

Energy & Resources Alert

Strategic Cropping Land Act commences

January 2012

From 30 January 2012, Queensland Coal Seam Gas (**CSG**) exploration and production projects determined to be on strategic cropping land (**SCL**) will face further regulatory restrictions, assessment costs and delays under the new *Strategic Cropping Land Act 2011* (Qld) (**Act**) and executive officers will be personally liable for company breaches under SCL offence provisions.

Background and impact on CSG projects

In early 2010, the Queensland Government released an initial discussion paper detailing plans to implement a framework to protect SCL. Since then, the Queensland Government has released an SCL policy framework and on 6 December 2011, the Act was given assent by the Governor in Council and will commence on 30 January 2012.

On commencement of the Act, CSG proponents are likely to be subject to compliance costs including potential assessment delays, mitigation expenses and the risk of a development being prohibited. These compliance costs should be considered at the outset of any proposed CSG project and when making an application to move from an exploration to production tenement.

Assessment process for CSG projects

Once the Act takes effect, CSG proponents must undertake an assessment to determine the extent to which a proposed project will impact on SCL.

1. **(Determining if project is on potential SCL)** – The first step in the assessment process is to determine whether the project is on land that is potential SCL. Trigger maps identifying SCL are available from the Department of Environment and Resource Management (**DERM**) website at www.derm.gov.au. If after consulting the trigger maps, proponents:
 - a. are satisfied that their project will not be on SCL, then no further assessment is required;
 - b. are satisfied that their project will be on SCL, then proponents must assess the impact of the project on SCL; or
 - c. determine that their project may be on SCL, then the zone should be identified and the associated SCL criteria consulted. If proponents still question whether the project is on SCL, then an application may be made to the Chief Executive to make a determination through an on-ground assessment of the land.
2. **(Determining if project will impact on SCL)** – Different impact rules apply for Protection Areas and Management Areas:
 - a. Protection Areas – If the project is on land that is SCL within a Protection Area, then proponents must not permanently impact the land, except in Exceptional Circumstances.
 - b. Management Areas – If the project is on land that is SCL within a Management Area and the land has a history of cropping, then proponents will be required to avoid and minimise to the maximum extent possible, any temporary or permanent impacts on SCL. This may include mitigation arrangements.

SCL will be temporarily impacted where the land is not permanently impacted and the project only

prevents cropping of the land for up to 50 years. For example, gas wells and pipelines will generally not impede the SCL from being cropped for more than 50 years.

SCL will be permanently impacted where the land cannot be restored to its former SCL status or the impact will prevent cropping of the land for 50 years or more. For example, infrastructure such as water storage ponds and gas compression stations will generally impede the SCL from being cropped for at least 50 years. Other mining activities such as the storing of hazardous mine wastes, tailing dams, overburden or waste rock dumps will also be considered to have a permanent impact.

3. **(Determining if there are Exceptional Circumstances)**
- Proposed CSG projects will not be permitted to be carried out where they will permanently impact on SCL in a Protection Area unless Exceptional Circumstances can be demonstrated to the Minister. This may include circumstances where the project will present an overwhelmingly significant opportunity to the State and the benefit outweighs the State's interest in protecting the SCL. It is expected that a declaration of the Minister for Exceptional Circumstances will be uncommon.

A CSG Project that is declared by the Minister to be an exceptional circumstance is required to still make all efforts to avoid and minimise any impacts on SCL.

Transitional arrangements

If a CSG project was not considered a transitional project and did not have final environmental approvals by 31 May 2011, then proponents will not be able to rely on transitional arrangements, but will rather be subject to the full effect of the Act.

CSG projects co-existing with SCL

CSG projects in Management Areas and Protection Areas that are determined to be Exceptional Circumstances must mitigate any permanent impacts on SCL. This will include either, or a combination of:

- payment to the mitigation fund – which is to be a collective fund for the benefit of cropping productivity; and
- entering into a mitigation deed – which must include specific mitigation and periodic reporting requirements.

DERM has suggested that some CSG proponents are already undertaking positive efforts to facilitate the co-existence of their projects with SCL. For example, some CSG proponents are increasing the spacing between wells and adopting a flexible approach to the placement of wells to ensure that the land can be rehabilitated so as to minimise any loss to the agricultural value of the land.

Moving from exploration to production

CSG projects moving from an exploration stage to a production stage will be subject to the Act. This means that where a proponent holds an Authority to Prospect (**ATP**) and they desire to make an application for a Petroleum Licence (**PL**) to commence production, the application for a PL will be subject to the full effect of the Act.

The Act expressly provides that no liability or compensation can be sought for any loss or damage arising from the introduction of the Act.

Powers to require compliance

In respect to an SCL offence, the Chief Executive has a number of enforcement provisions to ensure that the Act is complied with including powers to issue compliance notices:

- (Stop work notices)** – If an authorised person reasonably believes that a person has committed or is involved in an activity that is likely to result in the commission of an SCL offence, then the authorised person may issue a stop work notice requiring the recipient to cease committing the suspected offence or not to commit that type offence again.
- (Restoration notices)** – If an authorised person reasonably believes that a person has committed or is involved in an activity that is likely to result in the commission of an SCL offence, then the authorised person may issue a restoration notice requiring the recipient to rectify the matter.

The Act also provides authorised persons, in certain circumstances, the broad authority to enter project land to search, inspect and monitor amongst other things.

'Executive officers' to be personally liable for company breaches

The executive officers of a corporation have a duty to ensure that the corporation complies with each provision of the Act to which an SCL offence is created. Each of the executive officers also personally commits an offence where the corporation commits an offence.

The definition of executive officer under the Act is likely to have wide ramifications as it will cast most employees who are concerned with or take part in management of a corporation as an executive officer. This means that an employee who is merely involved in a management decision in relation to an SCL offence may be held personally liable despite not being a director of the corporation.

Executive officers can rely on a defence to any personal liability where an executive officer can prove that:

- a. if the officer was in a position to influence the conduct of the corporation in relation to the SCL offence – the officer exercised reasonable diligence to ensure the corporation complied with the SCL offence provision; or
- b. the officer was not in a position to influence the conduct of the corporation in relation to the SCL offence.

The penalties established under the Act are consistent with the levels and types of those under the *Environmental Protection Act 1994* (Qld).

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Proposed stamp duty on transfer of Queensland exploration tenements

Pending the enactment of legislation, changes to the duty treatment of Queensland exploration tenements will be introduced and have retrospective effect from 10:30am on 13 January 2012 (**Start Time**).

Current duty treatment of exploration tenements

Currently duty is generally payable on the transfer of mining and petroleum rights, however, the transfer of exploration permits is generally not dutiable and not treated as land for landholder duty. This is because prospecting or exploration permits and authorities do not fall within the definition of statutory licence or land under the *Duties Act 2001* (Qld) (**Duties Act**).

Proposed changes to the duty treatment of exploration tenements

The Office of State Revenue has advised that, pending the enactment of legislation and retrospective from the Start Time, the following will be included in the definition of statutory licence and land under the Duties Act:

a. prospecting and exploration permits under the *Mineral Resources Act 1989* (Qld);

- b. authorities to prospect under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (including those under the previous *Petroleum Act 1923* (Qld));
- c. geothermal exploration permits under the *Geothermal Exploration Act 2004* (Qld); and
- d. GHG exploration permits under the *Greenhouse Gas Storage Act 2009* (Qld).

This means that:

- a. **(Transfer duty)** – Transfer duty will be payable on agreements for transfer and transfers made or entered into at or after the Start Time for exploration tenements including direct and indirect acquisitions. However, duty is not expected to be payable on the transfer of an exploration tenement where the agreement is entered into before the Start Time and the exploration tenement is transferred after the Start Time pursuant to the agreement.
- b. **(Landholder duty)** – From the Start Time, landholder duty will be payable on the acquisition of shares in a corporation or units in a listed unit trust where that corporation or listed unit trust directly or indirectly holds exploration tenements.

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