On 12 September 2012, the NSW Government released the Strategic Regional Land Use Policy which aims to provide greater protection for valuable agricultural land and water resources from the impacts of mining and coal seam gas proposals, and better balance competing land uses. Under these reforms, a new Gateway assessment process has been introduced for all State significant mining and coal seam gas proposals on Strategic Agricultural Land.

The NSW Government has commented that the Policy “fits well” with the new approach set out in the Green Paper A New Planning System for NSW designed to place greater emphasis on early community engagement and upfront strategic planning. More details about the Green Paper are provided in a Corrs In Brief available here.

IDENTIFYING STRATEGIC LAND

Strategic Land is considered to be highly productive land that has unique natural resource characteristics (such as soil quality and reliable water access) or socio-economic value (such as high productivity, infrastructure availability and access to markets).

To be Strategic Land, a site must satisfy the Strategic Land Criteria set out in the Regional Plans. Any land may be mapped and identified as Strategic Land under a Regional Plan or else may be verified as Strategic Land in accordance with the verification process.

In circumstances where a Mining Proposal is to be located on Strategic Land, the Gateway assessment process will be triggered.

IMPLICATIONS OF THE GATEWAY

The Gateway involves an independent, scientific and upfront assessment by the Mining and Coal Seam Gas Gateway Panel (Panel) of the impacts of Mining Proposals on Strategic Land. Before a development application may be lodged for a Mining Proposal, a Gateway Certificate (Certificate) must first be obtained from the Panel.

The Gateway process does not apply to Mining Proposals:

1. where the proponent verifies that the subject site does not satisfy the Strategic Land Criteria (irrespective of whether or not the land is mapped as Strategic Land in a Regional Plan), or

More details about the Policy are provided in a Corrs In Brief available here.
In considering the application for a Certificate, the Panel will assess the proposal against specific criteria set out in Regional Plans, including whether the Mining Proposal would significantly reduce the agricultural productivity of the site or impact productive industries in the region.

Interestingly, the Panel does not have the power to refuse an application for a Certificate. Instead, the Panel must issue the Certificate either unconditionally or subject to conditions; in the latter case the proponent must address these conditions during the development application process. Once the Certificate is obtained, the Mining Proposal may proceed to the development application stage.

Under the earlier draft Policy released for public comment, it was proposed that the Panel would be able to refuse issuing a Certificate. This change represents a significant watering down of the Gateway process and provides more certainty to Mining Proposals. It also raises questions about the role of the Gateway and whether it adds any value to the assessment process or merely duplicates the assessment that will be undertaken during the development application stage.

What is clear is the Gateway will cause further delays for the granting of planning approvals to Mining Proposals because it adds another level of bureaucracy and assessment. The extent of these delays is uncertain as the Policy does not give indicative timeframes for the assessment and determination of Gateway applications. However, having regard to the fact that the State’s gas supplies are expected to run out in 2017, any delays experienced at the assessment stage will have obvious implications for the looming gas shortage and, consequently, gas prices.

Further, depending on the presence and scope of any appeal rights (on which the Policy is silent), the Gateway determination itself or any prolonged delay by the Panel in making the Gateway determination may also become the subject of Class 4 proceedings in the Land and Environment Court.

For instance, depending on the wording of the amendments to the Mining SEPP, the verification process or the Gateway determination may be considered by the Court to be a jurisdictional fact and, therefore, reviewable. This may result in legal challenges whereby the Court could determine the existence or non-existence of a fact de novo (on the merits). Any such proceedings would again delay the approval of Mining Proposals and the delivery of resources.

**HOW DOES THE VERIFICATION PROCESS OPERATE?**

Due to the regional scale of the mapping of Strategic Land in the Regional Plans, appropriate measures have been implemented to provide for site-specific verification that particular sites do in fact meet the Strategic Land Criteria, despite being mapped as Strategic Land. In practice, this means a proponent may challenge the identification of its site as Strategic Land in the relevant Regional Plan through the verification process.

Where land is located outside mapped areas of Strategic Land, the proponent of the Mining Proposal must nevertheless verify whether the proposed site meets the Strategic Land Criteria. This infers that the Gateway process applies to Mining Proposals on any regional land in the State provided that the Strategic Land Criteria are satisfied. For certainty, landowners may apply for a site verification certificate to confirm whether or not their land is Strategic Land.

Although the details of the verification process will be set out in amendments to the Mining SEPP, it appears that this process may have the effect of adding another tier of complexity for proponents of Mining Proposals simply to determine whether the Gateway applies. For example, two soil experts may have different opinions about the same land and whether it satisfies the Strategic Land Criteria, but whose opinion will prevail, is it reviewable and, if so, by whom? Proponents of Mining Proposals may seek to verify that the site is not Strategic Land to avoid the Gateway, but if landowners or environmental groups are able challenge the verification, such proposals will be even further delayed.

**DOES THE POLICY STRIKE THE RIGHT BALANCE?**

The Policy has been described by Nationals’ Leader Andrew Stoner as implementing “the strongest and most comprehensive set of regulations around mining and gas extraction in the nation, if not the world”.

The Policy has been criticised by farmers and environmental groups for failing to quarantine agricultural land from mining activities and adequately protect water resources. On the other hand, coal and CSG industries have complained about the costs of complying with the Policy and the delay it will cause to the approval and delivery of projects. As a result of the criticisms from opposite ends of the spectrum, NSW Premier Barry O’Farrell has inferred that the Policy has got the balance right.
Through the introduction of the Gateway, the Panel is required to make an upfront assessment of the impacts of Mining Proposals on agricultural activities and businesses, as well as on water resources on advice from the Minister for Primary Industries in accordance with the Aquifer Policy. These measures have been implemented to protect prime agricultural land and water resources.

The draft Policy released for public comment imposed far more stringent requirements on the coal and CSG industries than the implemented Policy. As such, the impacts on these industries could have been much more significant.

While adding costs and causing further delays to the delivery of coal and CSG resources through the introduction of the Gateway, in practice these reforms simply bring forward the consideration of the environmental impacts of Mining Proposals, but they may duplicate the assessment process. Importantly, the Policy does not establish “no-go zones” that prohibit Mining Proposals which allows the Panel and the consent authority to consider the impacts of a proposal on a case by case basis.

The Policy’s release has ended the NSW Government’s moratorium on the use of fraccing and the issue of exploration licences. Since the release of the Policy, renewals for 22 outstanding exploration licences have been granted to mining companies including Santos, AGL Energy and Metgasco.