

SCIENTIFIC INQUIRY INTO HYDRAULIC FRACTURING IN THE NORTHERN TERRITORY



Department of Industry, Innovation
and Science Submission #459

Glenys Beauchamp
Department of Industry, Innovation and Science
Industry House
10 Binara Street
Canberra ACT 2601

Dear Ms Beauchamp

RE: HYDRAULIC FRACTURING INQUIRY – INFORMATION REQUEST

I refer to the *Scientific Inquiry into Hydraulic Fracturing of Unconventional Reservoirs in the Northern Territory (the Inquiry)*, which was established by the Northern Territory Government under the *Inquiries Act 1945 (NT)* in late 2016 to investigate the impacts and risks of hydraulic fracturing of onshore shale gas reservoirs and associated activities on the environmental, social, economic and cultural conditions in the Northern Territory (**NT**).

I also refer to your letter and submission to the Inquiry dated 4 July 2017. The Inquiry is seeking further information from the Department of Industry, Innovation and Science (**the Department**) on certain issues raised in its submission, some of which are also discussed in the Inquiry's Interim Report, which is available at www.frackinginquiry.nt.gov.au.

Royalty return scheme

The Inquiry understands that your Department is leading the development of “a nationally consistent approach to schemes that direct a share of petroleum royalties to landholders” (**Royalty Return Scheme**).¹ The purpose of the scheme is, according to the Department's submission, to “ensure that farmers impacted by the onshore gas industry are fairly rewarded”.² Any royalties received pursuant to the scheme are in addition to payments made in connection with any private land access agreement entered under the State or Territory's land access regime.

The Inquiry seeks further information from your Department regarding the objectives of the Royalty Return Scheme and how the policy will practically achieve those objectives.

¹ Department Letter dated 4 July 2017, page 6.

² Department Letter dated 4 July 2017, page 7.

1. Will leaseholders benefit?

Over half the NT is inalienable freehold under the *Aboriginal Land Rights (Northern Territory) 1976 (Cth) (ALRA)*. Most of the remaining land is Crown land over which pastoral leases have been granted under the *Pastoral Land Act 1992 (NT)*.³ In other words, most pastoralists in the NT do not have a freehold interest in land, which is different to the land tenure system in other States.

The Department's submission uses the term "landholders" and "landowners" to describe the people that will benefit from the proposed Royalty Return Scheme. Please comment on whether the Scheme is intended to benefit pastoral leaseholders, owners of freehold interests, or both.

2. Will foreign entities benefit?

The Inquiry understands that around 30 percent of pastoral leases in the NT are held by foreign entities. Please comment on whether the Royalty Return Scheme is intended to benefit pastoral leaseholders that are not domiciled in the NT or Australia.

3. Will other stakeholders benefit?

Unconventional gas development in the NT will impact pastoral lessees *as well as* other stakeholder groups, including traditional owners, other Aboriginal people, and non-Aboriginal people in the communities affected by development. For the gas industry to earn and maintain its social licence to operate it must secure the consent of *all* of these (and other) stakeholder groups. None of these groups, however, owns the rights to any sub-surface petroleum resources.

Traditional owners and the broader Aboriginal community are not currently allocated any part of the statutory royalty that the Northern Territory government receives in connection with petroleum. Traditional owners have the right to negotiate payment provisions in access agreements under Commonwealth legislation (that is, the *Native Title Act 1993 (Cth)* and the ALRA), however, those payments can only relate to "compensation for the damage or disturbance" to the land.⁴ The ALRA expressly prohibits traditional owners from negotiating a royalty based on the value of the sub-surface petroleum resources because traditional owners do not own it – the Crown does. Access agreements under the NTA and the ALRA are largely about compensation for impacts on Aboriginal customs and traditions - not payments to the owner of a resource.

Please explain why landholders (pastoralists) have been identified as the potential recipients of a statutory royalty in addition to compensation arrangements that may be negotiated under the land access regime. Please comment on whether other stakeholders, such as traditional owners, were considered potential beneficiaries, and if not, why not.

Please comment on whether or not a "royalties for regions" program of the kind being implemented in Western Australia would be a more effective way to ensure that *all* stakeholders that are directly affected by development will benefit.⁵

³ Interim Report, page 118.

⁴ s 44A(1) ALRA.

⁵ Information on Western Australia's royalty for region programs is available at <http://www.drd.wa.gov.au/rfr/whatisrfr/Pages/default.aspx> (last accessed 1 August 2017).

Please also comment on whether there should be any limitations placed on the type of payments and/or compensation arrangements that landholders can negotiate as part of the land access regime. For example, please comment on whether or not the State based land-access regimes should prohibit payments based on the value (or well head value) of the minerals.

4. *Is the scheme intended to facilitate a social licence to operate?*

The unconventional gas industry's failure to earn and maintain a social licence has resulted in moratoriums on hydraulic fracturing in various States and Territories in Australia, including in the Northern Territory. It has been suggested, most notably by the Natural Resources Committee in South Australia, that industry's social licence should be a precursor to the development of the unconventional gas industry.⁶

The Inquiry has met with many landholders in the Northern Territory and Queensland. The Inquiry has received a large amount of evidence suggesting that the unconventional gas industry has not earned, and/or maintained, a social licence to operate in either jurisdiction.

Following the coal seam gas industry "boom" in 2010 the Queensland government implemented a range of measures to facilitate a social licence to operate for industry, including the introduction of a Land Access Code, the establishment of the independent GasFields Commission to facilitate better relationships between landholders, regional communities and the onshore gas industry, and the introduction of a bill establishing a Land Access Ombudsman.

Notwithstanding these measures, there is evidence that the industry has not earned its social licence to operate, and that there is still a significant lack of trust in the industry regulator.

Please provide evidence on how the implementation of a Royalty Return Scheme will assist the unconventional gas industry earn and maintain a social licence to operate.

5. *Will the scheme lead to more balanced negotiations?*

A primary concern for pastoralists in the Northern Territory is that negotiations with gas companies around land access are not "balanced".⁷ Various pastoralists submitted that they are disadvantaged during negotiations with gas companies because they have limited access to legal advice, limited political influence, limited technical knowledge and limited time to negotiate agreements.⁸ While some submissions argued that pastoralists should be fully compensated for any damage and disturbance on their pastoral lease, the Inquiry did not receive any submissions arguing that pastoralists should benefit from an additional royalty stream over and above the compensation payments.

⁶ For example the recommendation from the Natural Resources Committee in South Australia was that "without social licence, unconventional gas exploration/development should not proceed". *Inquiry into Unconventional Gas (Fracking) in the South East of South Australia Final Report*, page 11.

⁷ Interim Report, page 124.

⁸ Ibid.

It is not clear how implementation of the Royalty Return Scheme will address the apparent power imbalance between pastoralists and gas companies. A statutory royalty will not place pastoralists in a better bargaining position when it comes to negotiating provisions that will allow for coexistence on their land (for example, which gates to use, where to build access roads and so on).

Please comment on the impact that a Royalty Return Scheme may have on land access negotiations between landholders and gas companies. Please comment on whether a robust land access regime of the kind developed in other jurisdictions in Australia (for example, New South Wales or Queensland) would ensure balance to such negotiations.

6. Does the Scheme have community support?

The Inquiry has received submissions suggesting that payments made to individual stakeholders, such as pastoralists, means that there will be less money available to spend on public programs and initiatives, such as schools and roads. The concerns were raised in response to arguments that pastoralists should have the right to veto access by gas companies. Some pastoralists argue that a veto right will restore balance to land access negotiations (see above).

However, other stakeholders were concerned that a statutory veto right for pastoralists would give the pastoralists a *de facto* ownership right over petroleum, which it is universally accepted, they do not own.⁹ As noted in the Interim Report:

“A right of veto might mean that pastoralists could negotiate substantial payments in exchange for their consent, possibly in the form of a royalty based on the value of the petroleum. Payments of this kind might reduce the amount of revenue that would go to the Government under any statutory royalty regime.”

And further:

“The payments (or other benefits) that are received by the pastoralist would not be shared for the public good: if the cattle industry was to earn a large chunk of royalty from the Northern Territory public service, how many schools, hospitals will they build, how many roads, bridges, water storage/drainage infrastructure will they construct?”

Please provide evidence that the community and other relevant stakeholders support the Royalty Return Scheme. Please also indicate whether there will be any conditions imposed on how pastoralists spend the money they receive in connection with the Scheme.

Model access agreements

The Department is responsible for the development of a model land access agreement to assist landholders achieve a fair level of compensation and to reduce the time taken to negotiate land access agreements.¹⁰

Each State and Territory in Australia is responsible for the development and implementation of the petroleum regulatory framework, which includes the land

⁹ Interim Report, page 124.

¹⁰ Department Letter dated 4 July 2017, page 6.

access framework. Both New South Wales and Queensland have developed fit-for-purpose land access regimes for their respective jurisdictions. In 2016 the Queensland Government updated the *Land Access Code* under the *Mineral and Energy Resources (Common Provisions) Act 2014*.¹¹ The Inquiry has also been advised that AgForce Queensland is in the process of developing a model land access agreement (called a “Conduct and Compensation Agreement”) with the Australian Petroleum Production and Exploration Association. The Inquiry is also aware that the New South Wales has developed a land access framework, which is set out in the *Exploration Code of Practice: Petroleum Land Access* in late 2016.¹²

Please explain how the model land use agreement will be used in jurisdictions that already have advanced land access regimes and model agreements.

If a model land access agreement is developed, please explain how it would be applied in the Northern Territory, noting that:

- (a) the land access regime under which access agreements are negotiated is different to other States;
- (b) pastoralists in the NT do not have a freehold interest in land;
- (c) coal seam gas and shale gas have different surface and sub-surface impacts and a different risk profile; and
- (d) half the NT land mass is inalienable freehold under the ALRA and the other half is subject to the NTA, which means that traditional owners already have the right to negotiate land access agreements.

Please comment on the above.

In order to meet reporting deadlines, please provide your response by **25 August 2017**. Please also note that your response will be published on the Inquiry’s submission library. To the extent your submission includes confidential information that should not be publicly disclosed, please identify that information and explain why it is confidential.

Yours sincerely



THE HON JUSTICE RACHEL PEPPER
Chair

2 August 2017

¹¹ http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0005/688595/PUB16-428-FINAL-Exploration-code-of-practice-petroleum-land-access.pdf (last accessed 26 July 2017).

¹² http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0005/688595/PUB16-428-FINAL-Exploration-code-of-practice-petroleum-land-access.pdf (last accessed 26 July 2017).