

Property Rights and CSG: Unanswered Questions of Trespass; Access; Deviated Drilling

Without considering the implications of native title and commonwealth 'settlement' of Australia, the following investigates the issues surrounding ownership of land and access, what is "property" and property rights. In other words this article investigates the value of property rights and how this is directly affected by the quality of information about title to those rights. (Abraham, 2016)

When the commonwealth government issues a deed to a parcel of land to an individual, they are granting the individual a certain interest over that parcel of land.

The type of deed or title that is most often issued to many of us is the freehold (fee simple title) that provides the holder of that title the maximum ownership interest over that parcel of land. (For more detail on title see inset below)

This type of title grants the land owner a number of rights over their land, such as:

- Building a home or conducting a business upon the land;
- Selling or subdividing the land; or
- Passing it down in a Will when they die.

In the case of coal seam gas, the Queensland Government can allow separate interests to be held over a single land parcel. While the government issued freehold interest over the land to the individual, the government who has reserved the right to the minerals, has also provided a title to the coal seam gas company to explore and produce the gas under that land on their behalf. The act of production then turns the gas into the "property" of the gas company, who pays the government royalties for the product and can then sell their product commercially.

The deed to the freehold title holder relate to the Land - however, it is the rest of their rights in relation to the use of that land that creates greater complexity to the interaction and that is complications relating to their 'property' rights - what is theirs, within the land parcel.

The rights of the gas company relate to the "property" of the gas - they are not given interest over the land .

The means of managing this subrogation of the ability of the freeholder to determine who has access to their land under their title, is the arrangements for land access contracts and conduct arrangements and compensation between the gas company and the individual.¹

The subsequent limitation of that compensation to a view of 'land' not 'property' is the next level of problems in the ongoing evolution of this forced interaction.

The freeholder, upon this land parcel, has created "property": a private home with value, a business with value and a product with value, a recreational area, plans for the future and the future of their children, and a right to do so without 'unreasonable interference'. Also intertwined in this are the

¹ Curnow, K., Hunter, T., Weir, M., & Boule, L. (2017). Negotiation and regulation of land access agreements: lessons from Queensland. *The Journal of World Energy Law & Business*, 10(2), 117-135. <https://doi.org/10.1093/jwelb/jwx003>

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additional responsibilities and accountability's that come with doing so, eg WHS, biosecurity, property values and taxes, etc. As described by Gray and Gray^{2&3}

"To claim "property" in land is to arrogate at least a limited form of sovereignty over the land and to allege that one has some emotion or investment-backed security in it. To have "property" in land connotes, ultimately, a deeply instinctive self-affirming sense of belonging and control;"

And it is precisely this sense of possessory control which is fundamental to the problems discussed in this article. Yet the compensatory and conduct contracts and the legislative and regulatory structure and organisation of this interaction between the individual and the gas company fails to consider these many additional aspects of this forced interaction and focuses only on the limited items relating to actual land access (compensatory effect in P&G Act).

These arrangements to date have also only been instigated when the gas company undertakes access to the individual's land ostensibly through a fence or gate, above ground. However, there is significant subsurface infrastructure that may be accessing neighbouring land physically or via impact but via subsurface access. And due to the lack of physical visibility, these issues have not been considered to date.

Given the gas company have been given title to the gas, not the property, and a gas company must not enter private land unless they have an access agreement, the gas company must arrange access for authorised activities with the individual (and access is not defined as above or below). The individual with Freehold interests in the land has title to use as much of the property below the surface as is necessary for their undertaking (which may be considerable depths when one considers the potential for subsequent impacts of such subsurface activities). These issues indicate there is enormous work still to be done on understanding and protecting individuals whose property is accessed via activities such as deviated drilling.

Further to this, is another complication. That without the gas company approaching the neighbour for access to their subsurface property, the neighbour may be unaware of the access, and for the neighbour to find out any details about that deviated well and if it is accessing their subsurface property, the government has further disadvantaged them by limiting their right to information by allowing the gas companies to keep the drilling details of the wells commercially in confidence for up to 5 years. ⁴

² Gray K and Gray SF, "The Idea of Property in Land" in Bright S and Dewar JL (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) pp 15-51 at p 19

³ Hunter, T., & Weir, M. (2012). Property Rights and Coal Seam Gas Extraction: The Modern Property Law Conundrum. *Property Law Review*, 71(2).

⁴ https://www.dnrme.qld.gov.au/__data/assets/pdf_file/0020/1512074/reporting-practice-direction-petroleum.pdf

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Overview of the process of issuing interests for land and gas

When establishing these processes of issuing title to land, the government (or the crown) reserves in every deed the right to gold and silver if it was present in the land parcel. The deed to the land would need to expressly reserve the rights to any other item. In the absence of the express reservation, the owner acquired title to the other items.

Some individuals have titles to property issued from the time of settlement and therefore they do not have the express reservation to other items such as the coal and gas or other minerals to the state, and therefore they have that right to them.

However, in the intervening years, there have been various legislative and statute changes that means with very few exceptions all 'minerals' (very broadly defined) above and below the land have been reserved for the state.

It is this particular interest in the 'minerals' (coal and gas in particular) that is of issue in this article.