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Property Rights Australia Submission on the Consultation Regulatory Impact Statement - Strategic Review of the Water Act 2000

Property Rights Australia (PRA) was formed in 2003 to provide a strong voice for landowners with regard to property rights issues. It aims to promote fair treatment of landowners in their dealings with government, businesses and the community.

Our philosophy is that if the community (or business) wants our resource for any other purpose such as environmental protection then the community must pay fair and unsterilised value for it.

Most of our members are in Queensland but we have members in all States.

SUMMARY

Property Rights Australia would like to say at the outset that for such deep and wide ranging amendments to the Water Act very much more time and consultation should occur than is possible in the timeframe. Groups of affected irrigators need to be consulted. Make good provisions for bore owners under present circumstances may never deliver anything approaching a satisfactory resolution. Deficiencies must be taken care of as they are identified. Government must take the lead on this.

It is our view that water licenses be necessary for all resources activities including associated and non-associated water. It is impossible for the State to plan for efficient and sustainable water use without knowing exactly what volumes each company is using and for what purpose.

The discussion paper makes it clear that changes will be made to the purpose of the Water Act as it relates to the allocation and management of water. It is impossible to know with any clarity what these changes are likely to be. The basic purpose of the Water Act has been the efficient allocation of water with economic, social environmental and fairness issues taken into account. Are we to assume that these are no longer relevant? The purpose of the Water Act contains many admirable aspects which ought to be retained. It would appear that it has been the administration of the Act and some Regional plans that have been at fault.

WATER ALLOCATION AND TRADING

PRA is adamant that no changes be made which allows allocations by Government to be made to individuals or entities who are not bona fide users of water but simply water traders.

Increasing rather than decreasing the amount of water that can be taken by resources companies without an entitlement is putting the water security of other users at risk. We would like to reiterate our policy that there is no substitute for a good, clean, reliable supply of bore water for stock, domestic and agricultural use where that is customary.

It is also contrary to natural justice for irrigators and other water users to suffer cuts to allocations while resources companies have the right to take or interfere with as much water as they like.

MAKE GOOD PROVISIONS

Property Rights Australia supports the legislated right to a "make good" agreement for landowners whose water supply may be affected by mining operations.

However in a first world country with supposedly secure property rights this should be the absolute minimum requirement in an area where landowners are forced to co-exist with other businesses with the potential to affect their most vital resource either with or without entitlement.

"Make good" agreements are as yet untested and will not prove to be the panacea that governments seem to think they will be.

Affected bores

The definition of "affected bores" will be crucial in determining the effectiveness of the policy and should include all bores in an aquifer, an aquifer flow line and interconnected aquifers. This should include reserve bores and unregistered bores whether equipped or not. Trying to play down the importance of a bore because it is

not in daily use is unacceptable. Every bore is part of the asset of a property. Minimal water substitution to support only present production as resources companies are attempting to do is not preserving the asset and future productivity increases of the landowner.

In the wake of the overly narrow definition of an “affected landholder” in the Mineral and Energy Resources (Common Provisions) Bill 2014 there is not necessarily confidence that all applicable bores will be covered.

Impairment

The definition of “impairment” of “new water bores” in the present legislation as where depletion has been greater than predicted in the relevant report is already an infringement on the property rights of landowners. S.412(2)(b) needs to be amended so that “new water bores” trigger “make good” provisions at the usual trigger level or when they go below the level predicted by the relevant underground water report whichever is the lowest fall.

The increasing propensity to offer less protection to “new” infrastructure such as bores and other restricted areas under the common Provisions Bill leaves landowners in a time warp. Increases in productivity, capital improvement and standard or living seem to be unacceptable to the Government and resources companies. This is a clear abrogation of landowner rights who are increasingly being treated as lodgers on their own land instead of owners with property rights. This blights property values and it is doubtful that full and fair compensation will ever be paid in many cases.

Cost benefit analysis

We note that a cost benefit analysis was done but only the cost to resources companies and Government have been considered. It is Property Rights Australia’s view that many of the costs appear to have been externalised to the agricultural and livestock industries

Speedy resolutions

Landowners whose bores have been impaired or depleted do not have time for protracted disputes. Water needs replacement in a matter of hours, not months or years after disputes have been resolved.

At the moment the effectiveness or otherwise of “make good” agreements depends on the agreement struck and the quality of the legal advice available to the landowner. They are as yet entirely untested and it seems inevitable that there will be dire situations which have unsatisfactory resolutions.

Many landowners have reported that they have spent much time, effort and money in good faith negotiations with resources companies and think they are near

agreement only to have the companies find a problem when landowners thought they were on the point of signing. This is typical of a time wasting tactic used to frustrate time poor landowners into signing unsatisfactory agreements.

Another tactic employed by some resource companies is not committing to completion of the “make good” measures proposed until they have been given permission to enter the property by the landholder for resource development even though the “make good” measures come under the Water Act which is an entirely different Act to the proposed Resource Activity. Landholders entering into “make good” provisions must be protected from this type of bullying tactic from the Resource Industry. Time frames must be legislated for agreed make good to be completed once an impairment is identified (maximum of 12 months). There does not appear to be a maximum time frame identified for completion of make good provisions once agreement is reached. This is a loophole that negatively impacts the landholder with the affected bore.

Protection of rights

The Water Act should contain some statutory provisions to protect some basic rights in recognition of the fact that water is an indispensible, time sensitive resource. “Make good” should also include purchase of property at a significant premium on unblighted market value if crucial water bores or a quantum of bore water available drops below an acceptable level. This right should be enshrined in legislation. Relying on commercial arrangements between landowners and companies will often lead to poor and unfair outcomes.

Some suggested measures, now posing as safety measures, seem to disadvantage landowners. Each and every bore that is capped by resources companies must be replaced with a similar bore with similar characteristics.

In the event of a catastrophic event the EPH should immediately stop production until outstanding concerns of landowners and other water users are addressed. Only calling a halt if companies cannot “make good” or provide substitution to other users is unacceptable. This is not a responsible way to deal with the future of the State’s water resource.

Provisions spelling out that pre compulsory registration bores can easily be brought into “make good” agreements in the future are needed. The present “best efforts” by resource companies under the present s.363 should not be the end point.

Monitoring

For such a vital resource the necessity to report to Government every three years is too long. Considering that monitoring is supposed to be ongoing reporting to Government and analysis should be ongoing so that any problems for other water users are picked up and dealt with in a timely manner. Bore owners should be

notified immediately if any potential problem arises long before the bore reaches any "trigger" level.

Resource companies being solely responsible for monitoring of impacts is unacceptable and bore owners should have access to independent evaluation at resource company expense.

Bore owners should not need to request ongoing monitoring and monitoring obligations should not be able to be varied by amendment to the Environmental Authority without this being made known in writing to the bore owners and agreed upon. This strengthens the impacted landholder's rights and provides an opportunity to object without having to be forever vigilant.

Water quality and quantity

Issues currently occurring for landholders whose bores have been identified in the 500 plus directly affected bores is that until the make good bore is drilled the depth, quantity and quality of water is largely unknown. This means quotations required to equip bores is largely unknown. One gas company has been offering landholders a bore to the Hutton Sandstone with $50 000 cash to equip, when quotations from companies to equip the bore are in excess of this and could be more if the quantity and quality are not equal or better to what exists on the landholding before the impacts of resource development. Landholders have been pressured into accepting an overall cash payout without knowing if this will provide adequate make good due largely to frustration due to the time impacts of negotiating with the resource company and delaying tactics being employed by the resource companies legal team..

The trade-off for legislated "make good" agreements of having mining companies brought into line with CSG companies in not having to have a water license for associated water is unacceptable. Property Rights Australia have consistently made the point that CSG companies should be required to have an entitlement for associated water. It is not possible to meet the aim in the discussion paper of responsible management of water resources in Queensland if the Government does not have a clear idea of water used or likely to be used by resources companies.

LICENSE RESOURCES COMPANIES USE NON-ASSOCIATED WATER

One would wonder why graziers have spent hundreds of thousands of their own money which would have been better off in their own pockets during the present drought capping and piping open bores to have resource companies taking and interfering with as much water as they like. This does not provide a balance of rights within the Act or protect an important and vital water resource for future generations.

We would also like to make the point that the water volumes attributed to the agricultural sector are almost certainly an overestimation of the actual volume used. Calculations are based on the maximum available to the bore in an aquifer. Stock and domestic water would rarely harvest the maximum available.

Licensing is even more crucial for non-associated water as in the discussion paper. Property Rights Australia supports moves to license non-associated water used by resources companies.

Without the need for a water entitlement there is no incentive to make the most efficient use of water, to use alternative technology or sources of water and to use treated associated water.

If a very large user of underground water, namely the resources sector, which is often concentrated in a closely knit area, is to be unlicensed for associated water one wonders what the purpose of the Water Act is to be. Management will be impossible without knowledge.

IRRIGATORS

This leaves the largest number of licences in the hands of a plethora of farmers with irrigation licences whose treatment in some areas has been roundly condemned by the Land Court (Gallo and Williams)[1] and the Ombudsman Phil Clarke[2].

The discussion paper gives few clues as to whether the concerns of Member Smith of the Land Court and the recommendations of the Ombudsman, will be implemented. Property Rights Australia would support the implementation of the majority of these considered observations and recommendations.

If water is to be truly transferable as proposed, irrigators unused reserve water should not be sold or given to a third party by the Government or Government authorities or companies. It should be acquired on the free market from the irrigators who own it. This has been just one of the criticisms of the Barron water plan.

After such a mammoth effort which amends the purpose of the Act to favour resource companies it would be a shame if valid concerns of other water users particularly irrigators, expressed over many years, were not addressed in a fair way. Keeping a tight control on small farm irrigation licenses seems to be a bit pointless if resources companies are to be allowed to take and interfere with as much associated water as they please.

[1] http://www.landcourt.qld.gov.au/documents/decisions/WAA021-07-etc-15.pdf
[2] http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2014/5414T5012.pdf

Property Rights Australia supports the streamlining and modernisation of the issuance of water entitlements but not at the expense of the water and property rights of other users. The licence procedure for small license holders who wish to divide, amalgamate or who have licences revoked as a result of disposal of some of the land to which the license attaches has been arduous and should be streamlined and modernised so that small irrigators have a reasonable expectation that they will get a similar entitlement to what they had. Similarly, unwarranted moratoria on issuing new licences should not occur and preference should not be given to potential large users.

POSITIVES IN THE REVIEW

PRA supports the repeal of sections which have reversed the onus of proof.

PRA supports the removal of transitional measures which have been spent

PRA understands the wish for the Government to bring special legislation for specific uses within the gambit of the Water Act.

Joanne Rea

Joanne Rea
Chairman
Property Rights Australia Inc.

ATTACHMENT

The following pages have been extracted from a 2012 submission by Property Rights Australia to the revised CSG water management policy

PRA believes that the fundamental principles outlined in the following pages are still highly relevant.

Property Rights Australia Submission to revised CSG water management policy 2012

Overriding Fundamental principles

Landowners are limited by license in their water use but CSG are unfettered.
The drawdown of aquifers in CSG areas is a primary concern of Property Rights Australia. Any substitute for clean, reliable underground water is a second grade option and should be recognised as such.
Depletion of aquifers which service premium agricultural land sterilises that land and makes it unavailable as a reliable resource for an indispensable commodity, namely food, to future generations.

"Make good" provisions are littered with uncertainty and unfairness
The store set in the "make good" provisions by government and public officials is alarming. Government and public officials are setting so much store by the provisions and seem unconcerned at water drawdown and depressurisation.
Too much weight is being given to the inferior action of "make good" provisions when the EPA will only stop local extraction for catastrophic effects if companies are unable to "make good" or provide substitution.
This is not good enough!
"Make good" is a poor substitute for a reliable clean underground water source.

"Best efforts to make good" is not good enough**.**
Well drafted, detailed, step by step "make good" agreements seem to be essential in contracts between landowners and CSG companies operating on landowner's lands. It remains to be tested how difficult it will be to have the implications implemented and what steps are necessary should a dispute arise.
How much money will a landowner need to spend and how far down the court track will the landowner need to go to gain resolution.
It is a concern that landowner's bores experiencing impacts of who do not have a company operating on their property may have to jump through extra hoops to access "make good".

"Make good" provisions need to apply to water quality as well as quantity.
It is of concern that Government and public officials have not recognised that water quality is just as important to the quaintly of water available for landowners. Both crops and livestock can experience reduced performance from lower quality water and if this has been caused by CSG activity it must be recognised as an equally serve impact.
Also any substitution of water in "make good" provisions must not be of inferior quality water.
Landowners and landowner's solicitors do not believe that these provisions have been provided for in the legislation.

All actions for "make good" needs to be specifically permitted by legislation.
The differing opinions between landowners and their legal representatives and government personnel are reminiscent of advice given under the Vegetation Management Act which later proved to be erroneous.
When one goes to court all that is relevant is what is in the Act. Water quality being relevant to "make good" MUST be clarified in the Act.

There is some concern that CSG companies drilling new bores for "make good" may not be lawful as it is outside the purpose of their access to water as granted by legislation.
Who will ensure that "Make god" is carried out until the full recharge of the bore? Will the arrangements be adequate? I suspect in many cases they will not.

How these provisions will be accessed by landowners is still not clear. Already CSG companies seem to be attempting to contract out of the obligations.
"Make good" applies to water impairment resulting from water extraction. What about gas movement as a result of depressurisation? Landowners want the legislation to leave no doubt that "make good" provisions apply to impairment from any event.

<u>Government personnel giving advice outside their qualifications.</u>
If legal questions are to be asked at landowner meetings, government representatives need to be fully briefed by government solicitors and written advice given. A better option would be for a government solicitor to be present to answer questions as very many are legal questions. The current situation is unfair on both the Government personnel and the landowners.

<u>There are more contaminates than just salt</u>
Currently Government and industry does recognise any other contaminant present in CSG water other than salt and that the quality of CSG water varies greatly. The amount and composition of remaining chemical elements and compounds needs to be known on a consignment by consignment basis. Once treated the CSG water should be put to a suitable beneficial use. However it needs to be recognised that brine is not the only contaminant present in CSG water.
Farmlands, farm aquifers and stock watering facilities should not be put at risk of contamination by any chemical elements and compounds that can cause impairment including substances such as heavy metals.

<u>The need for more research, baseline testing and transparent monitoring</u>
It would be a far more satisfactory approach if proactive research is carried out to learn of possible impacts before they occur rather than continuing with the flawed "adaptive management" approach inherited from the previous Government.
Baseline data needs to be ascertained; priority given to a comprehensive network of monitoring bores including bores to different aquifers at the same geographic location; the level of connectivity between aquifers needs careful research and the work of the Queensland Water Commission soon to be carried out by the new statutory body. Office of Underground Water Assessment should be independent & transparent.
There are emerging new technologies of water treatment that when used as a replacement of or in tandem to the existing reverse osmosis water treatment plants will provide a far superior result in quality of water available to beneficial water uses and for the less volume of waste produced.

There is no substitute for a clean, reliable underground water supply. All other options are vastly inferior.