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Research Director
Agriculture and Environment Committee
Parliament House
Sent via email only: aec@parliament.qld.gov.au

Dear Chair and Committee Members

Submission to Committee on Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016

We welcome the opportunity to make this submission to your inquiry into the Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016 (Bill).

We provide our submissions in summary **below** and in detail in **Annexure 1**.

Annexure 2 provides an excerpt of the principles of ecologically sustainable development (ESD) for your convenience, as provided in the *Water Act 2000* (Qld) (**Water Act**) currently, and as proposed to be amended through the Water Legislation Amendment Bill 2015 (Qld) (**WLA Bill**) still under consideration by Parliament.

Summary of key submission on the Bill

We support the overall intent of this Bill. However, the associated water licence must be equal to, and not weaker than, the assessment of a normal water licence.¹

Our submission consists of one key recommendation with respect to the Bill:

Amend clause 1250T to require that assessment of the associated water licence must include consideration of the principles of ecologically sustainable development, along with other principles of ‘sustainable management’ under the Water Act.

This amendment must be made for the following reasons, in summary here, and in more detail in Annexure 1:

- 1. Transitional provisions normally apply the law as is in effect prior to the law changing for a specified ‘transitional’ period to smooth the transition to the new law – the associated water licence is instead a ‘new law’ and does not adequately address**

¹ As per *Water Act 2000* (Qld) chapter 2.

the injustices and gaps in environmental assessment caused by the introduction of the statutory right;

- 2. Assessment of advanced mine projects already completed would have occurred with an expectation that the groundwater impacts would be assessed under a normal water licence;**
- 3. Recommendations of the Land Court point to requirement that principles of ESD be applied to associated water licence assessment;**
- 4. The principles of ESD help avoid unsustainable impacts to our groundwater resources;**
- 5. Providing natural justice to those concerned about impacts to groundwater resources, for their businesses, their livelihoods, or the environment.**

Overview

This Bill is necessary due to the government's intention to commence the statutory right to associated water for mining companies introduced through the *Water Reform and Other Legislation Amendment Act 2014* (Qld) (**WROLAA**) (**statutory right**). The statutory right will commence automatically on 6 December 2016, unless it is commenced by government prior to this date.

The commencement of this statutory right will take away the current application, assessment and consequent public submission and appeal rights provided through the existing water licence framework that applies to most mining companies seeking to take or interfere with associated water.

This Bill is an attempt by the government to ameliorate some of the impacts to the environment and the community that the government has recognised will arise from the commencement of the statutory right.

These impacts arise through the consequent removal of the requirement for mines to obtain a water licence for associated water (water required to be taken or interfered with to access the resource, such as through dewatering a mine pit). The impacts of the commencement of the statutory right include the loss of:

- the water licence assessment process that would normally consider the groundwater impacts posed by mining projects prior to the project commencing to take or interfere with associated water; and
- the check and balance on groundwater impact assessment provided through public submission and appeal rights provided through the water licence assessment process, which many stakeholders may have been relying on for mines that have already applied for their environmental authority at the time the statutory right commences.

We remain strongly opposed to the commencement of the statutory right to associated water for mining proponents, and opposed to the statutory right to water held currently by the petroleum and gas industry. The existing water licence framework for the resource industry is in need of reform, but this reform should not be the complete removal of the water licence framework, and consequent removal of community legal rights in the decision making process for a water licence.

However, this Bill makes some steps to soften the impact of the commencement of the statutory right and is therefore supported.

We have regrettably not had sufficient capacity to analyse the other areas of the Bill in close detail to provide commentary to assist the Committee beyond general support for the effect of the provisions.

We thank you for inviting us to appear at the hearing of this Bill next Wednesday. We look forward to presenting our considered opinions to the Committee at the hearing and answering any questions.

Yours faithfully
Environmental Defenders Office (Qld) Inc



Revel Pointon
Solicitor

Annexure 1 - Detailed submissions

Recommendation:

Amend clause 1250T to require that assessment of the associated water licence must include consideration of the principles of ecologically sustainable development, along with other principles of ‘sustainable management’ under the Water Act.

The introduction of the associated water licence is supported.

However, the associated water licence must be subject to the same assessment as provided by the water licence in the Water Act currently.

The associated water licence has been introduced in the Bill to fill a gap in groundwater assessment for those mines that will *not* be subject to the strengthened groundwater impact assessment, because they have already applied for their environmental authority, or are in the coordinated project process, but they have not yet applied for their associated water licence under the current *Water Act 2000* (Qld) (**Water Act**) as far as they are necessary (**advanced mine projects**).

Where advanced mine projects would normally have to obtain a water licence under the current Water Act for associated water use, they will be required to obtain an associated water licence once the Bill is passed and the statutory right to associated water commences.

There are numerous solid reasons as to why it is essential that the associated water licence should be subject to the principles of ecologically sustainable development (**ESD**), detailed as follows.

- 6. Transitional provisions normally apply the law as is in effect prior to the law changing for a specified ‘transitional’ period to smooth the transition to the new law – the associated water licence is instead a ‘new law’ and does not adequately address the injustices and gaps in environmental assessment caused by the introduction of the statutory right**

The associated water licence has been provided through transitional provisions, as an amendment to WROLAA.

The whole purpose of transitional provisions is to ensure that any undesired impacts or injustices that may occur through a change in the law may be ameliorated for a specified period while those affected adjust to the new law. This typically means that the law that is in effect prior to the law changing is applied for the specified period.

Instead, the transitional provisions for the associated water licence create a new law.

We fully support the introduction of the associated water licence as a necessary transitional provision to address some of the impacts of the transition to the statutory right to associated

water for mines. However, as drafted the associated water licence does not address all of the injustices created through the transition to the statutory right.

Law applicable for water licences for advanced mine projects prior to the statutory right

The advanced mine projects are currently required to obtain water licences under chapter 2 of the Water Act.

The assessment of water licences under chapter 2 is subject to the application of the purpose of chapter 2, provided in section 10 of the Water Act currently. This purpose includes:

*‘to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water’.*²

In considering the definition of ‘sustainable management’, the decision maker must consider whether the management of the water resource contributes to the:

*‘economic development of Queensland in accordance with the principles of ecologically sustainable development’.*³

The principles of ESD are defined in Water Act section 11 for the purpose of that Act; this section is excerpted in **Annexure 2** to this submission. The definition provided in section 11 of the Water Act provides for the following provision:

‘if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation’.

This principle is commonly known as the ‘precautionary principle’ as it requires a precautionary approach to assessment and approval of impacts to the environment where there is uncertainty as to the likely implications of these impacts. The precautionary principle is often considered to be one of the most important principles of ESD due to its common sense approach to regulating our impact on the environment.⁴

Therefore, advanced mine projects are currently required to obtain water licences which are assessed with consideration of the principles of ESD, including the precautionary principle.

Law applicable for associated water licences for advanced mine projects when statutory right commences

Contrastingly, in accordance with clause 1250T of the Bill, the associated water licence will be assessed with consideration of the following purpose:

² Water Act 2000 (Qld), s10(1).

³ Water Act 2000 (Qld), s10(2)(c)(ii).

⁴ Gullett, W, Environmental protection and the precautionary principle: a response to scientific uncertainty in environmental management, *Environmental and Planning Law Journal*, 14(1), 1997, 52-69.

*‘the management of impacts on underground water caused by the exercise of underground water rights by the resource sector’.*⁵

As the Bill is currently framed, an associated water licence is in no way required to be assessed with consideration of the principles of ESD. The precautionary principle will therefore not apply to this assessment. Rather, the associated water licence will be assessed within an ‘impact management’ context. This is unacceptable and puts our groundwater resources at risk.

7. Assessment of advanced mine projects already completed would have occurred with an expectation that the groundwater impacts would be assessed under a normal water licence

The principles of ESD are required to be considered in the assessment of an application for an EA under the *Environmental Protection Act 1994* (Qld) (**EP Act**).⁶ However, for advanced mine projects which have already finished their EA assessment, the assessment of groundwater impacts would have been carried out on the assumption that chapter 2 water licence framework under the existing Water Act applies, including the principles of ESD, and would not have been assessed under the EP Act to the strengthened standard introduced by this Bill. The groundwater impacts of the advanced mine projects therefore will not be assessed adequately against the principles of ESD.

The associated water licence is therefore subject to a weaker environmental assessment than the current water licence assessment under Water Act chapter 2.

The associated water licence is therefore not a sufficient transitional arrangement to deal with the injustices and gaps in environmental assessment caused by the change of the law to the statutory right, as explored more below.

8. Recommendations of the Land Court point to requirement that principles of ESD be applied to associated water licence assessment

One advanced mine project, the Alpha coal mine, is particularly pertinent to demonstrating the need for associated water licences to be assessed with consideration of the principles of ESD. **In the Land Court objections hearing for the Alpha coal mine, the Member actually recommended that the government refuse the Alpha coal mine mining lease application unless any approval of the mining lease is subject to the proponent:**⁷

⁵ *Water Reform and Other Legislation Amendment Act 2014* (Qld) (WROLAA), s59 inserting Water Act 2000 (Qld) s2(1)(c); *Water Legislation Amendment Bill 2015* (Qld), cl12 amending WROLAA s59, inserting Water Act 2000 (Qld) s2(1)(c).

⁶ The ‘standard criteria’ is required to be considered for applications for environmental authorities under Environmental Protection Act 1994 (Qld), ss 175 and 176. ‘Standard criteria’ is defined to include the precautionary principle per *Environmental Protection Act 1994* (Qld) schedule 4.

⁷ *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12, judgment available here: <http://archive.sclqld.org.au/qjudgment/2014/QLC14-012.pdf>.

‘first obtaining licences to take, use and interfere with water under s 206(1)(a) and (b) of the Water Act such that all concerns pursuant to the precautionary principle are resolved’.

The Member specifically recommended that this mining proposal be subject to the water licence process under Water Act chapter 2, with an intention that the precautionary principle be applied to its assessment. This was due to ‘clear environmental concerns’ regarding the mining project, particularly as a result of uncertainties as to the impacts to groundwater off the mine tenure. To this effect the Member stated:

‘My concern relates principally to my lack of confidence, from a precautionary perspective, in the groundwater evidence and, because of that, my concerns regarding the knock-on effect to ecology should the predictive groundwater modelling relied on by Hancock not be correct.’⁸

The Member’s primary recommendation was that the Alpha mine be refused unless a proper assessment in light of the precautionary principle addressed remaining concerns about groundwater impacts. While the associated water licence provides for some further assessment of groundwater impacts prior to the mine being allowed to take or interfere with associated water, these impacts will not be subject to assessment which considers the precautionary principle, which is precisely what the Member considered was necessary before this mine was approved.

9. The principles of ESD help avoid unsustainable impacts to our groundwater resources

The impacts caused by resource project activities to groundwater aquifers, and the landholders and ecosystems dependent on them, are still largely uncertain in Queensland. The principles of ESD require the decision maker to take account of established principles which require an important depth of consideration of the environmental impacts posed.

It is arguable that nowhere is the precautionary principle more appropriate for application than for groundwater impacts due to the uncertainties involved in the interactions between groundwater aquifers and the likely results of impacts of resource activities on groundwater resources.

The livelihoods of many Queenslanders rely on access to groundwater – particularly our farmers, graziers or isolated rural landholders.

Also, the existence of many ecosystems relies on healthy, functional groundwater systems, particularly those that feed spring systems.

For over 25 years, ESD has ensured acknowledgment of the close relationship between development, communities and the environment. ESD is about living within our means. It is

⁸ *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12 [406].

about development within ecological limits - the undisputed limits which nature provides and on which all life depends. It is about being able to identify circumstances in which the science is uncertain (the precautionary principle) and considering the future of those generations yet to come (the principle of intergenerational equity). It is about economic growth and development, but sustainable economic growth.

There is a misconception held by some industry representatives that those who advocate for ESD are somehow 'anti-development'. The opposite is true. Nobody wants to stop development – we need development – however it is essential that development does not undermine the ecological processes that support life. This is smart development that will ensure a healthy future for all Queenslanders and our precious ecosystems.

10. Providing natural justice to those concerned about impacts to groundwater resources, for their businesses, their livelihoods, or the environment

The advanced mines projects that will be required to obtain associated water licences include some of the largest, riskiest mines that have ever been proposed in Australia. These mines have been in the assessment process for various amounts of time, but typically enough for stakeholders to have become aware of the mines proposed.

This is certainly true of mines like Carmichael, Alpha and Kevin's Corner coal mines, which have all finished their environmental authority and mining lease assessment processes, including the public submission and Land Court referral process this involves.

Many landholders, conservation groups and other stakeholders were involved in the submission and Court processes for these mines. These stakeholders were involved in the assessment process with the law as it is now, which requires that these mines obtain water licences for their groundwater impacts. These stakeholders are therefore likely to have been relying on the opportunity to provide particular submissions on the groundwater impacts through the water licence framework that presently applies.

Some other stakeholders may have chosen not to be involved in the EA and ML assessment processes for advanced mine projects because they were relying on having their concerns as to groundwater impacts heard at the time of assessment of the water licence, through the submission and appeal rights the normal water licence process provides.

Water licence court appeal process and EA court appeal process are not equal

The provision of a court merit appeal process is a standard feature for development related application assessment. This is because it is widely accepted that a court merit appeal improves the consistency, rigour, quality and accountability of decision-making in

environmental matters.⁹ Merits review process by an independent court also safeguards against corruption.¹⁰

The community rights to be involved in the decision making around the environmental authority are not equal to those provided for a normal water licence under the Water Act.

The Water Act provides the Land Court with the power to hear appeals of the final decision of the government on the water licence application. The Land Court then is empowered to make the final decision as to whether to allow the water licence to be approved.

This is compared to the Land Court process for EAs and MLs in which the Land Court provides only a recommendation in an administrative capacity. The final decision is then made by the Director General of the Department of Environment and Heritage Protection for the EA and the Mining Minister for the ML. This process takes away a lot of the benefit of an independent court, free from politics, scrutinising the decision made on an application and providing the final decision.

Therefore, while some stakeholders have had some of their concerns around groundwater impacts considered by the Land Court for the EA and ML of some advanced mine projects, this is not an equally effective Court process compared to the Court appeal process for a water licence.

Conclusion

Our groundwater resources are precious, imperative to the livelihood of many rural landholders and businesses, and not well understood. Impacts to groundwater bodies are not easily remedied, and in the case of mining impacts are sometimes impossible to remediate; once a groundwater aquifer is dug up it cannot be replaced. Due to the slow rate of groundwater flow velocities, unforeseen impacts can take tens to hundreds of years to become apparent.

All proposed water impacts, and particularly proposed groundwater impacts, must be subject to the strongest of protections to safeguard the quantity and quality of water.

⁹ A. Finanzio, 'Public Participation, Transparency and Accountability – Essential Ingredients of good Decision Making' (2015) 2(1) Australian Environmental Law Digest 3, 3; Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' (Paper presented at Town Planning Law Conference, Western Australia, 16 November 2009) http://www.sat.justice.wa.gov.au/files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf; Stephen Willey, 'Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia' (September 2006) 24(3) Urban Policy and Research 369–389; Preston B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.

¹⁰ Independent Commission Against Corruption, Anti-Corruption Safeguards and the NSW Planning System, Report (2012) 22.

Annexure 2 – Excerpt of principles of ecologically sustainable development

Under *Water Act 2000* (Qld), as at 7 October 2016:

11 Meaning of principles of ecologically sustainable development

The following principles are principles of ecologically sustainable development—

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the present generation should ensure the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) recognition of the need to develop a strong, growing and diversified economy that can enhance the capacity for environmental protection;
- (f) decisions and actions should provide for broad community involvement on issues affecting them.

Under Water Legislation Amendment Bill 2015 (Qld), as introduced into Parliament on 10 November 2015:

Inserted by clause 14:

7 Meaning of principles of ecologically sustainable development

The following principles are principles of ecologically sustainable development—

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the present generation should ensure the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) recognition of the need to develop a strong, growing and diversified economy that can enhance the capacity for environmental protection;
- (f) decisions and actions should provide for broad community involvement on issues affecting them.