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**Missing the Connection: how SRLU
Policy Fragments Landscapes and
Communities in NSW**

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MISSING THE CONNECTION

How SRLU Policy fragments landscapes and communities in NSW

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In late 2010, the Environmental Defenders Office ('EDO') released a report on the state of planning law in NSW. It suggested that detailed analysis 'revealed a failure of the current system to balance social and environmental considerations against the Government's desired economic and statistical outcomes.'¹ In 2012, responding to widespread community opposition to coal seam gas ('CSG') mining in rural and regional NSW, the O'Farrell government drew on such critiques when announcing its proposed suite of law reforms to address what it saw as flaws in the planning process.² The Strategic Regional Land Use ('SRLU') Policy (regarding multiple geographically-specific Strategic Regional Land Use Plans ('SRLUPs')) is a key component of these proposed reforms.³ The Draft SRLUP for the Upper Hunter region ('the Plan') was one of the first two plans⁴ for the state. It represented 'the government's proposed framework to support growth, protect the environment and respond to competing land uses, while preserving key regional values over the next 20 years.'⁵

This article contends that there are gaps in both the logic and detail of the Plan's mechanisms that disconnect people from place. These gaps indicate that the necessary tools for the Plan's key functions — information and evaluation — belie its claimed neutrality. There are substantial knowledge gaps and substantial imbalances in the assessment process. Scientific and economic research indicates that the known disruption to land approved for CSG mining is potentially harmful to both the hydrological and geological systems on which local communities and economies depend.⁶ Given that the policy disregards the physical and cultural connections between communities living in the Upper Hunter and the lands, waters or 'places' on which they depend, this is a major concern.

The first section of this article outlines the claims and objectives of the policy in general terms before drilling down into its detail in the second section to explore the conceptual framework of the policy and the gap between the vision the NSW government has for the Upper Hunter region as presented in the Plan, and that of regional communities themselves. The third section questions the meaning of 'protection' used in the SRLUP with regard to environmental sustainability and compliance.

The Strategic Regional Land Use Policy

The SRLU Policy is to be implemented through Regional Plans because the reform is designed to create enduring plans that are responsive to the specific social and environmental conditions of particular geographical regions. At its heart, the policy aims to provide greater protection for 'the State's most valuable land as well as the critical water sources which supply it' from the impacts of increased mining and proposed CSG operations.⁷ The policy is accompanied by an Aquifer Interference Policy and two Codes of Practice for Coal Seam Gas relating to Fracture Stimulation Activities and Well Integrity.⁸ To give this suite of policies statutory force, subsequent amendments are required to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* ('Mining SEPP') and the *Environmental Planning and Assessment Regulation 2000* ('EPA Regulation').

Under the SRLU Policy, land identified as Strategic Agricultural Land ('SAL') on account of being 'highly productive' can be classified under two categories: a) Biophysical SAL (having a rare combination of natural resources highly suitable for agriculture); and b) Critical Industry Clusters ('CICs') which are high localised concentrations of productive (including viticultural and equine) industries within the same region that contribute to the identity of that region and provide significant employment opportunities.⁹ CIC criteria also include an area's potential to be 'substantially impacted by mining and CSG proposals', the result being that any development proposed for that Strategic Land should trigger a 'Gateway assessment process.'¹⁰

The Gateway assessment process is to be an 'independent, scientific and upfront assessment of the impacts of state significant mining and CSG proposals on Strategic Agricultural Land that will be undertaken prior to the lodgment of a development application'.¹¹ The assessment is to be undertaken by an independent Mining and Coal Seam Gas Gateway Panel comprising experts in the fields of agricultural science, hydrogeology, mining and petroleum development (yet to be appointed). The Gateway process, however, will only apply to mining and CSG proposals that are: a) a State significant development ('SSD') (Clauses 5 and 6 of Schedule 1 of the *State Environmental Planning Policy (State and Regional Development) 2011*) which sets out mining and petroleum activities declared to be SSD; b) developments requiring a new mining lease or petroleum production lease; and c) are on Strategic Land whether mapped in a Regional Plan or verified to fit the criteria to be classified as Strategic Land.¹² The Gateway process does not apply to coal or CSG leases and licences issued before the release of the policy on 12 September 2012.¹³

A new position of NSW Land and Water Commissioner has been created to provide independent advice to communities regarding exploration activities on Strategic Agricultural Land throughout the state. This includes

guidance to landholders and the community regarding mining and CSG exploration licences and activities, SRLUPs, 'regulatory approval and assessment processes, compliance and enforcement matters, landholder rights, access agreements and compensation, and the rights and responsibilities of exploration companies'.¹⁴ The Land and Water Commissioner will also supervise the finalisation and implementation of access arrangements,¹⁵ which are currently being developed in conjunction with key agricultural sector and minerals/petroleum industry representatives.¹⁶

On the surface, these processes appear to pave the way for better environmental protection for regions. However, 'the devil is in the detail'. The following section explores the conceptual framework of the policy and contends that contrary to its claims and objectives to balance social and environmental considerations with the government's own economic goals, the policy only serves to highlight the imbalance between them.

Drilling down into detail

It is one thing to understand what a specific policy is supposed to do; it is another to understand what it does. In the case of the SRLU policy, the gap between these is significant. SRLUPs belong to an emerging global trend in planning law to deliver environmentally and socially sustainable plans that 'identify the capacity of land for particular forms of development, and set long-term strategic goals and a blueprint for development of a particular region.'¹⁷ As legal researcher Katherine Owens remarks, strategic spatial planning is supposed to contemplate the big picture effect of the combination of 'individual development consents' with the 'cumulative effects of multiple projects at the regional level'.¹⁸ Consequently, the SRLU policy is designed to provide overarching information and an evaluative framework for the assessment and planning of competing and/or conflicting land use interests at regional levels. The language and process of the policy attempts to advance planning law from a poorly integrated and unsustainable process overseen by multiple government departments, lacking coherence and long-term perspective, into strategic, sustainable and regionally coherent plans that integrate the various social, economic and environmental dimensions of land use.¹⁹

In NSW, the conflicting land uses under these plans are 'strategic agricultural land use' and CSG and coal mining. The Upper Hunter Plan has deepened the conflict between advocates of these two modes of land use. In the process, it has thus far failed to deliver a sustainable and coherent long-term land-use plan for the region that brings certainty to communities and balances environmental considerations against economic outcomes. Since its announcement, the Plan has produced greater uncertainty, conflict and significant risk to both the sense of place that local communities have worked for decades to establish and the natural environment on which it depends.

Cynics might say that the concept of a regional sense of place is incompatible with the concept of the state's growth-oriented program of mining the minerals in the earth (to which it has ultimate legal title) and that the conflict is as interminable as it is inevitable. But there are alternatives. Compare the business-as-usual choices of the NSW and Queensland governments to the progressive approach of South Australia. There, the ideal of character preservation in regards to land use has recently achieved legal protection. On 18 January 2013, the *Character Preservation (McLaren Vale) Act 2012* and the *Character Preservation (Barossa Valley) Act 2012* came into force, protecting both wine regions from urban encroachment, mining and CSG exploration. These Acts are designed 'to ensure that activities that are unacceptable in view of their adverse effects on the special character of the district are prevented from proceeding'.²⁰ These Acts are part of that state's larger Strategic Plan which includes a vision for 'a strong and sustainable economy which builds upon our strengths'.²¹ The exclusion zones therefore are designed to ensure South Australia's world renowned wine regions remain productive and protected. A similar legal exclusion zone has been called for in the vineyards of the NSW Hunter Valley. Anti-CSG lobby groups including Lock the Gate and the Hunter Valley Protection Alliance argue that 'we need certainty and ... legislation to irrevocably protect the region'.²²

Calls to protect the Hunter Valley from mining have been ongoing since the first exploratory CSG well appeared adjacent to the vineyard village of Broke in 2004.²³ Protests began in earnest, however, when it became apparent that the most productive agricultural lands of the Hunter had also been identified as having 'high potential' to contain CSG in the Plan.²⁴ The grounds for ongoing opposition rest upon environmental concerns including: the possible contamination of aquifers and ground water; health risks to local populations; adverse economic effects of the destruction of valuable food producing land; age-old industries including viticulture, thoroughbred horse breeding and tourism; and the loss of long-established regional communities.²⁵

Conventionally, the conceptual framework of law regarding land use and land ownership is supported by the logic of a growth economy. This organises conflicts over land around the concept of profit, which promises increased returns on investment using a cost-benefit method of calculation. In the case of CSG mining, the logic of the cost-benefit approach to decision-making around land use is contested. Opposition to CSG mining reveals multiple and diverse values of land beyond its economic profitability. In submissions to the NSW government's parliamentary inquiry into CSG mining and in ongoing protests against the policy, there is ample evidence of individuals and communities valuing particular lands as unique places rather than as mere sites of fungible commodity deposits. Certainly, many of those same individuals and communities enjoy economically profitable relationships with the land in question. The economic base of human life cannot be anything other than the land and water.²⁶ However, the problem is not that land may be profitable; the problem is that the land is not only profitable. 'This is irreplaceable. The history in this valley is absolutely unique to Australia, and to think that ... the State Government would jeopardise that for a few bucks is just, you know words fail me.'²⁷

The commodification of land has long been taught in law schools, and promoted among the general community, and is now presumed to be necessary for the common good.²⁸ Indeed, the rationale for mining generally is based on the notion of the common good or public interest, with mining licences being granted to restore the economic value of mineral resources to the rightful owners, in the case of CSG to 'the people of New South Wales'.²⁹ However, an uncritical acceptance, indeed an embrace, of a very particular economic philosophy arguably warrants evidence of a sustainable track record if it is to underpin a long-term land use strategy. This is especially important when the risks of the associated land use transformation may harm the land and the water in ways that are at odds with the public interest (for example, the contamination of drinking water).

Economic critiques question the profitability of CSG mining by pointing to the absence within the Policy of mechanisms to perform the first task of its own method — calculating and deducting the total cost of the projects from the total benefits.³⁰ Without cumulative risk assessments that make it possible to calculate the total cost of CSG mining activities, any claims about profits are premature and fail even the conventional cost-benefit approach to land use planning. Accounting for total costs associated with CSG mining entails knowing what those costs are. Such costs include potential disproportionate environmental harms at site, project and regional levels.³¹ Scientific critics of the policy point out the fact that the physical systems in which mining already occurs (and is proposed) contain complex geological and hydrological processes and relationships that are not yet completely known and/or understood.³² In other words, the comprehensive 'information' on which a SRLUP is supposed to be based is not yet available. Thus, there is neither the conventional cost-benefit method of assessing proposed CSG activities nor any alternative method in the Policy. Thus instead of designing a Policy that rebalances the State's economic goals and the social and environmental needs of specific regions, the SRLUP Policy further entrenches imbalance by rendering it impossible to undertake genuine evaluation of the merits of a CSG mining proposal. Indeed, the SRLUP Policy all but guarantees approval of all CSG proposals.

The Gateway process is the evaluative mechanism of the Policy and it is here that we see the imbalance most clearly. A development application for State Significant mining and CSG development that requires a new or extended mining lease cannot be lodged and considered unless it has been issued with a Gateway Certificate (after assessment by the Gateway Panel) or until the land has been verified as not containing Strategic agricultural land.³³ The problem lies in the fact that no matter how questionable the application, the Panel does not have the power to refuse an application for a Certificate.³⁴ It must issue a Certificate either 'unconditionally' or 'subject to conditions'.³⁵ Previously under the first draft SRLUP released for public comment, it was proposed that the Panel would be able to refuse the issuing of a Certificate. This change represents a significant watering down of the Gateway Process, suggesting that there is no land deemed by the SRLUP as a no-go zone for exploration and mining/CSG production.

Under the Gateway process, the Panel is required to make an upfront assessment of the impacts of the mining/CSG proposal on agricultural activities and businesses. On what basis is that assessment to be undertaken if the impacts are cumulative or unknown? Since CSG mining is a relatively new industry in Australia, it is possible that the impacts of mining activities may not be only site specific but potentially also affect a greater proportion of a region. Communities have expressed concerns over how and whether data will be gained about the condition of groundwater and aquifer sources before and after CSG mining activities. While the Aquifer Interference Policy is seen as 'a key plank' to the SRLUP, it is essentially left to the Minister to provide appropriate advice to the Gateway Panel on the potential impacts on aquifers of mining, CSG extraction, exploration and other activities based on the minimal impact considerations set out by the Aquifer Interference Policy.³⁶ There is nothing in place, however, to ensure the quality of aquifers and groundwater after CSG activities have occurred and the operators moved elsewhere.

The Aquifer Interference Policy will stipulate how and where water associated with hydraulic fracturing operations is to be disposed of on a case-by-case basis. Of particular concern to communities, environmentalists and scientists are the alternative options currently listed including 're injection to an aquifer, discharge to a river, on-selling to a nearby industry, agricultural development or potable water supply'.³⁷ In addition to the question of disposal of wastewater from the production process, there is also the question of accidental contamination caused by drilling in the production process itself. Many aquifers contain naturally occurring untainted water sources and subjecting these to the risk of contamination by chemicals or naturally-occurring saline water could affect the ongoing integrity of the water source, as would allowing water from two differing sources to mix. As water researcher Dr Stuart Khan confirmed in a submission to the NSW government parliamentary inquiry into Coal Seam Gas:

drilling through aquifers, impervious rock and coal seam[s] risks 'interconnecting' otherwise confined aquifers. In such circumstances, aquifers holding large volumes of pristine water can be contaminated by mixing with other contaminated waters.³⁸

Addressing these issues is paramount if the NSW government wants to get the balance right as it claims to do in its SRLUP Policy.

Protection and compliance

Another major ongoing challenge in the implementation of the SRLUPs is the task of ensuring that the companies who conduct CSG activities comply with the Policy. Some companies are unresponsive to recent comments by the NSW government concerning specific changes to the Upper Hunter SRLUP.³⁹ On 19 February

2013, the NSW government announced that new 'buffer zones' would come into effect to protect 'critical cluster industries' from CSG projects. Under the Upper Hunter SRLUP, regions such as Broke-Fordwich and Pokolbin are listed under the Viticulture CIC which is supposed to ensure that they receive extra protection. In response to prolonged community campaigns against continuing CSG exploration in CIC regions, the NSW government intervened by announcing heightened protection measures by means of the introduction of exclusion zones.⁴⁰ Premier O'Farrell stated that 'two-kilometre buffer zones' would be introduced around equine and viticulture areas identified as 'critical industry clusters' as well as residential areas to prevent new CSG exploration, assessment and production activities for surface and underground works taking place.⁴¹ The Premier also announced that the Environment Protection Authority ('EPA') would be given new powers as an industry watchdog to revoke CSG licences. Likewise, the state's Chief Scientist was appointed and is currently undertaking a review of the impacts of CSG mining not covered by these reforms.⁴²

Despite these proposed changes, exploratory drilling continues in the Broke vineyards area.⁴³ It was also reported in December 2012 that energy company AGL would discontinue hydraulic fracturing in its planned 66-well drilling program between Liverpool and Campbelltown in Sydney.⁴⁴ Yet by January 2013, an AGL spokesperson stated that the company:

would prefer to use a 'horizontal drilling' technique to extract gas, but reserves the right to revert to 'vertical drilling' which would lead to 'well stimulation', or fracking.⁴⁵

At issue here is not that AGL may have changed its plans, but that it has not been transparent in its decision-making and nowhere in the current SRLU Policy is it or any other mining/CSG company required to be accountable to communities.

Certainly companies are required to prepare an Agricultural Impact Statement ('AIS') to demonstrate that impacts on agricultural land and resources will be avoided or reduced to acceptable levels (though these levels have yet to be set out).⁴⁶ Likewise, it is suggested that the AIS must show evidence of effective early engagement with stakeholders to 'clarify potential issues, minimise the risk of conflict and provide additional information to assist with preparation of the AIS', but there is nothing in place to actually ensure that this has occurred.⁴⁷ This raises concerns about how, if at all, the limited protections for CICs in the SRLU Policy are enforceable when the companies conducting CSG activities already choose to risk their licences in the belief that the NSW government will do little to stop them.

Conclusion

Despite consulting widely in the drafting process, the Upper Hunter SRLUP appears to have failed to allay the ongoing concerns of individual land holders, communities, farmers' groups, heritage groups, environmentalists and scientists. By leaving no room for the rejection of CSG proposals in the Gateway assessment process, and by excluding vital food production land from 'protective' clusters, the Policy has already failed to deliver not only its own stated objectives but also the needs of all but two stakeholders: those of the government itself and the mining proponents. This failure invites substantial revision of the Policy and the Regional Plans.

As such, the promised reform of the worst features of planning law is yet to be seen. Rather than substantiating its claims to adaptive and strategic planning at regional levels over the long term, the policy's design is unlikely to do more than deliver short-term benefits at potentially disproportionate costs over the long term. The protection and security of all non-economic values of land are absent from the Plan. Most notable by its omission is the preservation of a regionally-specific sense of place and the natural environment on which it depends. The NSW government has pledged to further clarify its intentions in a revised SRLUP. However, as the activities of CSG companies in the Broke region indicate, until compliance measures are introduced, risks to communities and environments remain.

When we look at landscapes, we can see land-use practices and the policies that prescribe them as an integrated system of law 'in action'.⁴⁸ Where we see degraded landscapes, there are most often laws and policies which demonstrate their foundation on either a lack of information about local biophysical systems or else a disregard for those systems despite having adequate information. Landscapes tell the truth about land laws. This fact often comes as a surprise to those who forget that people are physical creatures who depend physically on the land for all our needs. But the connection between people and land is more than simply biological and economic, it is also cultural and personal — it is 'place-bound'. In short, connections between people and place are missing from the SRLU Policy. Without these components, the NSW government cannot hope to adequately address ongoing concerns of communities in Broke nor elsewhere in NSW.

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7. NSW Department of Planning and Infrastructure, above n 5, 2.

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10. *Ibid* 23. Note that the concept of a 'gateway' in the planning process was also introduced into another area of planning system in NSW, the Local Environment Plan ('LEP') in 2009. Although a different area of planning law and policy, it uses the concept of a 'gateway' for a similar purpose: the consideration of proposed development at an early stage prior to the submission of a complete Development Application ('DA').

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