

# - Amicus Brief -

## Fracking and coal seam gas (CSG) in Australia: A violation of our procedural rights?

Amicus brief to the Permanent Peoples' Tribunal (PPT) Session on the Human Rights Impacts of Fracking. May 14-18, 2018, Oregon State University, USA



Source: Kate Ausburn, Lock the Gate 'Fair Go' petition

## ABOUT THE CONTRIBUTORS

### **Evan Hamman**

Dr Evan Hamman is an environmental lawyer and lecturer in the school of law at Queensland University of Technology (Brisbane, Australia). He holds bachelors degrees in law, commerce and a masters in environmental science and law. His PhD research, completed in 2017, investigated the role of non-state actors in protecting the Great Barrier Reef. Dr Hamman has worked for NGOs and the State Government Department on conservation and environmental law issues. He has published over a dozen articles on environmental law in Australia and has written a book on mining and coal seam gas law in Queensland.



### **Revel Pointon**

Revel Pointon is a lawyer specialising in law and policy reform with Australian NGO: Environmental Defenders Office, Queensland (EDO Qld). She works on a broad range of law reform and advice matters concerning particularly resource activities, planning and development, water and air emission regulation, vegetation protection, renewables and climate change. Revel has worked with EDO Qld on climate litigation, law reform, advice and education matters for nearing 6 years. Revel holds a Bachelor of Laws and Bachelor of Environmental Management from the University of Queensland, and a Masters from KU Leuven, Belgium.



### **Amanda Kennedy**

Associate Professor Amanda Kennedy is the Deputy Director of the Australian Centre for Agriculture and Law at the University of New England in Armidale. She holds bachelors degrees in law and commerce, and a PhD in law. Amanda has extensive experience in law-based multidisciplinary research, particularly focused on instruments and institutions for effective agricultural and rural governance. Amanda is at the forefront of environmental justice and land use conflict in Australia. She recently published a book examining the governance of mineral and gas development in regional Australia and the USA.



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Source: Jeremy Buckingham CSG Pipeline in Tara, West of Brisbane.

## Overview

This document – entitled an ‘amicus brief’ - has been produced for the purposes of debate within the Permanent Peoples’ Tribunal Session on the Human Rights Impacts of Fracking (hereafter the PPT). The PPT is a unique forum. It has been described as:

an internationally recognized public opinion tribunal functioning independently of state authorities. It applies internationally recognized human rights law and policy to cases brought before it. The PPT is a descendant of the 1967 Bertrand Russell-Jean Paul Sartre Vietnam War Crimes Tribunal, and hears cases in which prima facie evidence suggests abridgement of basic rights of ordinary people.<sup>1</sup>

This document is, in effect, a legal submission to the PPT. It provides a critical and scholarly analysis of the human rights implications of coal seam gas (CSG) and fracking activities in Australia.<sup>2</sup> The focus of this document is on the Australian states of Queensland and New South Wales (NSW) where most of the CSG activity currently takes place. More specifically, the arguments in this brief focus on ‘procedural rights’ and how they are impacted by CSG activities in Australia.<sup>3</sup> At the conclusion of this document (following the analysis) we provide a brief response to four specific advisory questions put in front of the PPT. We also seek four specific findings from the PPT related to Australia’s current situation.

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<sup>1</sup> <https://www.tribunalonfracking.org/>

<sup>2</sup> Fracking, also referred to as ‘fraccing’ or ‘hydraulic fracturing’ involves destabilising underground rock formations to release gas for commercial production. It can be used to extract gases such as shale gas, or in Australia’s case, coal seam gas (also known as coal bed methane). In Australia, the process of fracking is used in about 10% of all CSG projects.

<sup>3</sup> Procedural rights might also be referred to as ‘procedural human rights.’ The breach of substantive human rights is largely outside the ambit of this brief. A further analysis might examine, therefore, whether the breaches of procedural rights (or procedural human rights) can be linked, in a causative way, to breach of substantive rights such as the right to health, the right to life and, potentially, the right to a healthy environment (which some argue is a separate right).

## Why focus on procedural rights?

The pursuit of 'procedural justice' is a fundamental stage in the attainment of 'environmental justice' – that is, the fair and equitable distribution of environmental risks and benefits throughout society.<sup>4</sup> As lawyers and legal scholars, we are first and foremost concerned about proper process, just decision-making and adequate avenues of appeal. Indeed, these are fundamental elements of a functioning democratic society. To our mind, they represent a society which respects and applies the principles of the Rule of Law.

In criminal jurisprudence, which has developed over several centuries, procedural justice is closely aligned with what is often referred to as 'due process.' Due process encapsulates the process by which someone is tried for a criminal offence. It includes, amongst other things: the right to a fair trial; the right to legal representation; the right to hear (and challenge) the evidence; and the right to be judged by a jury of one's peers. In administrative law – the law concerned with the control of government action - procedural concerns are often seen through the lens of 'natural justice' - specifically: (1) the 'right to be heard' and; (2) the right to a hearing free from bias.<sup>5</sup>

In the human rights literature (which focuses on which human rights 'legally' exist and how they are implemented), procedural rights are commonly recognised as a precondition for the attainment of more substantive human rights enshrined under international law.<sup>6</sup> On most occasions, these procedures may need to be 'read into' international treaties, or upheld by protocols or implementation bodies.<sup>7</sup> On other occasions they are explicitly referred to within human rights instruments themselves. For example, Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The right to information, in other words, is an inseparable part of the substantive human right to freedom of expression.<sup>8</sup> Some of the other well-known substantive human rights recognised under international human rights law include:

- the right to be free from torture;
- the right to life;
- the right to health;
- the right to privacy; and
- the right to freedom from discrimination.

In recent years, arguments have been made for the emergence of a possible 'right to a healthy environment' though there is some disagreement as to whether such a substantive

<sup>4</sup> See Schlosberg, D. (2007). *Defining environmental justice: Theories, movements, and nature*. Oxford University Press.

<sup>5</sup> Natural justice dates back to Ancient times and is of course older than more recent notions of natural justice in modern administrative law (which in countries like Australia is heavily statute-based).

<sup>6</sup> There are several recognised human rights treaties at the international level. These include: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Rights of the Child (CRC); . Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

<sup>7</sup> For early discussion of procedural human rights in the US context, see: Lillich, Richard B. "Procedural Human Rights," *Acta Juridica* 1979 p124-137

<sup>8</sup> See for example Maeve McDonagh; The Right to Information in International Human Rights Law, *Human Rights Law Review*, Volume 13, Issue 1, 1 March 2013, Pages 25–55, <https://doi.org/10.1093/hrlr/nqs045>

right exists.<sup>9</sup> Certainly the Aarhus Convention (discussed in the next section) highlights the right of every person ‘to live in an environment adequate to his or her health and well-being.’ In the end, whether or not a specific right to a healthy environment exists, it seems clear that substantive rights rely on the ability of people (both individually and collectively) to access information and to participate and/or legally challenge decisions which affect their lives. In short, the achievement of substantive rights is contingent on the availability and successful implementation of procedural rights.

## Approach to Analysis

The analysis presented in this brief used the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus)<sup>10</sup> as a normative framework for discussion. By ‘normative’ we mean, the state of affairs ‘as they ought to be’ as opposed to ‘what they are’. Whilst Australia is not a signatory to the Aarhus Convention,<sup>11</sup> the treaty is widely acknowledged as the best available international legal framework for the protection of procedural rights in environmental matters. There are other frameworks on ‘effective public participation’ that could be used for such analysis, but Aarhus presents the clearest attempt at creating legal rules for the fulfilment of procedural rights in environmental matters.

The three ‘pillars’ of Aarhus (1. access to information, 2. public participation and 3. access to justice) are put forward in this brief as representing the minimum standard by which governments should seek to protect procedural rights in environmental matters (including CSG extraction). In this brief we have applied the standards of Aarhus across the three pillars to both Federal and State Governments, in spite of the fact that only the Federal Government is ‘legally’ obliged to uphold human rights under international law. For the purposes of our analysis, and for the benefit of creating debate within the PPT, we have also sought to extend the principles of Aarhus to apply to non-state actors (e.g. private corporations) who it is clear hold significant amounts of information relating to CSG activities.

By and large, the Aarhus Convention was adopted by us for three main reasons:

1. It deals specifically with environmental issues (including extractive industry);
2. It sets out a clear legal framework for the protection of procedural rights in environmental matters; and
3. It clearly links the implementation of procedures to the attainment of substantive human rights including the right to life and the right to health.

The third point is particularly important as it provides a direct link, in the context of a legal document, between procedural rights and substantive rights. For instance, the Preamble to the Aarhus Convention recognises:

that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.

And;

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<sup>9</sup> See Atapattu, Sumudu. “The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law.” *Tulane Environmental Law Journal*, vol. 16, no. 1, 2002, pp. 65–126. JSTOR, [www.jstor.org/stable/43292777](http://www.jstor.org/stable/43292777). For a more recent contribution see Lewis, Bridget, *Environmental Rights or a Right to the Environment?: Exploring the Nexus between Human Rights and Environmental Protection* (2012). *Macquarie Journal of Comparative and International Environmental Law*, 2012. Available at SSRN: <https://ssrn.com/abstract=2673932>

<sup>10</sup> 2161 UNTS 447; 38 ILM 517 (1999)

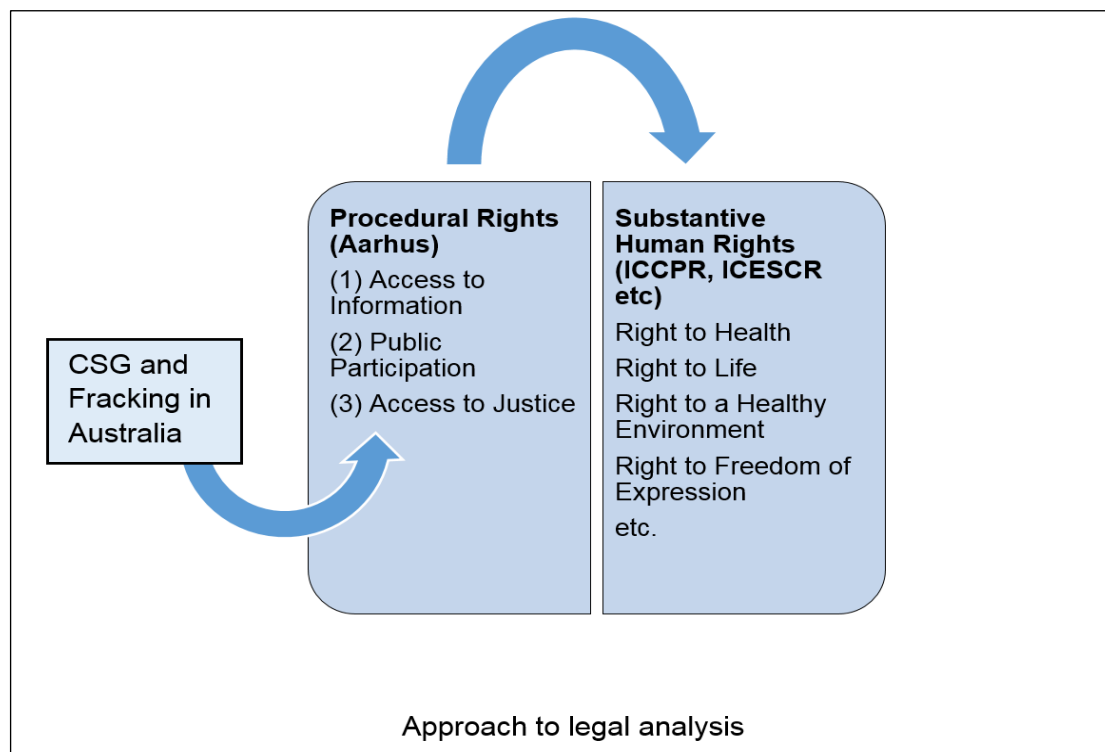
<sup>11</sup> Aarhus began as a European Union treaty, but today it is open for universal signature by any country.

that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.

Furthermore, Article 1 of Aarhus (the objective of the Convention) draws a direct link between procedural rights and the human right to health:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Our approach to the analysis is represented in the diagram below. Whilst our focus is on procedural rights, we have assumed that these are fundamental to the attainment of substantive human rights; in particular the right to health, the right to life and the right to a healthy environment.



## Materials used

A wide variety of legal and non-legal documentation have been used to inform the positions in this brief. These sources included:

- Published journal articles and manuscripts;
- Court and tribunal decisions;
- Legislation and Regulations (subordinate legislation);
- International conventions and treaties;



- Government Policy and Guidelines;
- NGO and Private Corporation reports; and
- Media and government websites.

## Structure

This document is structured in four main parts. Part one provides an overview of CSG and fracking in Australia. Australia has some of the world's richest deposits of CSG and the industry is an advanced state in Queensland. Some 6,000 wells have already been drilled and some 30,000 -40,000 more are anticipated. The industry in NSW is in developing stages, whilst the Australian state of Victoria in 2016 introduced a complete ban on onshore unconventional gas extraction, including fracking.<sup>12</sup> Part two provides an overview of the existing legal framework at the state and federal level focussing on the availability (or otherwise) of procedural rights. Part three then provides our analysis against the three pillars of Aarhus: (1) access to information; (2) public participation; (3) access to justice. Finally, part four provides recommendations to the PPT about Australia's compliance with procedural human rights. Four specific advisory questions are addressed for the PPT and four additional requests are also made of the tribunal.

## 1. CSG and fracking in Australia: Setting the scene

### 1.1 Queensland

Australia has about 10% of the world's CSG reserves.<sup>13</sup> Most of the current reserves are found in the states of Queensland and NSW. The CSG industry was first established in Queensland in the 1980s<sup>14</sup> but has since experienced rapid growth, particularly since about 2010. Contrary to southern states like NSW and Victoria, the CSG industry in Queensland is now considered to be in an 'advanced' or 'mature stage' of development - 'meaning that it has moved from large construction to operation and production.'<sup>15</sup> That said, there is still considerable construction in Queensland still to occur. In 2013, for example, there were approximately 4,000 wells in Queensland.<sup>16</sup> In 2016, this figure had grown to 6,000 wells. This figure is predicted to grow to between 20,000-40,000 over the next two decades.<sup>17</sup>

Each CSG well is about half the size of a tennis court and is interconnected by pipelines which transport the gas to processing stations or to power stations.<sup>18</sup> Most wells sit on private land (in Queensland, Crown Leases of Freehold) and are stationed about 800 metres apart. A CSG project can be seen from an aerial perspective in the image below.

<sup>12</sup> Victoria Government, 'Victoria Bans Fracking to Protect Farmers' <https://www.premier.vic.gov.au/victoria-bans-fracking-to-protect-farmers/> accessed 31 March 2018.

<sup>13</sup> Walton, A. M., McCrear, R., Leonard, R., & Williams, R. (2013). 'Resilience in a changing community landscape of coal seam gas: Chinchilla in southern Queensland.' *Journal of Economic and Social Policy*, 15(3)

<sup>14</sup> Department of Natural Resources and Mines, Queensland's Petroleum and Coal Seam Gas 2015-2016' <[https://www.dnrm.qld.gov.au/\\_data/assets/pdf\\_file/0008/1237742/qld-petroleum-coal-seam-gas-2017.pdf](https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0008/1237742/qld-petroleum-coal-seam-gas-2017.pdf)> p 1. Some of the first discoveries of CSG are referred to in this decision: *Sykes v Minister for Mines and Energy and Queensland Gas Company Limited* [2008] QLC0201 <<https://archive.sclqld.org.au/qjudgment/2008/QLC08-201.pdf>>

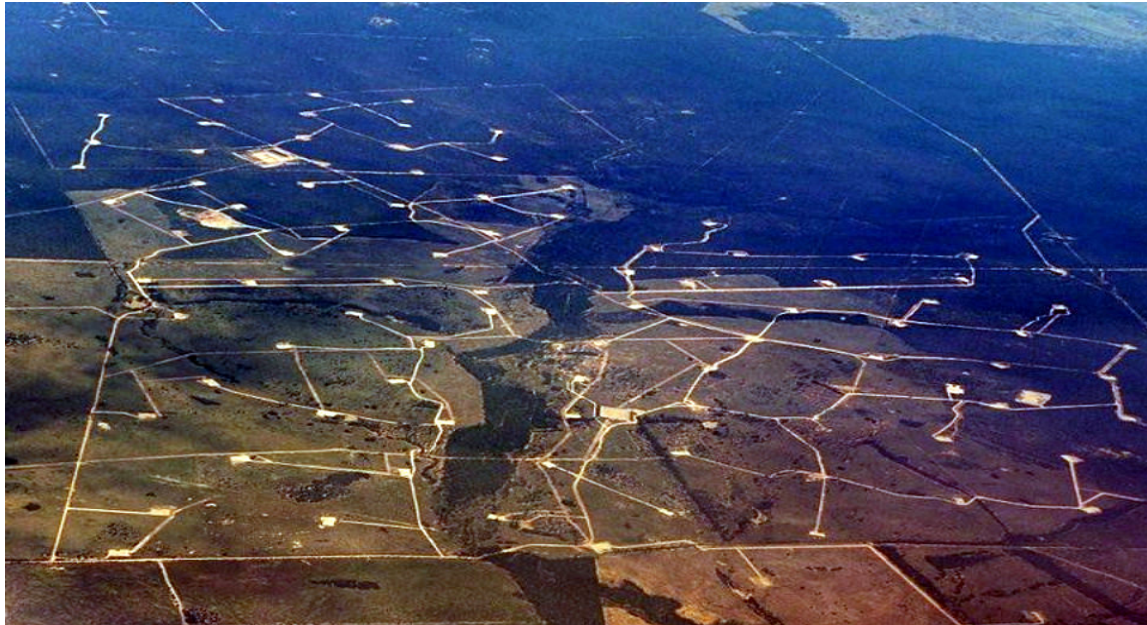
<sup>15</sup> Agforce, 'CSG & Mining newsletter' December 2016 <<https://agforceqld.org.au/intranet/file.php?id=4883>>

<sup>16</sup> APPEA, 'CSG Predicting Impacts', <<https://www.appea.com.au/wp-content/uploads/2013/11/csg-predicting-impacts.pdf>> p 2.

<sup>17</sup> Agforce, above n 15.

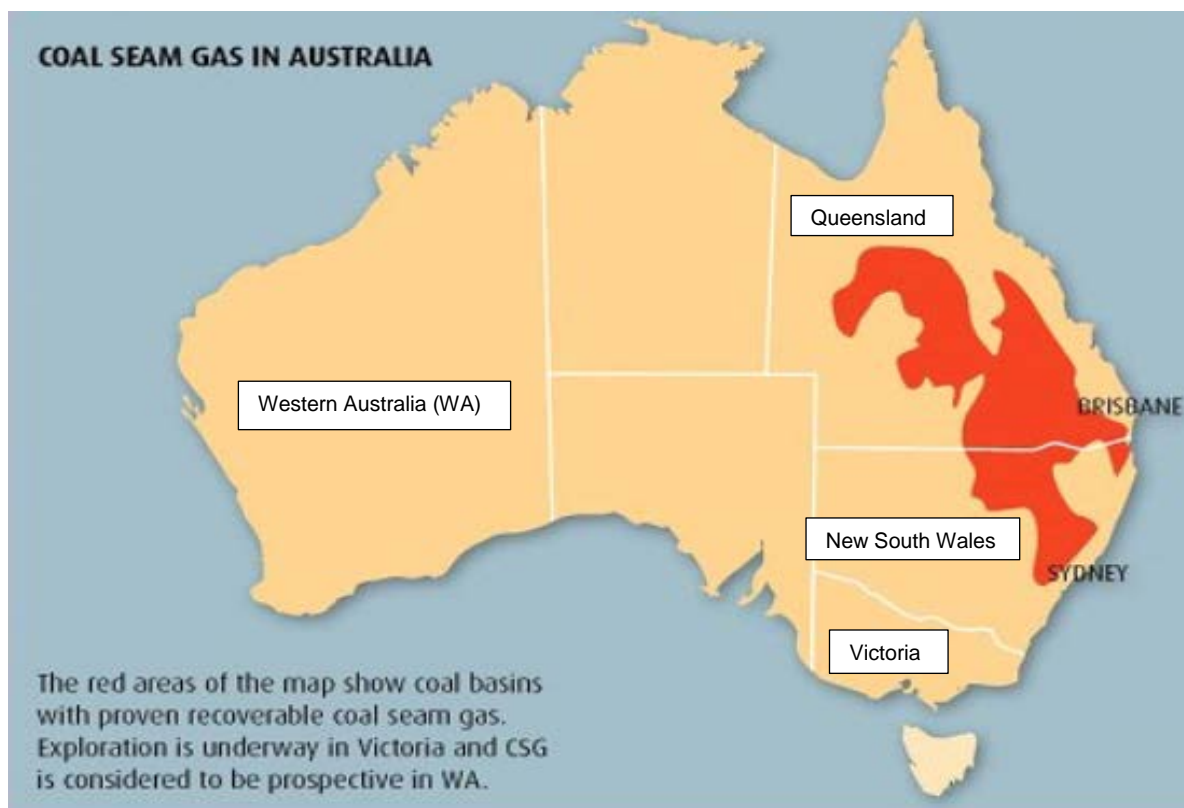
<sup>18</sup> According to a recent news report, the Condamine Power Station in Southern Queensland 'was Australia's first combined-cycle power station to run entirely on CSG.' See 'CSG Fires Up at Condamine Power Station' <[http://gastoday.com.au/news/csg\\_fires\\_up\\_at\\_condamine\\_power\\_station/52348](http://gastoday.com.au/news/csg_fires_up_at_condamine_power_station/52348)> accessed 31 March 2018.





Coal seam gas field showing interconnected wells, Chinchilla, Qld Source: Max Phillips (Jeremy Buckingham MLC)

Most of Queensland's CSG reserves are located in the Surat and Bowen Basins in the South and Central parts of Queensland. Together these basins represent more than '90% of the gas produced in the state'<sup>19</sup> and about 97% of total CSG currently being produced in Australia.<sup>20</sup> Since about 2005, the Surat Basin (just to the left of the 'B' in Brisbane below)



<sup>19</sup> Queensland Government, 'Petroleum and Gas Resources' <<https://www.business.qld.gov.au/industries/invest/mining/resources-potential/petroleum-gas>>

<sup>20</sup> Shilo AM, 'The Effect of Water Occlusion on Gas Production in Coal' PhD thesis (University of Queensland, 2017) 6.

has become the major source of Queensland's CSG.<sup>21</sup> In Queensland, CSG supplies about '80% of reticulated gas for Queensland's domestic, commercial, manufacturing and industrial needs.'<sup>22</sup> Most CSG operations in Queensland are being proposed and/or currently operated by one of four large corporations: Arrow Energy, Origin Energy, Queensland Gas Company (QGC - part of the British Gas Group) and Santos. Each company seems to have had varying reputations amongst landholders.

Emerging social science literature suggests that the rapid growth of the CSG industry in Queensland has greatly affected the region. There are both positive and negative aspects to this, including, on the one hand, an increase in infrastructure, job creation and investment, but on the other hand, an increase in living costs, distrust of major corporations and government agencies, and disruption to previously tight-knit communities. A small town like Chinchilla, for example, in the Surat Basin, has reportedly 'changed from a small, predominantly agricultural community administered by a local council to a rapidly expanding and changing community responding to an influx of CSG activity.'<sup>23</sup> These changes have been described as both 'rapid and complex.'<sup>24</sup> As Walton and others have pointed out:

many of the changes [introduced by the CSG industry] were previously unknown to the community, of varying scale, and created a sense of uncertainty and unpredictability.<sup>25</sup>

The fast pace of change has undoubtedly caused many in the rural community to reject the intrusion of the CSG industry into tightly knit rural and regional communities. The growth of the 'lock the gate movement,' for example, has been directly linked to the failure of



Curtis Island (Queensland) where four LNG plants are located. Curtis Island is part of the Great Barrier Reef World Heritage Area. It is about 500km Northwest of Brisbane on the coast. Source: Lock the Gate Alliance

<sup>21</sup> Poh-Ling Tan, David George and Maria Comino (2015): Cumulative risk management, coal seam gas, sustainable water, and agriculture in Australia, *International Journal of Water Resources Development*, 4.

<sup>22</sup> Department of Nature Resources and Mines, Code of Practice for the construction and abandonment of coal seam gas wells and associated bores in Queensland (2017) <[www.dnrm.qld.gov.au/data/assets/pdf\\_file/0011/119666/code-of-practice-csg-wells-and-bores.pdf](http://www.dnrm.qld.gov.au/data/assets/pdf_file/0011/119666/code-of-practice-csg-wells-and-bores.pdf)> 4.

<sup>23</sup> Walton, above n 13.

<sup>24</sup> Ibid.

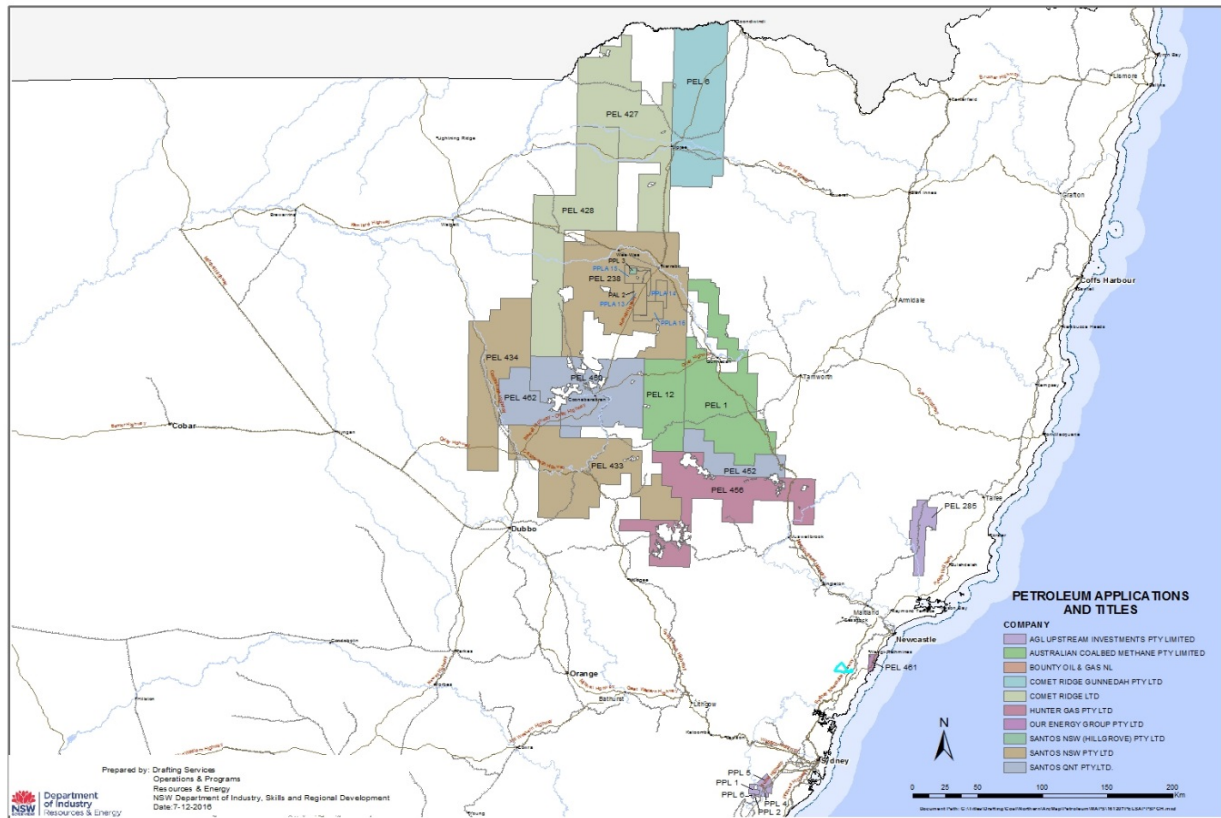
<sup>25</sup> Ibid.



governments and industry to obtain a 'social licence' for their operations, irrespective of whether CSG operators have complied with the 'letter of the law'.<sup>26</sup> This also seems to be linked to a general refusal by private landholders to accept they do not own the rights to the earth beneath their soil (something which has rarely been tested in Australia until recently).<sup>27</sup> The upshot of all this is that the CSG industry in Queensland has increasingly 'faced significant social opposition'.<sup>28</sup> A large part of this response appears to be down to a lack of confidence in the 'profit-making' motivations of CSG operators as well as the perceived weaknesses of the regulatory approach adopted by government.<sup>29</sup>

## 1.2 New South Wales (NSW)

Compared with Queensland, the CSG industry in NSW is in an emerging state of development, with the Sydney, Gloucester and Gunnedah coal basins holding rich sources of CSG. While exploration licences cover a significant amount of land in these areas, actual production is still minimal. Commercial production is currently only underway in Camden (located south-west of Sydney), at AGL's Rosalind Park Gas Plant. This site has supplied around 5% of the state's gas needs since 2001; however, in 2016 AGL announced that it will



NSW Petroleum Applications and Titles - Source: NSW Department of Resources and Energy, online  
[www.resourcesandenergy.nsw.gov.au/landholders-and-community/coal-seam-gas/facts-maps-links/petroleum-titles-in-new-south-wales](http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/coal-seam-gas/facts-maps-links/petroleum-titles-in-new-south-wales)

<sup>26</sup> On the growth of the lock the gate movement in Australia, Drew Hutton (2012), 'Lessons from the Lock the Gate Movement' 31(1) *Social Alternatives* 15-19.

<sup>27</sup> Tina Hunter, Crikey.com.au 'Land use and CSG: what rights do property owners have?' <[www.crikey.com.au/2012/02/20/land-use-and-csg-what-rights-do-property-owners-have/](http://www.crikey.com.au/2012/02/20/land-use-and-csg-what-rights-do-property-owners-have/)>

<sup>28</sup> Justine Lacey and Julian Lamont (2014) 'Using social contract to inform social licence to operate: an application in the Australian coal seam gas industry' 84 *Journal of Cleaner Production* 832.

<sup>29</sup> One shocking social results of the rapid expanse of the CSG industry has been the inability of many farmers to cope emotionally and financially. In 2015, anti-CSG cotton farmer in the Darling Downs took his own life: See ABC News 'George Bender Family vows to continue fight against CSG' 26 October, 2015 <[www.abc.net.au/news/2015-10-26/george-bender-family-vows-to-continue-fight-against-csg/6886014](http://www.abc.net.au/news/2015-10-26/george-bender-family-vows-to-continue-fight-against-csg/6886014)>

progressively decommission its Camden wells with a view to ceasing production in 2023.<sup>30</sup> Other pilot and exploration sites have suffered similar fates, with AGL's Gloucester CSG project abandoned,<sup>31</sup> and Metgasco's CSG exploration licence in Bentley in the state's Northern Rivers purchased back by the NSW Government.<sup>32</sup>

CSG, like other extractive industries, has faced fierce public opposition and a lack of social licence in NSW as it has in Queensland. The last remaining CSG development in the state is being proposed by Australian company Santos, which currently holds a large petroleum exploration licence in Narrabri (located in North-West NSW). The proposed Narrabri Gas Project<sup>33</sup> – an 850 well CSG field which spans private and State Forest lands – has been estimated as having a gas recovery potential of 35 trillion cubic feet.<sup>34</sup> It has been projected that the Project could supply up to half of the state's natural gas needs, as well as provide a range of economic benefits for the wider Narrabri region.<sup>35</sup>

However, as with NSW's other experiences with CSG development, the Narrabri Gas Project has long been plagued by controversy.<sup>36</sup> The project area is largely located within The Pilliga – a State Forest that was previously used largely for logging – which has more recently had some 80,627 hectares set aside for nature conservation. Underneath the surface of The Pilliga is the Pilliga Sandstone Formation, a groundwater recharge for the Great Artesian Basin, the largest and deepest artesian basin in the world and the only source of fresh water for a significant portion of inland Australia. The Pilliga is also home to the Indigenous Gomeroi People, and holds great cultural significance with sacred sites and artefacts located in the State Forest area. Santos acquired exploration rights in the area in 2011. Prior to this time, the exploration lease exchanged hands a number of times, and was linked to a litany of environmental problems. A holding dam at one site collapsed, resulting in a leakage of saline liquid and the subsequent discovery of dead vegetation and native animals nearby.<sup>37</sup> Leaking water storage ponds, spillages, leaking gas pipes and ongoing vegetation dieback were reported on numerous occasions, prior to and following Santos' acquisition of the exploration licence.

## 2. Procedural Rights: The existing law

### 2.1 State Level

In Queensland, CSG operators require two permits to conduct their operations;

- (1) an appropriate tenure being either an 'authority to prospect' (for exploration activities) or a petroleum lease' (for extraction activities) and;
- (2) an environmental authority which regulates the health and environmental impacts of the operation.

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<sup>30</sup> AGL Camden Gas Project, <https://www.agl.com.au/about-agl/how-we-source-energy/natural-gas/natural-gas-projects/camden-gas-project>.

<sup>31</sup> Ibid.

<sup>32</sup> Davies, A., (2015), 'Metgasco accepts \$25m compensation to end CSG at Bentley in NSW Northern Rivers', *The Sydney Morning Herald*, 16 December 2015, <https://www.smh.com.au/national/nsw/metgasco-accepts-25m-compensation-to-end-csg-at-bentley-in-nsw-northern-rivers-20151216-glolpi.html>.

<sup>33</sup> See <https://narrabrigasproject.com.au/>.

<sup>34</sup> Morton, D. J. (2000). PEL 238 Gunnedah Basin coal seam methane. *New South Wales Mining and Exploration Quarterly (MINFO)* No. 66. St. Leonards, NSW: NSW Department of Mineral Resources.

<sup>35</sup> Santos, *Narrabri Gas Project*, <https://narrabrigasproject.com.au/about/narrabri-gas-project/>.

<sup>36</sup> For a detailed case study, see Kennedy, A., (2017) *Environmental Justice and Land Use Conflict: The Governance of Mineral and Gas Resource Development*, Earthscan (Routledge), London.

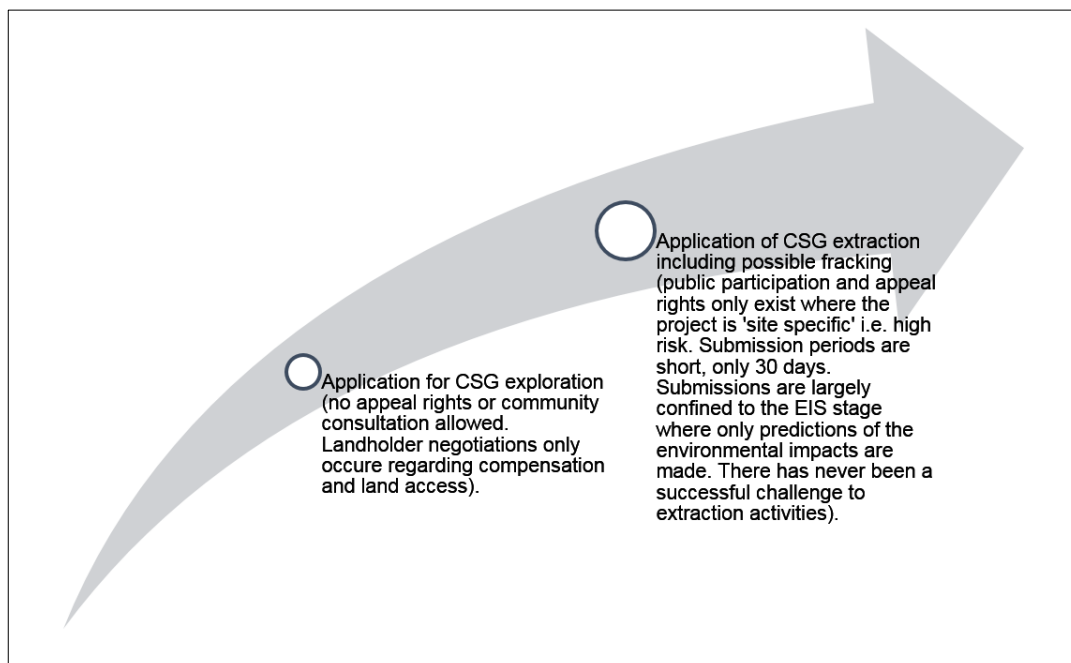
<sup>37</sup> Atkinson, C. M. (2005). Coal bed methane hazards in New South Wales. Report prepared for Australian Gas Alliance.



Whereas the tenure (permit) authorises the extraction of the resource and access to land, the environmental approval (a separate permit) authorises any emissions and levels of impact to the environment (noise, waste, vegetation clearing, erosion levels, water management etc). Compensation and access arrangements are a private matter and will need to be negotiated directly with the landholder who owns the land above which the gas resides.<sup>38</sup>

Only certain areas in Queensland such as national parks, churches, cemeteries, schools and within a few hundred metres of dwelling houses are 'off limits' (these are known as 'restricted areas'). On all other occasions, as long as the requisite tenure and environmental approval are obtained, it is up to the landholder and the operator to negotiate a suitable outcome. Where agreement cannot be amicably reached, one or both of the parties can file suit in the Queensland Land Court. The Land Court will then determine the compensation payable. In the bigger CSG projects (which include pipelines, port facilities, processing stations etc.), private land may be 'compulsory acquired' through a special process managed by Queensland's Coordinator-General (CG). The CG in Queensland is a senior, unelected public official tasked with driving economic development across the state.<sup>39</sup>

Generally speaking, there are no submission, participation or appeal rights with respect to an operator's application for tenure (i.e. their petroleum lease or authority to prospect). Unlike mining (of coal), for example, Queensland communities cannot object that the use of the land for CSG would be better suited to other human activities (e.g. nature tourism, parks, urban development, agriculture etc.). This effectively means that the debate about land use (from a socio-economic point of view) is largely non-existent. The focus, in other words, will be on the environmental risks of the project and whether they are 'acceptable.'



Public participation rights in Queensland CSG activities for exploration and extraction activities. Rights to participate (and challenge) are available only in the highest risk CSG projects and must focus on the environmental risks.

<sup>38</sup> All gas in Queensland is the property of the State Government. See the Petroleum and Gas (Production and Safety) Act 2004, section 27.

<sup>39</sup> This process further restricts community appeal rights. The Coordinator General's decisions are not subject to statutory judicial review.

Landholders and concerned members of the community do have the right to make submissions and bring Court appeals in certain circumstances. These opportunities relate only to the 'higher risk' CSG ventures and are known as a 'site-specific' environmental authority applications.<sup>40</sup> Under Queensland law, the fact that they are 'site-specific' means that the operator's application for environmental approval must be publicly notified, unless public notification has already occurred under a prior environmental impact statement (EIS) (which is usually the case).<sup>41</sup> This then means that the CSG operator only has to notify the potential impacts of their project once. Public consultation is available for all EIS as well as the 'terms of reference' (i.e. the blueprint) for the EIS.<sup>42</sup>

Finally, where landholders or the public are concerned as to breaches of an existing permit, they can make a complaint to the CSG company directly or to the Queensland Government. Quality monitoring data is difficult to come by and is discussed in part 3 of this brief. Members of the public who are 'directly affected' by a breach (e.g. landholders whose land or water bores are contaminated), or who have a special interest and follow a set process under the legislation, also have the right to bring 'third party' suits where the regulator does not take sufficient action.<sup>43</sup> These cases are, however, very rare given the costs and technical expertise needed for a successful action. Most breaches of the law by mining and gas operators are left to the Queensland Environment Department to pursue.

### ***New South Wales***

Licences for exploration and production of unconventional gas (including CSG) in NSW are both covered by the *Petroleum (Onshore) Act 1991*, which vests ownership of subsurface petroleum resources in the Crown (s 6). There are two main types of exploration titles under the Act; exploration licenses, which provide an exclusive right to prospect for petroleum (s 29); and assessment leases, which enable further prospecting and recovery of petroleum in the course of assessing the viability of commercial recovery (s 33). Production titles are covered under s41, which allow the holder to conduct full petroleum production operations including the construction of associated infrastructure (e.g. buildings, plant, pipelines, dams etc).

In terms of the granting of exploration and production licences, there are limited opportunities for members of the public to participate in the decision-making processes concerned with their approval. Affected landholders are not required to be notified that an exploration licence has been applied for over their land. However, in addition to a petroleum exploration or production lease, development consent for certain exploration or production activities may also be required, which does provide some avenues for public consultation. In comparison, this is not the case in Queensland, where development approval is not required by CSG operators as the conditions of their lease allow for construction of temporary facilities, electricity and other associated infrastructure.

The *Environment Planning and Assessment Act* (EP&A Act) governs the assessment and approval processes for CSG exploration and production activities within NSW. For the most part, exploration activities do not require full development consent under the *EP&A Act* (Part 5). The most common form of assessment is a departmental Review of Environmental Factors (REF). This is not an EIS but a preliminary environmental impact assessment of the proposed exploration; however, there is no legal obligation to provide the public with an

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<sup>40</sup> Whether they are higher risk or not depends on whether they fail to meet certain criteria. Environmental Protection Act 1994 (Qld), s524.

<sup>41</sup> Environmental Protection Act 1994 (Qld), s150.

<sup>42</sup> Environmental Protection Act 1994 (Qld), ss 43 and 51.

<sup>43</sup> Environmental Protection Act 1994 (Qld), s505.

opportunity to review a proponent's REF under the *EP&A Act*. Typically, REFs are usually published only after an exploration activity has been approved. Further, the assessment of a REF is limited to proposed exploration activities and does not contemplate impact of full-scale production. Where exploration activities will be likely to have a significant impact on the environment (including threatened species, populations and ecological communities), an EIS must also be prepared and placed on public exhibition for at least 30 days (*EP&A Act* ss 112, 113).

CSG production activities, on the other hand, usually always require development consent as they are considered to be a 'State Significant Development'. For these projects, applicants must prepare a full EIS (which usually take some 12-18 months to prepare), which must address the likely impacts of the development upon the environment, as well as measures which are proposed to mitigate or avoid such impacts.<sup>44</sup> The EIS is then publicly exhibited on the NSW Government's 'Major Projects' website for a minimum of 30 days, with notice published in a local newspaper. During the exhibition period, any person can make a written submission on the proposed project.<sup>45</sup> Similar to Queensland, it is important for those who object to the development to make a submission at this stage, as it preserves their ability to lodge a merits appeal against a decision in favour of development at a later stage in the NSW Land and Environment Court.<sup>46</sup>

The applicant will then have an opportunity to respond to issues raised in the submissions, and the NSW Government will then offer their assessment. The Minister for Planning is responsible for making a determination to approve or reject the application under the Act,<sup>47</sup> though in practice this responsibility has been formally delegated to the Planning Assessment Commission (PAC). The PAC is an independent planning body whose members are appointed by the Minister for Planning, and typically three members will consider and determine State Significant Development Applications, as well as review development applications and advise on planning and development matters generally.<sup>48</sup> In exercising its decision making function, the PAC is required to consider the likely impact of the development (including environmental, social and economic impacts), the requirements of any environmental planning instruments (such as *State Environmental Planning Policies* (SEPPs), any public submissions, as well as the public interest.<sup>49</sup>

The PAC can also undertake public consultation as a part of its decision-making processes. Under the *EP&A Act*, the PAC can conduct public consultation using public hearings or meetings. Public hearings are typically held as a part of the initial review process for a development, under request from the Minister (*EP&A Act* s23D (1)(b)(iii)). Public meetings are held as a part of the decision-making process if more than 25 public submissions have been made that oppose a development. One of the key distinctions between these two forms of consultation is the right to access merits review in the Land and Environment Court. Where a public hearing is held – there are no rights under the *EP&A Act* to lodge a merits appeal in the Land and Environment Court (s23F). Where a public meeting is held – merits appeal rights are preserved. The distinction between these two forums is vast. As Higginson points out:

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<sup>44</sup> Environmental Planning and Assessment Regulation 2000 (NSW), Sch 2 cl 3(4A).

<sup>45</sup> Environmental Planning and Assessment Act 1979 (NSW), s 89F(3).

<sup>46</sup> The Land and Environment Court is a specialised environmental court which can hear appeals against administrative decisions on development approvals. Such proceedings require the judge to re-exercise the statutory power of the original decision maker, effectively standing in their place to considering the matter afresh.

<sup>47</sup> Environmental Planning and Assessment Act 1979 (NSW), s 89D.

<sup>48</sup> Environmental Planning and Assessment Act 1979 (NSW), s 23D.

<sup>49</sup> Environmental Planning and Assessment Act 1979 (NSW), s 79C.

A public hearing before the PAC and a merits hearing before the Land and Environment Court cannot be compared. A PAC public hearing usually takes one day with members of the community allowed about 15 to 20 minutes to tell the commission why they support or object to the project. On the other hand, a hearing on the merits in the Land and Environment Court can take a fresh and objective look at a major development proposal, including hearing from expert witnesses whose opinions are tested and challenged by the parties.<sup>50</sup>

## 2.2 Federal Level

Most CSG activities across Australia are also regulated (in addition to the states) by the Federal Government through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The EPBC Act, introduced in 1999, makes it an offence for any 'development' (in the case of CSG - its wells, fracking, pipelines, processing plants, workers accommodation, export facilities etc.) to have a 'significant impact' on any of the following 'matters of national environmental significance' (MNES) without first seeking prior government approval:

- World Heritage sites (such as Australia's Great Barrier Reef)
- Underground water resources (acquirers etc.)
- Migratory native species (birdlife, marine species etc.)
- Commonwealth areas (used, for example for military purposes)
- Nationally threatened ecological communities (flora and fauna such as Australia's iconic Koalas and their habitat).<sup>51</sup>

As readers will note, these aspects are aimed at the 'natural environment' and not directly concerned with implications for human health or economic or cultural livelihoods. Moreover, there are no 'land use' considerations involved (e.g. whether the land would be better suited to a non-extractive industry) as states in Australia largely oversee planning and land use matters.

Under the EPBC Act, an EIS may be required (often the same EIS as used at the state level) which may or may not include some form of social impact assessment (SIA) which investigates cultural/economic issues. Most EIS regarding major projects talk broadly (and tend to over-inflate) the jobs that will flow from construction of the project. On other occasions under the EPBC Act, it is sufficient to produce a 'species impact statement' or some other lesser form of EIA which does not equate to a full EIS.

Broadly speaking, procedural rights under the EPBC Act to challenge or 'have a say' on proposed CSG projects are limited to the following situations:

1. 'Commenting' to the Federal Government on the potential impact of a project (i.e. whether it 'significantly impacts' one or more of the MNES above);
2. Bringing a Court action to stop a project from operating if the project operator has not sought Federal Government approval (or if they have breached their federal approval); and
3. Bringing an action against the Federal Government for approving the project based upon an error of law (such as failing to adequately take into account

<sup>50</sup> Higginson, S. (2014, April 14). Opinion: Public hearings a poor cousin to merit appeals. The Newcastle Herald. Retrieved from <http://www.theherald.com.au/story/2219279/opinion-public-hearings-a-poor-cousin-to-merit-appeals/>

<sup>51</sup> These are known as 'matters of national environmental significance' (MNES). There are 9 in total available from the Australian Government's website.



relevant evidence). This third action is known as 'judicial review' and is usually available to all persons in Australia when seeking to challenge a governmental decision. The Court, however, will not make a fresh decision, but rather send it back to the decision-maker to make the decision 'according to law.' In other words, the risk is that the decision-maker will make the exact same decision but for different reasons. There are significant costs if the litigant loses the case and cannot show their case was 'in the public interest.'

In reality, community activism at the federal level of government (including court actions) to stop major resource projects in Australia are rarely, if ever, successful. To the best of our knowledge, there has never been an action to successfully stop a CSG activity at the federal level through either the Federal Court or the Departmental consultation stages. The best that can occur for concerned communities is that additional (more stringent) conditions are added to a project before it becomes fully operational. These might include, for example, increases in 'biodiversity offset areas,' new 'remediation measures' or certain 'no-go' areas of the approved lease.

Whilst there is an option to bring a Court action to stop a CSG development proceeding without approval (point 2 above), the person or community group must have sufficient knowledge of the environmental issues for the Court to allow the action. This means they generally must have a track record of engagement in the issues and the broader risks of CSG extraction (e.g. understand fracking risks, CSG extraction, groundwater pollution etc.). In truth, this is a high standard to achieve and the Courts have at times refused actions certain environmental groups saying they lack sufficient connection with the subject matter of the conflict.

### 3. Procedural Rights: An analysis using Aarhus

#### 3.1 Access to Information

Access to information is the first pillar of the Aarhus framework. As noted earlier, it is a key aspect of achieving substantive human rights. The general premise of this right is that people ought to know about information held about them, or, information held by others which might adversely affect their community or general health. Article 4 of the Convention describes the access to information obligation as follows:

Each Party shall ensure that... public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including...copies of the actual documentation containing or comprising such information...[information is to be provided] at the latest within one month after the request has been submitted.

The obligation to provide information is placed on states but it is arguable that it applies (or, rather, ought to apply in our view) to non-state actors who hold vital information about community health, risks and the environment. For example, private corporations which operate and manage extractive industries (such as CSG facilities) ought to be expected to release (either to the state or directly to the public) timely information such as possible toxin levels and increased (or new) risks to human health as a result of their operations.

The release of such information by state (or non-state) actors should be timely, comprehensible and, above all, easy to obtain. As stated by the Human Rights Committee in their General Comment on Article 19 ICCPR:

To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant.<sup>52</sup>

At first glance, the federal and state governments in Australia fare reasonably well under the access to information principle. There are, for example, both national and state laws where any person can make an application (for a fee) to obtain information about government decisions. This includes CSG projects in the assessment stage or the operational phase. That said, the practical implementation of these laws appears weak. There are four key reasons for this:

- (1) First, Australia's freedom of information laws only apply to state entities. As noted above, often non-state entities (private corporations) hold information which is vital to the health and well-being of communities and the environment. The 'legal' relationship between the regulator and the operator is governed by the terms of their environmental licence and tenure.
- (2) Second, freedom of information laws are subject to exceptions, such as commercial sensitivity, military, diplomatic or 'state secrets' and the protection of names and personal details (even within government). Whilst Aarhus does envision reasonable exceptions (Article 4(4)), in practice, this can mean that documents which are released have many pages of redacted material at times rendering them worthless for independent investigation.
- (3) Third, there are many practical challenges for community groups in accessing information (even though they may have 'the right' to it) for example understanding and using the information they have received effectively. Some of these issues are discussed in the case study (box) below.
- (4) Fourth, there is a general lack of interest by states in the promotion of the right to information (and procedural rights more generally). Article 3(3) of Aarhus requires that states:

'shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information.'

Targeted campaigns on accessing information, and rights to information are rare in Australia. The information process seems more 'reactive' in this regard and seems to be exercised most often by media organisations, activists and NGOs investigating whether proper process was followed in the approval stages (and, for instance, whether there was any evidence of collusion or corruption by public officials).<sup>53</sup>

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<sup>52</sup> Human Rights Committee, General Comment No 34: Freedoms of opinion and expression (art. 19), 12 September 2011, CCPR/C/GC/34; 19 IHRR 303 (2012), p5.

<sup>53</sup> This in itself is problematic as information is most valuable before any damaging events have occurred. Its availability 'after the fact' is only useful for bringing those responsible to justice, rather than preventing or mitigating potential damage to human health and/or the environment.

Outside of freedom of information legislation, there are provisions within both state and federal environmental law for the provision of environmental information to the general public (mostly in the form of 'public registers'). This includes specific information about CSG and mining activities. Conditions of approval (i.e. the final permits) are often freely available (either online or in hard copy). In addition, as noted above, most EIA processes at the state and federal level must be publically notified. Finalised EIA documents must be kept on a register and searchable on request.

Overall, the problem in our view seems to lie not in the ability to access information (and the existence of that right in legislation), but to decipher it, make sense of it, and to use it effectively to protect substantive human rights such as the right to health and the right to life. To improve the process in Australia, further thought needs to be given to: (1) the timeliness of information provided; (2) the quality of the information provided and (3) the method of transmission of the information.

### **Case Study: Access to Information in Queensland**

In Queensland there are provisions in the *Environmental Protection Act 1994* (Qld) (Qld EP Act) for access to certain documents deemed as being required to be provided to the public.<sup>54</sup> The *Right to Information Act 2009* (Qld) also stipulates that Queensland public servants are subject to an obligation to proactively provide information to the public to avoid the need for applications to the government. In reality, however, the process of obtaining information that is important to the public to understand the impacts of projects, whether proposed or in existence, is time consuming and frequently ineffectual. Some of the key reasons for this are:

- The legislation does not allow the public certain access to key materials such as monitoring data (on levels of toxins, emissions etc.) undertaken by the operator where it was not required to be given to the Department;<sup>55</sup>
- The exemption 'commercial-in-confidence' can be claimed by the operator to exempt them from being required to provide key information to the public, such as the chemicals utilised for CSG activities;
- Monitoring required to be undertaken for the activity, particularly with regard to impacts on surrounding landholders, is often considered inadequate in that it does not sufficiently monitor air quality or water quality or quantity impacts. If there is no clear requirement to monitor impacts by the proponent, the obligation to create this information unfairly rests with the community.
- There is no centralised place where the information can be easily accessed. Information required to be made available to the public sits in offices throughout Queensland, sometimes only in hard copy, making it very difficult to ensure that the information can be provided to the public in a timely way. The availability of information only in hard copy is in breach of Aarhus article 5(3) which requires:

*"Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks."*

<sup>54</sup> *Environmental Protection Act 1994* (Qld) s540.

<sup>55</sup> *Environmental Protection Act EP 1994* (Qld), s 540 (1)(eb).

### 3.2 Public Participation

As noted earlier, the attainment of environmental justice requires effective participation in environmental decision-making, recognition of affected stakeholders, and fair distribution of benefits and burdens.<sup>56</sup> While there are some opportunities for public participation in decision making around CSG activities in Australia, it is the *quality* of participation and adequacy of recognition in particular that remains a significant concern. In many cases, stakeholders are extremely dissatisfied with the nature of opportunities for public participation, with how such processes are conducted, and how they are treated. As Jarrell and others write, avenues for participation typically offer 'no more than a thin patina of inclusion.'<sup>57</sup> The task is to move away from 'tick a box' exercises to meaningful engagement with communities before any governmental decisions are made.

The Aarhus Convention includes public participation as the second pillar necessary for sound environmental decision-making processes. Article 6 sets out the crux of the principle:

The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner... [and by] allowing sufficient time ... for the public to prepare and participate effectively during the environmental decision-making [period].

Moreover, Article 6(7) provides:

Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

In the state of NSW, one of the major sources of frustration for those who object to the development has been the lack of public consultation in the approval processes for exploration (as distinct to the approval processes for full-scale production). The situation is similar in Queensland, where communities have no participatory rights with regards to exploratory activities. Part of the problem is the complexity of the approvals processes and the way in which community and landholder rights are seen as an 'afterthought' to the 'tenure winning' process. An independent review of CSG in NSW found the regulatory framework to be:

highly complex and fragmented' with 'considerable cross-referencing, layering, exceptions and variations within and between legislative instruments.'<sup>58</sup>

More broadly, where there are rights to consult, there is a great inequity in public participation mechanisms that set well-funded corporate entities against under-funded or even non-funded community and interest groups, typically comprised of individuals who may need to balance other responsibilities (employment, carer duties) alongside their

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<sup>56</sup> Schlosberg, above n 4.

<sup>57</sup> Jarrell, M. L., Ozymy, J., & McGurrian, D. (2013). How to encourage conflict in the environmental decision-making process: Imparting lessons from civic environmentalism to local policy-makers. *Local Environment*, 18(2), 184-200, p184.

<sup>58</sup> O'Kane, M. (2014b). Independent Review of Coal Seam Gas Activities in NSW: Study of regulatory compliance systems and processes for coal seam gas. Retrieved from NSW Government, Chief Scientist and Engineer website: [http://www.chiefscientist.nsw.gov.au/data/assets/pdf\\_file/0006/56913/140930-Final-Compliance-Report.pdf](http://www.chiefscientist.nsw.gov.au/data/assets/pdf_file/0006/56913/140930-Final-Compliance-Report.pdf), 1.



participation in land use decision making processes.<sup>59</sup> As Richardson and Razzaque have noted:

“Excessively technical and bureaucratic procedures for public involvement can be a major hurdle for fruitful consultation. Complex, encyclopaedic-size EIA [Environmental Impact Assessment] reports, for instance, tend to hinder rather than facilitate public scrutiny of proposed developments. Lack of technical support and difficulties in gaining access to clear information can diminish the public’s ability to provide a meaningful voice in decisions.”<sup>60</sup>

In many cases, public participation is often limited to written submissions or one-off public hearing style forums, which falls short of recommended multi-directional and multi-phase communication. Moreover, the capacity of individuals to participate effectively in such opportunities is limited. For example, submissions against development proposals require objectors to respond to proponent claims regarding the economic benefit of a project, or its risk of causing environmental harm. This requires members of the public to not only have access to, but to be able to understand a significant volume of technical data (and often within a short time frame). Research has detailed the difficulties that this places on individuals and community groups, who in many cases do not possess adequate financial and other resources to fully interrogate the applicant’s claims.<sup>61</sup> Access to expert testimony to challenge proponent evidence often proves difficult, either proving too costly or not accessible within short time frames. Other structural factors may also inhibit access to information, or participation in decision making – including rurality, and membership or minority cultural groups.

In many cases, development proponents also enjoy significant political influence in land use decision-making processes. They are able to fund wide-reaching advertising campaigns, and typically enjoy lobbying access to politicians. Proponents often use this position of advantage to frame the scale of conflict, for example, by positioning extractive development as being in the ‘public interest’ for reasons of energy security and economic wellbeing, and discrediting those concerned with development as ‘NIMBYs’ (Not In My Back Yard) concerned with micro-scale local environmental and social issues.<sup>62</sup> This can be compounded where development takes place in non-urban areas characterised by low population density, which further obscures the ability of small communities to appeal to a broader narrative.

Development assessment processes can also involve the ‘fetishization of the scientific process’,<sup>63</sup> which positions expert scientific opinion as ‘objective’ and ‘apolitical’.<sup>64</sup> Those seeking to challenge development applications must do so using technical language and by engaging ‘authoritative’ scientific opinions and methodologies. This in turn can marginalise other forms of knowledge, such as citizen science, place-based and Indigenous perspectives.

Finally, government actions which seek to remove resources and funding for public interest legal services, or otherwise attempt to limit standing and curtail protests, or which utilise

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<sup>59</sup> Kennedy, above n 36; Radow, E. N. (2010). Citizen David tames gas Goliaths on the Marcellus Shale stage: Citizen action as a form of dispute prevention in the internet age. *Cardozo Journal of Conflict Resolution*, 12, 373-410.

<sup>60</sup> Richardson, B. J., Razzaque, J. (2006). Public participation in environmental decision-making. In B. J. Richardson, S. Wood (Eds.), *Environmental Law for Sustainability* (pp. 165-194). Oxford and Portland: Hart Publishing, p193.

<sup>61</sup> Kennedy, above n 36.

<sup>62</sup> Ibid.

<sup>63</sup> Simonelli, J. (2014). Home rule and natural gas development in New York: civil fracking rights. *Journal of Political Ecology*, 21(1), 258-78, p 274.

<sup>64</sup> Richardson and Razzaque, above n 60, p171.

derogatory language to characterise individuals and groups opposed to development as 'self-interested' reinforces a lack of recognition of non-dominant interests and concerns, and restricts access to environmental justice. Both the federal and state governments have actively sought to remove funding (and block philanthropic funding) to community legal centres that specialise in public interest environmental law.

Overall, restricting the capacity of individuals and community groups to participate effectively in land-use decision-making can cultivate perceptions of injustice and foster opposition. As Davoudi and Brooks note, 'being subjected to the harms in which we have no choice or responsibility reinforces people's sense of injustice'.<sup>65</sup>

### 3.3 Access to Justice

The final pillar of Aarhus is access to justice. Access to justice is closely linked to the failure to provide adequate measures for the fulfilment of the first two pillars. Article 9 of the Aarhus Convention describes the access to justice obligation as follows:

Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information ... has been ignored, wrongfully refused, whether in part or in full, inadequately answered...has access to a review procedure before a court of law or another independent and impartial body established by law. [And, in addition]... each Party shall ensure that, where they meet [certain] criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Aarhus also considers that costs and other barriers must be removed for communities to effectively access the courts and tribunals in order to address/challenge adverse environmental impacts. For example, Article 9(4) provides that states:

shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

As with the other two pillars of effective decision-making, on the face of it, the federal and state governments in Australia fare reasonably well under this limb. There are, for example, court actions available to communities where information is not provided as requested and in instances where the individual/community disagrees with the decision of the regulatory body. However, again, the practical implementation of these laws is weak. It must be noted that there are many challenges for community groups in accessing courts (even though they may have 'the right' to) most of which revolve around prohibitive costs, unreasonable time frames and inability to effectively access to expertise to assist in justice activities.

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<sup>65</sup> Davoudi, S., & Brooks, E. (2014). When does unequal become unfair? Judging claims of environmental injustice. *Environment and Planning A*, 46(11), 2686-2702, p2690.

### **Case Study: Queensland Coal Mine Expansion and Access to Justice**

In Queensland, there are significant constraints on the community in their ability to access justice to address potential or actual environmental impacts faced by CSG activities. The limitations on the ability of the community to provide submissions on applications for CSG activities or to appeal approvals prevents the check and balance this provides to ensure high quality, informed decisions in the public interest are being made by the regulator.

The decision of the Land Court of Queensland, made in May 2017, with respect to an application for a coal mine expansion for the New Acland Stage 3 Expansion of an existing coal mine is scathing of the inadequacies in the Queensland Government's complaints response process.<sup>66</sup>

The community surrounding the existing mine had been complaining for many years to about breaches of the environmental conditions pertaining to dust, noise and vibrations. These complaints were frequently ignored or not adequately addressed by the regulator, with no action taken to properly enforce the conditions.

While this case concerned a coal mine, the complaints process for monitoring CSG activities lies with the same Department and is highly likely to be subject to the similar inadequacies. Where the public cannot rely on the regulator to ensure conditions are complied with, it is then incumbent on the public to take legal action themselves. Members of the public likely to be interested in ensuring that conditions of an authority are upheld are highly likely to be far less resourced and less able to access evidence to undertake successful litigation to enforce an environmental approval.

Other insights can be gained from an independent investigation into community appeal rights in the context of human rights. In October 2016, a Special Rapporteur on Human Rights Defenders visited Australia. The Rapporteur's End of Mission Statement described the unjust barriers against human rights defenders in Australia, particularly to freedom of assembly and access to justice<sup>67</sup> Central to its focus is the impact of the limitations against environmental organizations and landholders ability to access justice to adequately protect their land. The Report highlighted the unjustifiable targeting of environmental human rights defenders' freedom to protest, particularly under Tasmanian and NSW legislation.<sup>68</sup> The Report also noted that the Australian Government had recently attempted to limit access to justice rights for environmental organizations.<sup>69</sup> Defunding of community law centers and the attempted weakening of legal standing rights have "undermined the ability of human rights defenders to protect the environment through political advocacy and litigation."<sup>70</sup>

Moreover, the Report noted that the portrayal of land owners and environmental human rights defenders as 'activists' who 'obstruct economic development' of the country demonstrates a disrespect for their rights. The Special Rapporteur recognized this pattern of public vilification of environmentalists among politicians and businesses. In particular, the Report noted that the mining and extractive industry in Australia is the most aggressive, "sometimes exerting excessive pressure against environmental activists or indigenous

<sup>66</sup> *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* (No. 4) [2017] QLC 24 (EPA495-15; MRA496-15; MRA497-15) PA Smith 31 May 2017

<sup>67</sup> Michael Forst, End of Mission Statement, United Nations Special Rapporteur on the situation of human rights defenders, 18 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>

<sup>68</sup> Ibid [42]-[44].

<sup>69</sup> Ibid [46], [49]-[54].

<sup>70</sup> Ibid [62].

peoples trying to protect their land, environment or cultural heritage.”<sup>71</sup> Finally, the Report called on government officials in Australia to recognize that “human rights defenders have a right to promote and protect all human rights, including the right to a healthy environment, regardless of whether their peaceful activities are seen by some as frustrating development projects.”<sup>72</sup>

### **Case Study: Indigenous Rights to be heard in Queensland**

Jah’shua McAvoy sought to have his views heard about the development of a major Coal mine through the process of objection under the relevant legislation. As a descendant of the Jagalingou people and the traditional owners of the land, Jah’shua submitted that the mine would cause “disastrous environmental harm of [his] sacred country...”<sup>73</sup> Jah’shua’s objection was received by the administering officer at 9.45pm on 17 June 2014; the last day for submissions. However, under the law a submission lodged between 4:30pm on one business day and 8:30am of the next business day is taken to be lodged on the later day. Queensland law provides that the Land Court may decide that ‘substantial compliance’ with the Act can be deemed to have been done in the prescribed way, however the official presiding over this case decided that this does not apply to whether or not a submission is duly lodged.<sup>74</sup> There is no provision under Queensland environmental law that refers to a specific time for making submissions, but there is a provision which stipulates that a submission period for an application must end on ‘the last objection day’.<sup>75</sup> The legislation gives the Land Court discretion to decide who could be a party to proceedings. In the end, the Court determined:

*“for what I find to be highly technical reasons as to the interpretation of the appropriate procedures under that Act, Jah’shua has not been allowed to [become an objector to the proceedings].”<sup>76</sup>*

Jah’shua subsequently discontinued being a party to the proceedings.

## **4. Response to Advisory Questions**

### **4.1 Breaches of human rights law**

The first advisory question asks:

*“Under what circumstances do fracking and other unconventional oil and gas extraction techniques breach substantive and procedural human rights protected by international law as a matter of treaty or custom?”*

On our analysis, there are three circumstances where procedural rights may have been breached by the practices of CSG extraction in Australia: First, (1) though information is ‘legally available’ on CSG projects, it is often too complex to decipher, too costly to obtain and too ‘reactive’ to be of any practical use to communities. Second (2) though the public is entitled to ‘participate’ in CSG decision-making, these rights are largely limited to extraction

<sup>71</sup> Ibid [82].

<sup>72</sup> Ibid [43].

<sup>73</sup> *McAvoy & Anor v Adani Mining Pty Ltd & Ors* [2014] QLC 32 [35].

<sup>74</sup> Ibid [14].

<sup>75</sup> Ibid [27].

<sup>76</sup> Ibid [38].



(not exploration) and often present themselves as ‘tick a box’ exercises, rather than meaningful debate and whether there might be a more suitable use for the land. Third (3) although some court appeal rights are available in legislation, these are rarely, if ever, used due to restricted standing provisions, a lack of technical (scientific) expertise, short time periods to appeal, and the costs and complexity of litigation more generally. Defunding of specialist community legal centres (such as Environmental Defenders Offices) by both state and federal governments has also hamstrung the ability of Australian communities to legally protest against CSG projects which negatively affect their lives.

## 4.2 Questions of Remediation

The second questions asks:

*“In what circumstances do fracking and other unconventional oil and gas extraction techniques warrant the issuance of either provisional measures, a judgment enjoining further activity, remediation relief, or damages for causing environmental harm?”*

Where environmental damage can be proven, including as a result of the denial of procedural rights, we see no reason why adequate compensation and/or remediation relief should not be available to all those who suffered through the process (including the environment). We bring to the attention of the PPT the principle of environmental law entitled the ‘Polluter Pays.’ We do note, however, that remediation for environmental damage was not the focus of our submission to the PPT. For breaches of procedural rights, however, we suggest that reparation must also be considered, for example in the form of reasonable damages, though the task is far more difficult to quantify. The best remediation that can occur is for states to ensure the procedural protections are sufficiently tightened (see the conclusion for our four requests in this regard).

## 4.3 Responsibility of States and Non-states for Human Rights

The third question asks:

*“What is the extent of responsibility and liability of States and non-state actors for violations of human rights and for environmental and climate harm caused by these oil and gas extraction techniques?”*

Based on our analysis both states and non-states are responsible for breaching procedural rights. Whilst states, through law and policy, determine the framework for participation in CSG decision-making, non-states must be held responsible for adequately providing, in good faith, relevant timely information and consultation opportunities that relate to the project posed. Otherwise, the risk is that, neither states nor non-states (e.g. corporations) accept responsibility for environmental transgressions and the ‘buck is passed’ to innocent communities and the taxpayer. We acknowledge that this view creates problems for the traditional view of human rights law (including Aarhus) which places obligations on states as opposed to non-states. However, for environmental justice to be truly realised, both states and non-states must be prepared to relinquish power in decision-making processes through possibility the imposition of the need for a ‘social licence’ to extract.

## 4.4 Responsibility of States and Non-states for Rights of Nature

The fourth question asks:

*“what is the extent of responsibility and liability of States and non-state actors, both legal and moral, for violations of the rights of nature related to environmental and climate harm caused by these unconventional oil and gas extraction techniques?”*

Our brief did not cover this question and we are not in a position to comment with any authority. We do note, however, that none of the procedural rights analysed in this brief recognise ‘nature’ as conceptually having standing to sue in a court, or obtain information nor participate in decision-making processes (or humans acting on nature’s behalf). Giving nature legal personality is something which is being currently explored in places like New Zealand and Ecuador. We defer to the position of the Australian Earth Laws Alliance in this regard who have considerable expertise on these questions.



Coal seam gas free community banner Source: Lock the Gate Alliance

## Conclusion

This brief has provided a legal analysis of the practices of CSG in Australia focussing on potential breaches of procedural rights. Procedural rights (such as access to information; public participation and access to justice) are fundamental to the attainment of substantive human rights. In the context of CSG, the most relevant substantive rights are probably the right to health and the right to life. There is a strong argument that there exists a right to a healthy environment which, if correct, is also highly relevant to the issues surrounding CSG extraction in Australia. Overall, our analysis has found that whilst Australian state and federal governments do have laws which provide for information, participation and appeals, they lack appropriate implementation at the institutional level, in particular, the support structures necessary for them to work effectively. The systems which are in place fail to recognise the enormous power imbalance which exists between the CSG industry, government and rural communities. This is why laws ‘on paper’ are often not enough. Urgent attention is needed to

ways in which the existing legal frameworks in Australia can be made to 'work better' on the ground in Australia and produce better outcomes for ordinary Australians.

In addition to the responses to the advisory questions above, we are seeking four specific requests from the PPT. They are as follows:

- (1) That the PPT recognise the extent of CSG activity (including associated infrastructure) in Australian states of Queensland and New South Wales and that such extraction carries immense social and environmental risks which exist primarily in poor, working class, rural and remote locations;
- (2) That the PPT recognise the considerable power imbalance that exists between the CSG industry, governments and local communities, including, but not limited to; the lack of cost-effective legal representation for communities; the technical language used by regulators and the industry; the close proximity of the relationship between the industry and the regulator; and the lack of effective independent review mechanisms for landholders and communities (outside of issues surrounding compensation);
- (3) That the PPT call on Australia to ratify the Aarhus Convention and implement its three pillars into state and federal environmental legislation in relation to all extractive industry activities (e.g. CSG, coal mining and others);
- (4) That the PPT call on Australia to establish a specialist independent body capable of investigating complaints (against states and non-states) where due process and procedural rights in environmental decision-making have not been met.



*CSG in the Hunger region (NSW) Source: Jeremy Buckingham*