Act, the regulations or the law (for example in relation to a previous title in relation to the same land such as the exploration licence) and to provide the Minister with the power to refuse to grant the title on these bases.	*applicant has failed to fulfil or has contravened:* *(i) any of the conditions of a previous title, the Act, the regulations or the law; and or* *(ii) the Minister's minimum standards referred to in this section 21."*
21	Grounds on which application may be refused	Currently the Act provides no grounds for refusal to grant an application based on environmental considerations. It is submitted that the Minister be given power to refuse applications on the grounds of protection and conservation of: (i) vulnerable aquifers, water catchment areas and or other vital fresh water sources; (ii) cultivated land; (iii) restricted areas [as defined in s72(1) of the Act]; and or (iv) sensitive areas [as defined in the petroleum title].	Insert a new subsection 21(f) *the grant of the application would adversely affect the protection and conservation of:* *(i) vulnerable aquifers, water catchment areas and or other vital fresh water sources;* *(ii) cultivated land;* *(iii) restricted areas, as defined in s72(1) of the Act; and* *(iv) sensitive areas, as defined in the petroleum title.*
22(1)	Cancellation or suspension	Currently the Minister has the power to cancel the title for failure, contravention, lack of good faith, or use for a purpose other than set out in the title. It is submitted that the Minister be given the power to also cancel or suspend a title in order to protect and conserve the environmental particularly around "act of god" conditions, such as drought, fire, flood or deterioration of water conditions, in order to allow the restoration of the environment. For example, if water conditions change materially due to drought and or aquifers are substantially depleted or their quality has deteriorated, in whatever circumstances, the	

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		Minister should be given the right to suspend or cancel the petroleum title. In this respect some interconnection needs to be made with s132 collection of water samples. The miner should provide samples at minimum benchmarked intervals, and at any time that the Minster is considering any action with respect to the title, including environmental events.	
27	Discovery of petroleum	This section makes it clear that if petroleum is discovered, the Minister may direct the holder to apply for a production lease. Currently, it is understood that the Government is allowing a miner to conduct a pilot study under other than production lease conditions. This would appear to be contrary to the tenor of the Act and denies landholders the right to object to the grant on the basis that it is over cultivated land. It also allows the miner to circumvent s71 concerning prevention of mining operations on cultivated land. It is submitted that there should be a clear division between exploration and production activities. Pilot studies should be conducted under production lease conditions.	Set out clear delineation: no production in exploration phase, if wish to do pilot study take out a production lease.
Part 4	**Consent of other Government authorities**	**The overlap between the operation of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act) and the POA is complex and would benefit from clarification particularly with regard to process and application and** the repeal of Part 3A of the EP&A Act**.**	
48, 54A, 62, 67		It is submitted that what needs to be clarified are the following: - clear setting out of the process in the application of the POA and the EP&A Act, for example, set out of the main steps in interrelationship of both Acts in the POA application and EP&A Act consent/approval/determination process. - clarification of priority of instrument in the event of an inconsistency between the EP&A Act	Amendment required to bring up to speed with EP&A Act amendments and to ensure that there is no grant of a PPL without the EP&A Act application and consent process having been complied with and the consent under the EP&A Act first granted.

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		approval/consent/determination conditions and the terms of the petroleum title. It is submitted that the terms of the petroleum title must prevail in the event of an inconsistency. - Part 4 of the POA needs to be amended to accommodate the repeal of Part 3A of the EP&A Act, particularly ss 48, 54A.	
Part 4A	**Access Arrangements for prospecting titles**	**The access arrangement provides the landholder with contractual rights and remedies against the miner in relation to the activities of the miner on the landholder's land. It is an essential ingredient in mining on private land and, it is submitted, that landholders be provided with as much legislative support and protection as possible, particularly in order to place them in a position of equal bargaining power vis a vis the miner.** **It is essential that the legislation provide the landholder with sufficient contractual rights and remedies against the miner to:** **(i) protect the landholder's property and the value in it,** **(ii) protect and conserve the environment;** **(iii) protect and conserve the water on the property;** **(iv) protect the landholder's current use of the property and or properly compensate him for interruption or denial of that use; and** **(v) provide just and equitable compensation for any loss sustained as a consequence of the miner's activities.** **Essentially, only the landholder has the primary interest in protecting and conserving the value in the property, the environment and the water. The miner's primary interest is to extract petroleum cheaply and quickly, and the Government's interest is to receive a royalty and create employment. Given that it is the landholder whose primary interest is to protect and conserve the environment, the legislation should give the landholder the legislative tools to ensure the landholder can do just that, for example:** **(a) allow the landholder to demand a security from the miner;** **(b) allow the landholder to demand an ultimate holding company guarantee from the miner;**	

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		(c) require the miner to take out and maintain public liability and environmental protection insurance; **(d) ensure that the term of the access arrangement continues for as long as the miner has a petroleum title over the landholder's land;** **(e) allow the landholder to establish the baseline data, monitoring, mitigation measures, rehabilitation measures by engaging specialists and having their fees paid for by the miner;** **(f) require the miner to provide just and equitable compensation to the landholder for any loss the landholder sustains, including the loss sustained to the whole of the landholder's property, and its value, not simply areas directly affected;** **(g) ensure that the landholder is always able to receive expert legal or specialist advice on its rights under the Act (as expert as that received by the miners) and have that advice paid for by the miner.** **(h) require the miner, at the request of the landholder, to provide to the landholder copies of all information made available to the Government (not all landholders have access to the internet, or printers, nor are they necessarily able to leave the property and travel to see the public register.)** **(i) build in provisions for unconscionable conduct of the miner, for example, uninformed consent should be unenforceable. Where a miner fails to properly and fully inform the landholder of the consequences of providing its consent to have access to the restricted areas, any consent gained from the landholder is unenforceable against the landholder.**	
69A(1)	Application of Part	**Clarify the term** Currently a landholder has the right to refuse access for prospecting operations until an access arrangement has either been agreed or determined. The landholder however does not have the same right during production.	Amend s69A(1) to include after the words "This Part applies" the words *"to all petroleum titles"* and delete the words from "the carrying out of" to the end of the subsection.

16 Sydney Gas (Camden) Operations Pty Ltd v Alan Gatenby et al 5 August 2005 NSW Mining Warden's Court.
17 See NSW Minerals Council template
18 Unlike mining under the *Mining Act 1992 (NSW)*, where the miner often acquires the land over which it holds a mining lease, in CSG mining such acquisitions have not taken place.

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		It is submitted a landholder be given the right to refuse access until an access arrangement has either been agreed or determined for production. It is in production that the disturbance to the landholder's activities, the property and the environment is going to be greatest and most long lasting, and it is during this period that the landholder, the property and the environment need the greatest protection. The fact that there is no legislative basis to demand an access arrangement in the production phase has led to confusion of rights of access to the production lease area between the miner, under the legislation, and the landholder's common law rights to prevent trespass. This has resulted in significant disputes between landholders and miners, the Gatenby[16] case a clear example. This is the case if the miner: (i) simply refuses to allow the term to extend into production[17]; (ii) at no time during the exploration phase, seeks to enter upon the landholder's land (giving the landholder no opportunity to demand an access arrangement). (iii) does not make an application for production lease, and the Minister calls for applications from others. It is submitted that the Act be amended to prevent a miner from commencing production operations until it has agreed, or has had determined, an access arrangement with the landholder.[18]	Amend the remainder of Part 4A to replace "prospecting title" with "petroleum title'.
69C(1)	Prospecting to be carried out in accordance with access arrangement	Currently this clause only applies to prospecting titles and prospecting operations. It is submitted that it apply to all petroleum titles.	Delete the word "prospecting" where it first appears and insert the word "petroleum" before the word "title" and delete the word "prospecting" where it appears before the word "operations".
69D(1)	Matters for which access arrangement to	This section sets out some of the matters for which an access arrangement may make provision. It is submitted this section be expanded to include the following matters:	

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	provide	• determination of and preservation of water on the property • provision of a security in favour of the landholder, to ensure the landholder has ready access to funds to remedy defaults of the miner under the access arrangement and ready access to funds if the miner fails to pay the specialists' invoices whether for the initial baseline data or the ongoing advice at each change of the miner's activities, for example at each approval stage; • provision of an ultimate holding company guarantee, particularly important if the miner is a $2 company, which is quite possible by circumventing the approval process under the transfer provisions of the Act. Further, if the miner is a project specific entity, [which is the common practice] and winds up or becomes insolvent, without an ultimate holding company guarantee, the landholder has no one to call on to perform the miner's obligations under the access arrangement. • provision of public liability insurance and environment insurance liability • the taking of a baseline data on water, soil, air, animals, humans, improvements, sensitive areas, restricted areas, aquifers, aquifer interconnectivity, geology. It is submitted that this baseline data be taken by specialists engaged by the landholder and paid by the miner, and be utilised by the landholder throughout the term of any tenement on the property to measure the effects of the mining on the property and the environment. Without this data a landholder has limited grounds to argue damage and seek compensation from the miner.	
69D(1)(j)	Concurrent breach provision	Currently the Act does not make provision for the inclusion in the access arrangement of a concurrent breach provision, allowing the landholder remedies against the miner if the miner breaches the provisions of the petroleum title. It is submitted a new paragraph 69D(1)(j) be inserted into the Act, that the access arrangement include a concurrent breach provision, such that breaches of the petroleum title, its associated documentation, the Act, the regulations and any environmental law, is a breach of the access arrangement, entitling the landholder to deny access.	Include a new *69D(1)(j) a breach of the Act, the regulations, any environmental protection law or the terms of the petroleum title or its related documents, is a breach of the access arrangement, entitling the landholder to deny access until that breach is remedied.*

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69D(1A) and (2A)	References to the NSW Minerals Council	Currently the Act provides for the NSW Farmers' Association to negotiate a template access arrangement with the NSW Minerals Council. However, the NSW Minerals Council is not the peak body for petroleum producers and does not represent them. It is submitted that NSW Minerals Council be replaced with the Australian Petroleum Production and Exploration Association (APPEA) and it be APPEA who is charged with the requirement to negotiate with the NSW Farmers' Association the terms of a template access arrangement under the Act. There is no agreed template between the NSW Farmers' Association and the NSW Minerals Council. The former agreed 1997 template for minerals cut across landholder rights and the current NSW Minerals Council template significantly cuts across landholder rights[19]. It is submitted any template must be evenly cast between the miner and the landholder and preserve, rather then eliminate, the rights of the landholder under the Act.	Replace NSW Minerals Council with APPEA.
69D(2A)	Legal fees	The Act provides that the miner is to pay the reasonable legal fees of the landholder in obtaining initial advice about the making of the access arrangement. Anecdotal evidence indicates that miners are offering $500 to cover the landholder's initial legal fees. Expert legal fees of a medium to large Sydney law firm range from $650-1000/hour. Clearly, $500 would not cover the reading of an access arrangement, let alone preparing one for the landholder which included the landholder's rights, or advising a landholder on the rights to be included. It is submitted that this section be amended to ensure all reasonable legal fees of the landholder be paid by the miner with no cap. The Queensland Government has recognised that all reasonable legal fees of the landholder must be paid by the miner[20].	Insert the words "accounting, valuation and" before the word "legal", and delete the word "initial" before the word "advice". Alternatively, insert before the word "legal" the words "landholder's time, and, accounting, valuation, specialist [including hydrogeologist, agronomist, surveyor, environmental scientist, vet and doctor] and". Replace "obtaining initial advice" with

19 Note that the rights in s72 and clause 4.1 NSWMC Land Access Arrangement for Mineral include no reference to water.

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		It is worth noting the recent decision of the Queensland Government to also provide free legal aid to landholders (not means tested), to assist landholders in dealing with miners in relation to access arrangements. The Queensland Government recognises the significant complexity of access arrangements and the fact that landholders do not have sufficient resources to properly negotiate an access arrangement with a sophisticated miner. The NSW Government should also recognise this complexity and provide a similar free legal aid service, by a legal practitioner with expertise in the field. The Queensland Government has also recognised that a number of other professionals' fees are payable by a landholder as a consequence of the Government granting a miner a petroleum title over its land. The Queensland Government has responded by ensuring that all these professionals' fees are payable by the miner. It is submitted that this section be amended to provide that the miner pay at least the legal, accounting and valuation expenses of the landholder in settling the access arrangement. It would be preferable that the legislation provide an even broader base, such as "all fees of all specialists engaged by the landholder, and the landholder's time, in connection with the granting of the petroleum title and protection of the environment and the landholder's property". Alternatively, "all fees of all specialists engaged by the landholder, and the landholder's time, in connection with the settlement and administration of the access arrangement."	"connection with the settlement and administration of the access arrangement." NSW Government should also provide a free legal aid service [non means tested] to landholders to assist them in negotiating access arrangements under the Act.
69D(2A)	Other expenses	The Miner and the Government benefit from the operation of petroleum mining, at the significant expense of the landholder (even if we simply look at the amount of time a landholder has to spend working out what its rights are, what it can do, who it can talk to, etc). A landholder would almost always have no experience with mining, mining rights, mining activities,	

20 See s79Q of the Petroleum Act 1923 (QLD) and s532 Petroleum and gas (Production and Safety) Act 2004 (QLD)

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		and its own activities in relation to those of the miner, and even less with CSG production activities, given there are only 6 production leases [as at May 2011] in all of NSW, one could not expect otherwise. All expenses of the landholder and any loss incurred should also be payable by the miner for there to be any equitable arrangement for the landholder.	
69D(3)	Inconsistency of provisions	Currently in the event of an inconsistency between the Act and a provision of the access arrangement, the Act prevails. It is unfortunate that this provision does not allow for an improved position to prevail which is agreed between the parties. It is submitted that this provision be amended to allow the access agreement provisions to prevail if they provide better protection, conservation or rehabilitation of the environment than is set out in the Act, the title or the regulations.	Add the words to the end of the subsection *"unless the provisions of the access arrangement provide greater protection, conservation or rehabilitation of the environment than is set out in the Act, the petroleum title or the regulations."*
69D(4)	Contravention of the access arrangement	This section contemplates a dispute between the landholder and the miner in relation to an alleged contravention of the access arrangement and provides the landholder with the remedy of denial of access. It is submitted the contravention be extended to include a contravention of the petroleum title, the Act, the regulations or an environmental law.	Insert the words *", the petroleum title, the Act, the regulations and or an environmental law*" after the words "access arrangement".
69I(2)(b)	Right of appearance	Currently the landholder is at the mercy of the miner and the arbitrator as to whether or not he or she may have legal representation in an arbitration for the determination of the terms of an access arrangement. It is submitted that this places the landholder in a significantly vulnerable position and must be remedied. A miner has substantial resources; in house counsel, expertise in relation to this	Delete paragraphs (a) and (b) and insert the words "by an Australian legal practitioner whose reasonable legal costs are payable by the miner" after the words "may be represented".

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		legislation and mining experience and expertise at a level that the landholder would not be able to match nor the resources to fight. It is disturbing that the legislation expressly puts a landholder in an even more vulnerable position by providing the miner with the power to deny the landholder legal representation in the arbitration process. The access arrangement has a significant impact on the landholder's ability to utilise their land and is the only vehicle available to protect their rights vis a vis the miner. It is hoped that arbitrators preserve the landholder's rights under the Act. The Act should not pit such unequally matched players against each other without trying to level the playing field for the weaker player. When such substantial and significant assets are at stake, essentially the landholder's livelihood, legal representation is essential to ensure some balance of power between the landholder and the miner in this process. It is submitted that this subsection be amended to allow a landholder legal representation in any arbitration conducted under the Act.	
69N(2) and 69L(1)(a)	Arbitrator's interim and final determination	Currently the Act provides for the arbitrator to come to an interim determination, and if that is objected to, a final determination. At each of these stages, the arbitrator is given the power to refuse access to the miner, or set out the terms upon which access is granted. Some arbitrators have assumed refusal of access can only be determined in "exceptional circumstances". This assumption is unfounded in the legislation, and arbitrators should not be setting such a high bar when the legislation does not so provide. The Act does not specify any criteria upon which the arbitrator may refuse access. Schmidt J in Brown v CMA Pty Ltd [2010] 76 NSWLR 473 at para [118] indicates that "inadequate protection of the property … provide[s] a proper basis for refusal of access." It is submitted that arbitrators be given guidance as to when they may refuse access and that that guidance include the circumstances set out by Mrs Justice Schmidt. These circumstances could include where a landholder can show that CSG exploration on its property and the methodologies	

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		sought to be used will provide "inadequate protection to the property", and specifically, "inadequate protection of the aquifers or the cultivated land on the property". That guidance could be in the regulations or listed in the Act itself.	
Part 5	**Restrictions on titles**		
70(4)	Definition of exempted areas	This section provides the holders of petroleum titles may not, except with the consent of the Minister, exercise any rights conferred by the title on land in an exempted area. It is submitted that areas of land within water catchment areas be classified as "exempt areas" in subsection 70(4) of the Act. Petroleum exploration and production onshore involves the extraction of large amounts of gas and water from under the ground. As a consequence, there may be geomechanical subsidence[21] of the land resulting in damage to overlying aquifers. As catchment areas depend on the integrity of the geological structures to hold the water, no activity should be permitted in these areas which would jeopardise the integrity of that geological structure.	Include a new paragraph "*the Sydney Water Catchment Area and any urban or town water catchment area to preserve the integrity of catchment areas from geomechanical damage.*"
71	Restrictions on rights of holders of leases over cultivated land	**Define cultivated land** Currently a miner is not allowed to "carry out any mining operations or erect any works on the surface of any land that is under cultivation", except with the consent of the landholder. The only detail in the Act on "cultivated land" is set out in subsection 71(3) as excluding "cultivation for the spread of pasture grasses". It is submitted more detail is necessary to give landholders clarity on whether their land is or is not	Replace the words "production lease" with "petroleum title". Delete subsection 71(4) of the Act and insert *"If a dispute arises as to whether or not land is cultivated land within the meaning of this section, any party to the dispute may apply to the Land and*

21 Dusseault 2010
22 Presumably the reason is that that State is keen to determine its petroleum resources and this is a means of obtaining this information by having the miner do the exploration for it.
23 Atkinson 2002

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		"under cultivation". The *Mining Act 1992 (NSW)* provides more detail in its definition of "agricultural land" in Schedule 2. It is submitted that the POA be amended to replace "cultivated land" with "agricultural land" and utilise the definition in Schedule 2 of the *Mining Act* in the POA to define agricultural land. **Provide the protection of cultivated land in the exploration phase** Currently the protection of cultivated land is only available to the landholder in the production phase. As a consequence, a miner will expend funds exploring on cultivated land, but not, without the landholder's consent, be able to produce on that cultivated land.[22] One means of ensuring no expectation of the miner to produce on cultivated land, or needless expenditure of funds when a landholder will not grant consent, is to provide that the miner may not explore or produce on cultivated land, without the landholder's consent. Although it is understood that this exploration is for the benefit of the Government in determining the State's resources, the detriment to the landholder is significant because CSG exploration activities, in particular bore hole drilling, are almost as damaging to underlying aquifers as production activities.[23] This protection may be effected by replacing the words "production lease" with "petroleum title in this section. If it is accepted that references to "cultivated land" be amended to "agricultural land", the suggested amendments in this section should accordingly refer to "agricultural land". **Disputes on cultivated land to go to LEC** Currently disputes on the determination of cultivated land are determined by the Minister. It is submitted that due to the significance of the determination on the livelihood of the landholder, disputes concerning whether or not land is under cultivation be referred to the LEC. This clause	*Environment Court for a determination on the matter."* If it is accepted that references to "cultivated land" be amended to "agricultural land", the suggested amendments in this section should accordingly refer to "agricultural land".

		has significant ramifications for landholders who operate businesses on their land and should not be left to an administrative decision open to judicial review. Decisions such as these should be made on the merits and by impartial courts, such as the LEC.	
72	Restrictions on rights of holders of titles over other land	This section makes it clear that a landholder may prevent a miner from exploring or mining within restricted areas on his or her land, by not giving his or her consent. It is also clear, that if consent is given, it is irrevocable. Irrevocability, although providing surety to the miner, is at a substantial loss to an inadvertent landholder. It appears that landholders do inadvertently give away this right and on that basis some amendment to this section is sought. The current practice of agreeing access arrangements appears to be that the miner provides its draft to the landholder and the landholders are signing access arrangements without legal advice. This results in landholders inadvertently giving away these substantial legal protections to their house, garden and improvements and doing so irrevocably. As an example, the current draft of the NSW Minerals Council (NSWMC) Land Access Arrangement for Mineral Exploration July 2010 does **not** prevent prospecting and mining operations within 200m of the principal dwelling house, 50m of the garden, vineyard or orchard, or on land on which is situated any improvement. Clause 4 of the NSWMC access arrangement allows the miner to prospect in these restricted areas as long as it causes minimum damage/interference. A landholder who is unaware of its legislative protections [allowing him or her to prevent such activities in these areas] may see this provision as innocuous and agree to it. Such significant rights of a landholder should not be able to be so easily thwarted. It is submitted that miners be required to advise landholders to obtain independent legal advice on the access arrangement and a landholder be required to have a certificate of independent legal advice before signing an access arrangement. Further, that a miner be required to advise the landholder of its rights under this section 72, and	

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		s71, and have a sign off of that advice, before the landholder may irrevocably sign away these rights. Another option, could be to remove subsection 72(2), providing that the consent is irrevocable, and inserting a provision providing that false or misleading conduct and or unconscionable conduct by the miner in relation to the settlement of an access arrangement, entitles the landholder to deny access or terminate the access arrangement and seek compensation for any loss sustained.	
Part 6	**Protection of the Environment**	**Division 1** Environment to be considered before grant of petroleum titles	
74(1)	Need to protect natural resources etc to be taken into account	The Act provides the Minister, before making grants of petroleum titles, *"is to take into account the need to conserve and protect (a) flora, fauna, fish, fisheries and scenic attractions; (b) features of aboriginal…or geological interest, in or on the land over which the petroleum title is sought."* It is submitted the Minister's actual considerations be made publicly available. Further, currently the section makes no reference to the protection or conservation of water. It is submitted that protection and conservation of water be inserted as a new paragraph 74(1)(c) and water be defined as set out in the definitions section 3.	Insert a new paragraph *"74(1)(c) the nature of, use of, integrity of, proximity to and vulnerability of water,".*
74(2)		Under this subsection, the Minister has the power to request environmental impact studies. It is submitted that this section be expanded to give the Minister the power to carry out agricultural and water impact studies.	Include "*agricultural and water impact study*" after the words "environmental impact studies".

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		Division 2 Conditions for protecting the environment	
75	Inclusion of conditions for protecting the environment	This section currently sets out those matters for which conditions can be placed in the petroleum title in relation to protection of the environment however the section makes no reference to the protection or conservation of water. It is submitted that protection and conservation of water be added in this section as a new paragraph 75(1)(c) and water be defined as set out in the definitions section 3.	Include a new *"75(1)(c) the nature of, use of, integrity of, proximlty to and vulnerability of water,".*
76	Rehabilitation etc of area damaged by operations	This section sets out those matters for which conditions can be placed in the petroleum title in relation to rehabilitation of areas damaged by operations. The section makes no reference to the rehabilitation of water. It is submitted that protection and conservation of water be added in this section as a new paragraph 76(1)(c) and water be defined as set out in the definitions section 3. In this respect the definition of "land" also needs amending to ensure that rehabilitation includes rehabilitation of water. It is further submitted that recognition be given to the potential for geomechanical subsidence caused by CSG mining. When large amounts of gas and water are extracted from under the ground it is inevitable that subsidence of the area above the mining will occur. This subsidence also acts to shear, bend and collapse bore holes, resulting in leaking of hydrocarbons in the surrounding environment. It is submitted that a policy decision be made to: (i) amend the *Mine Subsidence Compensation Act 1961 (NSW)* to deal with subsidence caused by any mining activity, including CSG and petroleum mining, not just coal and shale oil if there is no	Include a new *"76(1)(c) the rehabilitation of water,".*

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		other legislative instrument providing such protection; and (ii) reduce the number of holes a miner may drill and restrict drilling to places where there is little likelihood of subsidence effects on surrounding aquifers. This is to prevent drilling where there is a reasonable likelihood of subsidence damage to aquifers.	
Part 7	**Royalties and fees**		
85	Royalty	Currently there is no royalty payable on CSG produced for the first 5 years of production and thereafter increased 1% a year from 5% for 5 years up to a maximum of 10%. The recent NSW Budget threatens to increase coal royalties yet leaves CSG royalties untouched. It is submitted, with the considerable uncertainty regarding the irreparable damage which could be caused by CSG mining to overlying valuable fresh water aquifers, the giving away of CSG is an absurd policy. Given the possible high risk and the current community concerns, the NSW Government should place at least a 10% royalty rate on CSG from the beginning of production and use that royalty: (i) to employ more personnel to properly police the CSG activities, (ii) to undertake the groundwater studies on the cumulative effects of CSG mining, particularly in Camden and Narrabri; and (iii) to assist landholders negotiate access arrangements that are fair and equitable by providing a free legal aid service [non means tested]. The giving away of CSG for the first 5 years of production simply encourages CSG miners to exploit the resource to the maximum extent possible in order to exhaust the resource before the royalty kicks in. This policy could be seen to encourage reckless behaviour on the part of miners, with little benefit to landholders, the environment and the Government. When governments set royalties, they must have regard to the economic value of alternative uses	Amend the regulations to make at 10% royalty immediately payable on CSG produced.

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		of the land and balance the value of mining against those alternative uses. As CSG mining has the potential to irreparably damage groundwater systems it is important to set royalties to ensure that CSG mining only takes place when the value of the royalty gained by the NSW community outweighs the economic cost of the loss of a ground water system. As a matter of good decision making the Government should, in administering the Act, weigh up the economic considerations [which would include the economic cost of the irretrievable loss of groundwater systems], alternative uses of the land, likelihood of damage to the environment, against the value of mining. The Government should always publish is reasoning where it has to weigh up competing considerations. It should support its decisions with studies undertaken by economists or other appropriate specialists. Before any decisions become final, affected persons should be notified of the proposed decision, the reasoning behind it and given the opportunity to comment. An increased royalty revenue would make this possible. A higher royalty would allow the Government to properly administer petroleum titles, and at the same time, increase transparency and protect and conserve the environment. With higher royalties, less titles could be granted and miners would be less likely to engage in speculative mining to the detriment of the environment.	
Part 8	**Registration of titles and dealings**		
95(1)	Records of titles	The position in property law needs to be investigated for the purpose of ascertaining whether disclosures are required of petroleum titles to unsuspecting purchasers of real estate. Currently there is no requirement in the Act that a record of the petroleum title be placed on the land title register. It is submitted that this section, and query other property legislation, be amended to require the	Insert a new subsection *95(4) The miner must record with the Registrar General of the land titles office the petroleum title interest on the land titles which are affected by that petroleum title.*

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		miner to record the petroleum title on the land title register. Registration of the petroleum title on the land title will ensure that purchasers of land are not surprised that the land which they have purchased is covered by petroleum title. This is a significant obligation with respect to PELs as they cover large areas of land. However, it is submitted that it is of significant importance to an unsuspecting purchaser to know what petroleum interests are held over land it proposes to acquire, before it acquires that land.	
95(3)	Records of titles	Currently this section provides that records of titles are to be made available to the public at the head office of the Department free of charge. The Department has interpreted this as meaning that electronic versions are not free of charge and is charging $160/hour, with a minimum charge of $160, for electronic access to titles. Often miners do not give landholders a copy of the title. This means that a landholder has to locate and purchase the title from the department in order to determine the rights the miner. It is submitted that titles be made available by the department free of charge electronically. An increase in the CSG royalty could pay for such an activity.	Delete the words “at the head office of the Department”.
Part 11	**Compensation**		
107	Compensation	**Injuriously affected to include loss in market value to the balance of the land** Currently the holder of a petroleum title must compensate every person having any estate and interest in the land injuriously affected or likely to be so affected by reason of any operations conducted or other action taken in pursuance of this Act, title regs etc.	Insert a new s*107(5) The holder of a petroleum title is not authorised to exercise any rights under that title unless the amount of any compensation payable*

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		Some commentary[24] has argued that these words would not include damage to the value of the balance of the land because the words "injuriously affected" or "diminution in value of the land' are not included in s109, which is concerned with the measure of the compensation. Further, s107(3) provides that compensation is not payable where operations do not affect a portion of the land. The meaning of "affect" is not defined, and as a consequence it could be argued "affect" includes the intangible affect of loss of land value or that "affect" is limited to the tangible affect. As there is uncertainty of application of this section, it is submitted that the words "injuriously affected" be clarified either in this section or in s109, to ensure that they permit compensation for injuriously affecting the balance of the land, or more particularly for diminution of land value. The Queensland Government has recognised the significant effect of CSG mining on land values and included as a "compensable effect" payable by the miner to the landholder any and all diminution of land value.[25] It is submitted compensation be payable by the miner to a landholder for loss of market value of the property as a consequence of CSG mining operations. **No rights until compensation paid** Under s265(4) of the *Mining Act 1992 (NSW)* the miner is not authorised to exercise its rights under the mining lease unless the landholder concerned has been paid compensation, either agreed or assessed. The POA does not have such a provision and it is submitted that the POA should have such a provision. It is submitted the holder of a petroleum title, or alternatively, at least a production lease, should not be authorised to exercise any of the rights in the title until the amount of compensation payable	*to the landholder under subsection (1) in respect of that part of the area is the subject of a valid agreement or of an assessment made by the Land and Environment Court."*

24 Scarr 2004 p571
25 see s79Q of the Petroleum Act 1923 (Qld) and s532 Petroleum and Gas (Production and Safety) Act 2004 (Qld)

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		to the landholder has been agreed or determined.	
109(1)	Measure of compensation	Currently the measure of the compensation is confined to damage to the surface of the land. A landholder of the estate in fee simple at common law owns the land to the centre of the earth and to the sky above[26] subject to legislative carve outs, such as under the POA and the Mining Act for petroleum and minerals. As a consequence it is submitted the landholder be compensated for damage to any part of the land, surface and subsurface, and the words "surface of" or "surface" be removed where ever they appear in this section. As the damage done by the miner includes damage to the subsurface, and more particularly, potentially groundwater aquifers, it is submitted that this section be amended to ensure a landholder is compensated for: (i) loss as a consequence of damage to groundwater aquifers, (ii) loss of water quantity or quality, and (iii) loss as a consequence of pollution and or contamination of water on the property. Further, this section should be amended to ensure that a landholder is compensated for diminution of land value, as has been recognised and legislated for in Queensland. There is anecdotal evidence that properties in Gunnedah cannot be sold ostensibly because of the CSG activities occurring on the land.	Delete "surface" and "surface of" wherever they appear in this clause. Include a paragraph 109(1)(e1) *", damage to, or loss of, or pollution or contamination of, water, and".* Include a paragraph 109(1)(e2) *"by diminution of market value of the land, and"*

26 Butt P 2010 pp8-15 At common law "the person who owns the land owns it from the heavens above to the centre of the earth below" unless the grant of the land imposes height and depth dimensions, or there are legislative carve outs, such as, for petroleum or minerals under the POA or the Mining Act 1992 (NSW). Although there is no case law in Australia on the extent, or for that matter, limitations on subsurface rights, there is much case law in the English and US providing it is trespass for tunnelling into or excavating into or drilling under another person's land without their consent.

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Part 13	**Release of information**	**Currently information which is required to be given by the miner to the Government is not released for 2 to 5 years after it is given. Given the miner's exclusive rights under its petroleum title, there is little commercial damage that can be done by making all this information immediately available to the public, particularly information relating to work plans, and reporting of activities. The landholders and the community at large have a right to know what the miners are doing and going to do on the land.**	Amend the provisions in this part to allow for immediate public access to documentation reported by miners.
Part 14	**Miscellaneous**		
129	Notice to be given of cause of danger	Currently if an inspector considers any thing or practice connected with a miner's operations to be so dangerous or defective as in the inspector's opinion to threaten or tend to injure the health or body of a person, the inspector may give notice to the holder of the title and require the operations to be remedied and or to require the operator to cease operations. It is submitted that a copy of this notice be given immediately to the landholders concerned.	Insert in paragraph 129(1)(a) after the words "registered holder of the title" the words *"and to the landholder".*
134B	Consents of landholders	Currently if a landholder "cannot, after diligent inquiry, be found" a miner may enter on the property and "the operations may be carried out or the works erected without the consent of the landholder or other person". Could this effectively mean, in a worse case scenario, that a miner may demolish the house on a property to put down a well in circumstances where the landholder cannot be found? It is submitted that "cannot, after diligent inquiry, be found" is a completely inadequate benchmark to protect the landholder and the landholder's property from the activities of a miner in the landholder's absence. A landholder's absence should not allow a miner to enter private property without the landholder's knowledge and consent, with no access arrangement and no compensation. The first position should be that the miner may not enter.	

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		If entry must be admitted it is submitted that entry may only be permitted: (i) with a court order; and (ii) on the conditions one would see in an access arrangement which is balanced and protects the position and the rights of the landholder under the Act; (iii) with compensation payable into a trust to be held on behalf of the landholder, such compensation determined by the court and payable when it grants the power of entry, and on the landholder's "return" all previously determined conditions are terminable in the discretion of the landholder.	
	False or misleading conduct	Unlike the *Mining Act 1992 (NSW)* the POA does not contain penalties for false or misleading conduct on the part of the miner. It is submitted that such provisions be inserted to deter miners from providing false or misleading information both to landholders in the access arrangement process and to Government in the application, grant, term and renewal the title.	

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