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THE SENATE

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Landholders' Right to Refuse (Gas and Coal) Bill 2015

No. , 2015

(Senator Waters)

A Bill for an Act to provide Australian landholders the right to refuse the undertaking of gas and coal mining activities on their land without prior written authorisation, to ban hydraulic fracturing, and for related purposes

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1 **A Bill for an Act to provide Australian landholders**
2 **the right to refuse the undertaking of gas and coal**
3 **mining activities on their land without prior written**
4 **authorisation, to ban hydraulic fracturing, and for**
5 **related purposes**

6 The Parliament of Australia enacts:

7 **Part 1—Preliminary**
8

9 **1 Short title**

10 This Act may be cited as the *Landholders' Right to Refuse (Gas*
11 *and Coal) Act 2015*.

Section 2

1 **2 Commencement**

2 This Act commences on the day after this Act receives the Royal
3 Assent.

4 **3 Simplified outline of this Act**

5 This Act:
6 (a) gives Australian landholders the right to refuse mining
7 companies access to their land to engage in gas or coal
8 mining activity; and
9 (b) bans hydraulic fracturing operations by constitutional
10 corporations.

11 It is an offence for a constitutional corporation to conduct gas or
12 coal mining operations, or enter or remain on land to do so, without
13 the prior written authorisation of each person with an ownership
14 interest in the land. The prior authorisation must contain certain
15 information and is invalid if the corporation does not advise the
16 person of their right to refuse authorisation.

17 A person with an ownership interest in the land may also take
18 action against the corporation if they fail to obtain their
19 authorisation.

20 It is a contravention of a civil penalty provision if a constitutional
21 corporation engages in hydraulic fracturing operations.

22 Persons with an interest affected by any hydraulic fracturing
23 operations may apply for an injunction to stop a constitutional
24 corporation from engaging in the operations, or the Environment
25 Minister may apply to the Federal Court for an order that the
26 corporation pay a pecuniary penalty.

27 **4 Definitions**

28 In this Act:

Section 4

1 ***civil penalty provision***: a subsection of this Act (or a section of this
2 Act that is not divided into subsections) is a ***civil penalty provision***
3 if:

- 4 (a) the subsection (or section) sets out at its foot a pecuniary
5 penalty, or penalties, indicated by the words “Civil penalty”;
6 or
7 (b) another provision of this Act provides that the subsection (or
8 section) is a civil penalty provision.

9 ***constitutional corporation*** means a corporation to which
10 paragraph 51(xx) of the Constitution applies.

11 ***court*** means the Federal Court of Australia.

12 ***Environment Minister*** means the Minister who administers the
13 *Environment Protection and Biodiversity Conservation Act 1999*.

14 ***gas or coal*** means:

- 15 (a) coal; or
16 (b) coal seam gas; or
17 (c) shale gas; or
18 (d) tight gas.

19 ***gas or coal mining activity*** includes any activity undertaken for the
20 purpose of:

- 21 (a) exploring for gas or coal; or
22 (b) mining or producing gas or coal (including underground coal
23 gasification).

24 ***hydraulic fracturing operations*** means any operations that involve
25 the recovery (or the potential or enhanced recovery) of coal seam
26 gas, shale gas or tight gas by the high-pressure injection of fluid
27 into a wellbore to create fractures, or enlarge existing fractures, in
28 geological formations.

29 ***land*** includes:

- 30 (a) land within the beds and banks of streams, watercourses and
31 inundated land; and
32 (b) waters in, upon and above land; and
33 (c) subterranean land.
-

Section 5

1 *ownership interest* has the meaning given by section 5.

2 *prior written authorisation* means an authorisation given under
3 section 12 that has not expired.

4 **5 Meaning of *ownership interest***

5 (1) A person has an *ownership interest* in land if the person has a legal
6 or equitable interest in it or a right to occupy it.

7 (2) Despite subsection (1), a person does not have an ownership
8 interest in land if the interest or right in the land arises as a result of
9 a right granted under a law of the Commonwealth, a State or a
10 Territory to engage in gas or coal mining activities.

11 **6 Act binds the Crown**

12 This Act binds the Crown in each of its capacities.

13 **7 Extension to external Territories**

14 This Act extends to every external Territory.

15 **8 Relationship to State and Territory laws**

16 This Act is not intended to exclude or limit the operation of any
17 law of a State or Territory, to the extent that that law is capable of
18 operating concurrently with this Act.

1 **Part 2—Gas or coal mining**

2 **Division 1—Gas or coal mining without prior written**
3 **authorisation from landholders is unlawful**

4 **9 Application of this Division**

5 (1) This Division applies in relation to any gas or coal mining activity
6 engaged in by a constitutional corporation on, or in relation to, land
7 on or after the day this section commences.

8 (2) Despite subsection (1), this Division does not apply in relation to a
9 gas or coal mining activity engaged in by a constitutional
10 corporation on, or in relation to, particular land after the day this
11 section commences if:

12 (a) the activity is for the purpose of exploring for gas or coal;
13 and

14 (b) the constitutional corporation commenced exploring for gas
15 or coal on, or in relation to, the land before the day this
16 section commences.

17 (3) Despite subsection (1), this Division does not apply in relation to a
18 gas or coal mining activity engaged in by a constitutional
19 corporation on, or in relation to, particular land after the day this
20 section commences if:

21 (a) the activity is for the purpose of mining or producing gas or
22 coal; and

23 (b) the constitutional corporation commenced mining or
24 producing gas or coal on, or in relation to, the land before the
25 day this section commences.

26 **10 Gas or coal mining without prior written authorisation from**
27 **landholders is unlawful**

28 (1) A constitutional corporation commits an offence if:

29 (a) the corporation:

Part 2 Gas or coal mining

Division 1 Gas or coal mining without prior written authorisation from landholders is unlawful

Section 11

- 1 (i) enters, or remains on, land for the purposes of engaging
2 in a gas or coal mining activity; or
3 (ii) engages in a gas or coal mining activity on, or in
4 relation to, land; and
5 (b) the corporation does not have an ownership interest in the
6 land.

7 Penalty: 5,000 penalty units.

8 (2) A constitutional corporation that contravenes subsection (1)
9 commits a separate offence in relation to each day (including a day
10 of conviction for the offence or any later day) during which the
11 contravention continues.

12 (3) Subsection (1) does not apply if the corporation has a prior written
13 authorisation from each person with an ownership interest in the
14 land to engage in the gas or coal mining activity on, or in relation
15 to, the land.

16 Note: A defendant bears an evidential burden in relation to the matter in
17 subsection (3): see subsection 13.3(3) of the *Criminal Code*.

18 **11 Action for gas or coal mining without prior written authorisation**
19 **from landholders**

20 (1) A person (a *landholder*) with an ownership interest in land may
21 bring an action against another person if:

22 (a) the other person is a constitutional corporation; and

23 (b) the other person:

24 (i) enters, or remains on, the land for the purpose of
25 engaging in a gas or coal mining activity; or

26 (ii) engages in a gas or coal mining activity on, or in
27 relation to, the land; and

28 (c) the other person does not have a prior written authorisation
29 from the landholder to engage in the gas or coal mining
30 activity on, or in relation to, the land.

31 (2) An action under subsection (1) may be commenced by the
32 landholder at any time within 6 years after the day on which the
33 cause of action accrued.

1 **Division 2—Prior written authorisations for gas or coal**
2 **mining**

3 **12 Obtaining prior written authorisation**

- 4 (1) A constitutional corporation wishing to enter, or remain on, land to
5 engage in a gas or coal mining activity may apply to a person with
6 an ownership interest in the land for an authorisation (a *prior*
7 *written authorisation*) to engage in that activity on that land.

8 Note: If more than one person has an ownership interest in the land, the
9 constitutional corporation must obtain a prior written authorisation
10 from each of them to avoid an action under section 11.

- 11 (2) A prior written authorisation must contain the following
12 information:

- 13 (a) the names and details of the parties to the authorisation;
14 (b) the land to which the authorisation relates;
15 (c) the gas or coal mining activity proposed to be undertaken by
16 the constitutional corporation in relation to the land;
17 (d) when and where the activity is proposed to be engaged in;
18 (e) an independent assessment of the current and future risks
19 associated with the proposed gas or coal mining activity on,
20 or affecting, the land and any associated groundwater
21 systems;
22 (f) the date the authorisation has effect and its expiry date;
23 (g) any other information prescribed by the regulations.

- 24 (3) A prior written authorisation is invalid unless:

- 25 (a) the authorisation contains the information required by
26 subsection (2); and
27 (b) the authorisation is in writing; and
28 (c) the person with the ownership interest in the land (the
29 *landholder*) has been advised, in writing, by the
30 constitutional corporation that is a party to the authorisation,
31 that the landholder:
32 (i) may refuse to sign the authorisation; and

1 **Division 3—Remedies**

2 **13 Remedies in actions for gas or coal mining on without prior**
3 **written authorisation**

- 4 (1) Without limiting the relief that a court may grant to a person (the
5 *plaintiff*) in an action under section 11 (gas or coal mining without
6 a prior written authorisation), the relief may include an injunction
7 (including an interim injunction).
- 8 (2) The court must order that all costs incurred by a person
9 commencing an action under this Part are to be paid by the
10 defendant to the action unless the court considers that:
11 (a) the person instituted the action vexatiously or without
12 reasonable cause; or
13 (b) it would be unreasonable, in all the circumstances, to do so.
- 14 (3) The court may discharge or vary an injunction or other order made
15 under this section.

Section 14

1 **Part 3—Hydraulic fracturing operations ban**

2 **Division 1—Hydraulic fracturing operations ban**

3 **14 Hydraulic fracturing operations by constitutional corporation is**
4 **unlawful**

5 A constitutional corporation must not engage in hydraulic
6 fracturing operations.

7 Civil penalty: 50,000 penalty units.

1 **Division 2—Injunctions**

2 **15 Injunctions for contravention of hydraulic fracturing ban**

3 *Applications for injunctions*

4 (1) If a person has engaged, engages or proposes to engage in conduct
5 consisting of an act or omission that constitutes a contravention of
6 section 14:

7 (a) the Environment Minister; or

8 (b) an interested person (other than an unincorporated
9 organisation); or

10 (c) a person acting on behalf of an unincorporated organisation
11 that is an interested person;

12 may apply to the Federal Court for an injunction.

13 *Prohibitory injunctions*

14 (2) If a person has engaged, is engaging or is proposing to engage in
15 conduct constituting an offence or other contravention of section
16 14, the Court may grant an injunction restraining the person from
17 engaging in the conduct.

18 *Additional orders with prohibitory injunctions*

19 (3) If the court grants an injunction restraining a person from engaging
20 in conduct and in the Court's opinion it is desirable to do so, the
21 Court may make an order requiring the person to do something
22 (including repair or mitigate damage to the environment).

23 *Mandatory injunctions*

24 (4) If a person has refused or failed, or is refusing or failing, or is
25 proposing to refuse or fail to do an act, and the refusal or failure
26 did, does or would constitute an offence or other contravention of
27 section 14, the Court may grant an injunction requiring the person
28 to do the act.

Section 15

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Interim injunctions

- (5) Before deciding an application for an injunction under this section, the Court may grant an interim injunction:
- (a) restraining a person from engaging in conduct; or
 - (b) requiring a person to do an act.

Meaning of interested person—individuals

- (6) For the purposes of an application for an injunction relating to conduct or proposed conduct, an individual is an **interested person** if the individual is an Australian citizen or ordinarily resident in Australia or an external Territory, and:
- (a) the individual's interests have been, are or would be affected by the conduct or proposed conduct; or
 - (b) the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before:
 - (i) the conduct; or
 - (ii) in the case of proposed conduct—making the application for the injunction.

Meaning of interested person—organisations

- (7) For the purposes of an application for an injunction relating to conduct or proposed conduct, an organisation (whether incorporated or not) is an **interested person** if it is incorporated (or was otherwise established) in Australia or an external Territory and one or more of the following conditions are met:
- (a) the organisation's interests have been, are or would be affected by the conduct or proposed conduct;
 - (b) if the application relates to conduct—at any time during the 2 years immediately before the conduct:
 - (i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and
 - (ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment;

- 1 (c) if the application relates to proposed conduct—at any time
2 during the 2 years immediately before the making of the
3 application:
4 (i) the organisation’s objects or purposes included the
5 protection or conservation of, or research into, the
6 environment; and
7 (ii) the organisation engaged in a series of activities related
8 to the protection or conservation of, or research into, the
9 environment.

10 **16 Discharge of injunctions**

11 On application, the Federal Court may discharge or vary an
12 injunction.

13 **17 Certain considerations for granting injunctions not relevant**

14 *Prohibitory injunctions*

- 15 (1) The Federal Court may grant an injunction restraining a person
16 from engaging in conduct:
17 (a) whether or not it appears to the Court that the person intends
18 to engage again, or to continue to engage, in conduct of that
19 kind; and
20 (b) whether or not the person has previously engaged in conduct
21 of that kind; and
22 (c) whether or not there is a significant risk of injury or damage
23 to human beings or the environment if the person engages, or
24 continues to engage, in conduct of that kind.

25 *Mandatory injunctions*

- 26 (2) The Federal Court may grant an injunction requiring a person to do
27 a particular act or thing:
28 (a) whether or not it appears to the Court that the person intends
29 to refuse or fail again, or to continue to refuse or fail, to do
30 the act or thing; and
31 (b) whether or not the person has previously refused or failed to
32 do the act or thing; and

Part 3 Hydraulic fracturing operations ban

Division 2 Injunctions

Section 18

1 (c) whether or not there is a significant risk of injury or damage
2 to human beings or the environment if the person refuses or
3 fails, or continues to refuse or fail, to do the act or thing.

4 **18 Powers conferred are in addition to other powers of the Court**

5 The powers conferred on the Federal Court by this Division are in
6 addition to (and do not limit) any other powers of the Court.

1 **Division 3—Civil penalties**

2 **Subdivision A—Obtaining an order for a civil penalty**

3 **19 Federal Court may order person to pay pecuniary penalty for**
4 **contravening civil penalty provision**

5 *Application for order*

- 6 (1) Within 6 years of a person (the *wrongdoer*) contravening a civil
7 penalty provision, the Environment Minister may apply on behalf
8 of the Commonwealth to the Federal Court for an order that the
9 wrongdoer pay the Commonwealth a pecuniary penalty.

10 *Court may order wrongdoer to pay pecuniary penalty*

- 11 (2) If the Court is satisfied that the wrongdoer has contravened a civil
12 penalty provision, the Court may order the wrongdoer to pay to the
13 Commonwealth for each contravention the pecuniary penalty that
14 the Court determines is appropriate (but not more than the relevant
15 amount specified for the provision).

16 *Determining amount of pecuniary penalty*

- 17 (3) In determining the pecuniary penalty, the Court must have regard
18 to all relevant matters, including:
19 (a) the nature and extent of the contravention; and
20 (b) the nature and extent of any loss or damage suffered as a
21 result of the contravention; and
22 (c) the circumstances in which the contravention took place; and
23 (d) whether the person has previously been found by a court
24 (including a court in a foreign country) to have engaged in
25 any similar conduct.

26 **20 Contravening a civil penalty provision is not an offence**

27 A contravention of a civil penalty provision is not an offence.

Section 21

1 **21 Recovery of a pecuniary penalty**

2 If the Federal Court orders a person to pay a pecuniary penalty:

- 3 (a) the penalty is payable to the Commonwealth; and
4 (b) the Commonwealth may enforce the order as if it were a
5 judgment of the Court.

6 **Subdivision B—Civil penalty proceedings and criminal**
7 **proceedings**

8 **22 Civil proceedings after criminal proceedings**

9 The Federal Court must not make a pecuniary penalty order against
10 a person for a contravention of a civil penalty provision if the
11 person has been convicted of an offence constituted by conduct
12 that is substantially the same as the conduct constituting the
13 contravention.

14 **23 Criminal proceedings during civil proceedings**

- 15 (1) Proceedings for a pecuniary penalty order against a person for a
16 contravention of a civil penalty provision are stayed if:
17 (a) criminal proceedings are started or have already been started
18 against the person for an offence; and
19 (b) the offence is constituted by conduct that is substantially the
20 same as the conduct alleged to constitute the contravention.
21 (2) The proceedings for the order may be resumed if the person is not
22 convicted of the offence. Otherwise, the proceedings for the order
23 are dismissed.

24 **24 Criminal proceedings after civil proceedings**

25 Criminal proceedings may be started against a person for conduct
26 that is substantially the same as conduct constituting a
27 contravention of a civil penalty provision regardless of whether a
28 pecuniary penalty order has been made against the person.

1 **25 Evidence given in proceedings for penalty not admissible in**
2 **criminal proceedings**

- 3 (1) Evidence of information given or evidence of production of
4 documents by an individual is not admissible in criminal
5 proceedings against the individual if:
6 (a) the individual previously gave the evidence or produced the
7 documents in proceedings for a pecuniary penalty order
8 against the individual for a contravention of a civil penalty
9 provision (whether or not the order was made); and
10 (b) the conduct alleged to constitute the offence is substantially
11 the same as the conduct that was claimed to constitute the
12 contravention.
- 13 (2) However, subsection (1) does not apply to a criminal proceeding in
14 respect of the falsity of the evidence given by the individual in the
15 proceedings for the pecuniary penalty order.

16 **Subdivision C—Miscellaneous**

17 **26 Persons involved in contravening civil penalty provision**

- 18 (1) A person must not:
19 (a) aid, abet, counsel or procure a contravention of a civil
20 penalty provision; or
21 (b) induce (by threats, promises or otherwise) a contravention of
22 a civil penalty provision; or
23 (c) be in any way directly or indirectly knowingly concerned in,
24 or party to, a contravention of a civil penalty provision; or
25 (d) conspire to contravene a civil penalty provision.
- 26 (2) This Division applies to a person who contravenes subsection (1)
27 in relation to a civil penalty provision as if the person had
28 contravened the provision.

Section 27

1 **27 Civil penalty provisions contravened by employees, agents or**
2 **officers**

3 If an element of a civil penalty provision is done by an employee,
4 agent or officer of a constitutional corporation acting within the
5 actual or apparent scope of his or her employment, or within his or
6 her actual or apparent authority, the element must also be attributed
7 to the corporation.

1 **Part 4—Miscellaneous**
2

3 **28 Application of this Act to joint ventures and partnerships**

- 4 (1) This section sets out the way this Act applies to a partnership or
5 joint venture (an *entity*) that consists of 2 or more constitutional
6 corporations. Those corporations are referred to in this section as
7 *the participants*.
- 8 (2) If this Act requires or permits something to be done by a
9 constitutional corporation, the thing may be done by one or more
10 of the participants on behalf of the entity.
- 11 (3) If a provision of this Act refers to a constitutional corporation
12 bearing any costs, the provision applies as if the provision referred
13 to any of the participants bearing any costs.
- 14 (4) If a provision of this Act refers to a constitutional corporation
15 doing something, the provision applies as if the provision referred
16 to one or more of the participants doing that thing on behalf of the
17 entity.
- 18 (5) If a provision of this Act requires a constitutional corporation to do
19 something, or prohibits a constitutional corporation doing
20 something, the provision applies as if the reference to the
21 constitutional corporation were a reference to each participant.

22 **29 Regulations**

- 23 The Governor-General may make regulations prescribing matters:
24 (a) required or permitted by this Act to be prescribed; or
25 (b) necessary or convenient to be prescribed for carrying out or
26 giving effect to this Act.