Thynne Macartney

Newsletter

July 2017

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Landholders bound by gas agreement they didn't sign

By Ari McCamley, Agribusiness Partner

The Land Court has handed down its first decision on an application that allowed a gas field development to proceed on private land without the landholders' agreement.

QGC wanted access to an unimproved property south of Chinchilla to drill six gas production wells.

On the uncontradicted evidence of QGC's valuer, the Land Court ordered the payment of $35,000 in compensation and imposed conditions to regulate the parties' future relationship.

Most unfortunately, the landholders were not represented at the hearing and did not tender any evidence.

The decision creates an undesirable precedent and reminds landholders of the need to engage carefully in the resources-friendly land access regime that exists in Queensland.

The law

Queensland's resources legislation is premised on the principle that the extraction of resources including gas by private companies is to be encouraged to generate royalties for the State. It is an offence for anyone, including a landholder, to obstruct a resource company from carrying out authorised activities without a reasonable excuse.

Generally, landholders cannot say "no" to gas field developments. Instead, they are entitled to compensation, but not in an amount proportionate to the value of the target resource or the resource company's anticipated profits. Landholders' compensation entitlements are limited to the monetary impacts the interruption will have on their existing asset values and cash flows.

Resource companies can compel landholders into negotiations to allow the developments to proceed. The Land Court becomes involved if either the gas company or the landholder refers a failure to reach agreement to the Court for determination.

Failure to agree

The reported decision does not detail QGC's attempts to reach agreement, but states that one of the landholders was in Switzerland and reveals that neither were actively represented by lawyers at the hearing.

By referring the failure to reach agreement to the Land Court, QGC obtained immediate access to begin work.

Compensation assessment

To secure the greatest amount of compensation, a landholder needs to prove up the costs, damages and losses the landholder will incur because of the proposed activities. Usually, this is done with the assistance of an experienced valuer, accountant and lawyer. And the good news for landholders is that the gas company is obliged in most instances to cover these costs.

However, many landholders are still not obtaining professional assistance.

Of the $35,000 awarded, $5,000 was for disturbance during construction. The Court said it was "doing the best that it can" in the absence of any evidence as to the actual impact of construction activities. In the usual case, that impact could include significant losses of profit and additional costs as the landholder works around the gas company's disruption.

Approximately $7,000 was awarded for the decline in value of the area occupied by gas infrastructure and access tracks and the balance approximately $23,000 for the decline in value (assessed at 10% of market value) of the balance of the property.

Gas companies have long sought recognition of their view that a gas field development has little impact on the productive capacity and therefore value of what they call the "balance land". In this case, QGC found an opportunity to obtain a Land Court ruling on the issue in the absence of any evidence or submissions from the landholder.

In other words, only QGC presented its case, which went uncontested.

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Other conditions

The Land Court also imposed the terms of the Queensland Government's template conduct and compensation agreement as conditions binding on the landholder, QGC and their successors in title for the life of the gas project.

Since that template was released by the then State Government in 2010, Thynne + Macartney has been warning landholders about its shortcomings.

It omits certain conduct rules (for example, those related to weed control) that most people (including many gas companies) accept are common sense, weakens the landholder's bargaining position if ever the gas company proposes to expand its project, and fails to protect the landholder from liability arising from things that go wrong.

The Land Court might have been persuaded to impose more balanced conditions had the landholders been adequately represented.

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Implications

The case is a reminder that a gas company can approach a landholder and accurately say, "whether you like it or not, we will gain access to your property and, whether you sign it or not, in the end there will be a conduct and compensation binding on you and future owners of your property."

The landholders' response should be to secure the maximum amount of compensation to which they are entitled, to impose comprehensive conduct rules on the gas company to give the parties the best chance of successful co-existence and to avoid surrendering rights to further compensation if something goes wrong or the gas company extends its project in the future.

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Privately protected land to be introduced in Qld

By Kasey Solar, Agribusiness Lawyer

Special wildlife reserves are to be introduced for the protection of land with "outstanding conservation value" in Queensland. If passed, the legislation will protect a new class of privately funded and managed areas (on freehold and leasehold tenure) from resource activities and timber harvesting, for example.

The proposal is intended to encourage private investment in Queensland's protected areas.

As proposed, a declaration of a special wildlife reserve will not be able to occur without the landholder's agreement but, if a special wildlife reserve is declared, a legally binding conservation agreement and associated management program will be registered on title and will "run with the land". Going forward, these agreements will have consequences for sellers and buyers of affected properties.

The legislation does not clearly define "outstanding conservation value". Resources groups are concerned that the legislation will provide broad powers to the Department in determining whether a declaration should be made to the detriment of resource tenement holders' interests.

The proposed legislation was referred to a parliamentary committee on 14 June 2017, which is due to report by 11 August 2017.

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Land Access Ombudsman to oversee disputes

By Alex Ramsey, Agribusiness Senior Associate

Landholders who are parties to a Conduct and Compensation Agreement (**CCA**) or Make Good Agreement (**MGA**) could soon be able to seek assistance from a Land Access Ombudsman, if a proposal currently before Parliament is passed.

Under the proposal, a new Land Access Ombudsman's Office would be created to oversee disputes between landholders and resources companies who have already signed a CCA or a MGA. The Ombudsman would be given the power to call and oversee meetings, conduct interviews and seek advice from experts in making a recommendation to the parties as to how the dispute should be resolved.

However, there is a limit to these powers given that any recommendations made by the Ombudsman are not binding on the parties but can be used as evidence in later Land Court hearings.

While the proposal is a step in the right direction, it doesn't replace the security which a well drafted and negotiated CCA or MGA provides to landholders.

The proposal is currently being considered by a parliamentary Committee which is due to report to Parliament in early August.

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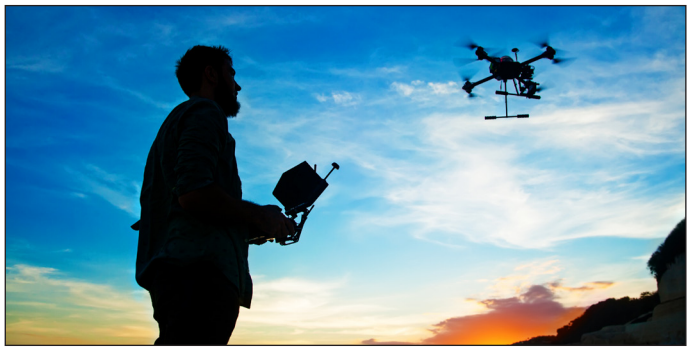
Congratulations Hannah

Thynne + Macartney is pleased to announce the promotion of Hannah Byrne to Associate. Hannah joined the Agribusiness team over four years ago and her promotion is recognition of the commitment she has shown in assisting the firm's farming and grazing clients in purchases and sales of rural properties, negotiations with mining and gas companies, and plans for the succession of their family business.

In recent years, Hannah has developed a specialisation in the area of carbon trading. She regularly advises landowners on how to establish and maintain a carbon offsets project on their land and has presented at the Agforce Carbon Farming Workshops in Quilpie and Eulo, the 2017 Australian Property Institute Rural Property Conference in Hervey Bay and to the Suncorp Agribusiness team in Brisbane. Congratulations Hannah!

Can landholders stop drones invading privacy on farms?

By Ari McCamley, Agribusiness Partner



Drones have become not only readily accessible but also affordable, compact and easy to operate. $2,000 can buy a drone capable of flying more than six kilometres with automated guidance, stabilisation and collision-avoidance systems and high-definition cameras.

As farmers consider how to use drones beneficially in their businesses, others on the outside are using them to peer in.

In 2013, animal welfare group Animal Liberation was reported by the ABC to have purchased a drone and used it to capture footage of the treatment of birds on a free-range egg farm. This year, the Wilderness Society used a crowd-funding campaign to raise $33,266 to buy three drones to film land clearing in Queensland, New South Wales and Western Australia. The goal: to "edit footage into compelling packages" to influence public debate and law making.

But has the law kept up to protect businesses and individuals from drone surveillance that invades their privacy?

Who regulates the use of drones?

Australian regulations, policed by the Civil Aviation Safety Authority (CASA), are concerned only with protecting the safety of other aircraft, people and property from physical harm. CASA sees the privacy implications of drone use as beyond its remit.

In the context of activist groups spying on farms, the Commonwealth *Privacy Act* is unhelpful, with numerous exceptions to its privacy principles for almost anything done by small businesses, political or media organisations and individual citizens.

Internationally, the United States is leading the way developing laws to protect against drove surveillance. Twelve States now regulate to address the surveillance capability of drones. So-called "ag-gag" laws limit journalists and activist groups from using drones to capture unauthorised images of farming enterprises. The Idaho version of this law, for instance, requires a landowner's permission before a "farm, dairy ranch or other agricultural industry" can be monitored by a drone.

> What protects businesses and individuals from drone surveillance that invades their privacy?

Developments in the Australian courts

Australian courts have considered several scenarios where an invasion of privacy could invoke other actionable legal rights.

Airspace above private land may be considered private property, to the extent that the airspace is necessary for using the land below it. The entry of a drone into that space could therefore give rise to an action in trespass. However, by flying higher, the higher-resolution drone operators could at least in theory overcome any challenge.

In a leading case, the Court found that no trespass was committed by a Cessna aircraft flying over a property to take an aerial photograph, but suggested that constant or ongoing surveillance could amount to actionable nuisance.

In a case from Tasmania that went to the High Court, two unknown trespassers filmed the inside of an abattoir where possums were legally slaughtered. The recording fell into the hands of the ABC, which intended to broadcast excerpts. The abattoir owner took court action to prevent the broadcast but failed, the High Court not recognising any legal right based on an invasion of privacy but indicating that such right could develop in the future.

In particularly compelling circumstances, it could be open for a court to restrain a proposed use of drones or award damages to a landholder based on an invasion of privacy, particularly where the landholder's activities are lawful and the intrusion would be highly offensive.

Self-help?

In 2013, the town of Deer Trail, Colorado was reported in the Sydney Morning Herald to be considering licensing drone hunters and paying US$100 bounties to those who could produce the fuselage and tail of a downed drone. For whatever reason, the residents voted against the proposed ordinance.

In Australia, no law permits such destruction of another's property. A drone owner could successfully sue anyone who deliberately destroys a drone. Further, wilful damage to another's property constitutes a crime punishable, in Queensland, by up to five years' imprisonment.

As drone technology and its popularity advances rapidly, the need for laws to protect the privacy of individuals and businesses becomes even more apparent. Until lawmakers provide some certainly, the extent to which landholders can insist on privacy from roving drones remains open to debate.

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Talking it over: A change in approach for farm debt in Qld

By Hannah Byrne, Agribusiness Associate

From 1 July 2017, a legislated farm business debt mediation process requires providers of rural credit to offer primary producers access to mediation prior to the creditor commencing enforcement action.

Who and what does it apply to?

The new regime applies to "farm business debts" being moneys owed by a farmer that were borrowed for the purpose of conducting a "farming business" and is secured by a "farm mortgage".

The new approach

Under the new regime, a secured lender must first serve an 'Enforcement Action Notice' on the farmer which notifies the farmer of the lender's intention to take enforcement action and that the farmer may request mediation.

After receiving the Enforcement Action Notice, the farmer has 20 business days to request a mediation. A farmer is entitled to have one or more advisors at a mediation.

Parties must bear their own costs of the mediation and share equally the cost of the mediator.

The Queensland Rural and Industry Development Authority (**QRIDA**) (previously QRAA) will receive copies of the Enforcement Action Notice and any mediation request, oversee the mediation process and be responsible for accrediting mediators.

Where the regime applies, it does not prevent the parties seeking to resolve issues informally or by other means but the secured lender is prevented from taking enforcement action without mediation unless an exemption certificate is in force.

QRIDA will issue exemption certificates if the applicant mortgagee satisfies certain prescribed criteria in the Act, including where satisfactory mediation has taken place or where a mortgagor farmer has refused to mediate.

Exclusions

The Act will not apply in circumstances where the farmer is bankrupt, subject to a creditors' petition, is a corporation in external administration or where the farmer and secured lender have previously taken part in the mediation process under the Act for a particular debt and there has been further default.

Impact

The new regime have wide reach and will afford considerable protection to farmers.

Practically however, it may lead to secured lenders giving notice of enforcement action to trigger formal mediation rather than negotiating informally in the first instance.

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Electronic NVDs introduced

By Kasey Solar, Agribusiness Lawyer

Meat and Livestock Australia's (**MLA**) Livestock Production Assurance (**LPA**) program is moving towards an electronic model.

From June 2017, electronic National Vendor Declarations (**eNVD**) were made available at no cost to LPA accredited producers. The new platform also offers producers electronic access to animal health declarations, Meat Standards Australia declarations and National Feedlot Accreditation Scheme declarations.

In addition, from 1 October 2017, producers who want to gain LPA accreditation or keep their LPA accreditation status will be required to complete online learning modules and a short assessment (at a cost of $60 plus GST) every three years. Producers who want to participate in the LPA program will need to have a Farm Biosecurity Plan and will also be required to demonstrate that they have implemented on-farm systems which ensure their livestock handling practices are consistent with the requirements set out by the Australian Animal Welfare Standards and Guidelines.

According to MLA, the online learning modules are designed to help upskill participants and ensure the continuation of Australia's high quality meat production industry.

The new electronic LPA program, including the eNVD, is designed to eventually replace paper National Vendor Declarations (**NVD**) although no specific phase out date has been announced.

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