Submission into the Inquiry by the Agriculture and Environment Committee into the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016*

Introduction

1. Kingfisher Law is a Sydney based commercial law firm specialising in litigating and advising on matters concerning access to water for agricultural purposes across Australia. We have a particular focus on water and Northern Australia and are highly qualified water lawyers. Noting this background, Kingfisher Law welcomes the opportunity to comment on the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016* (**the Bill**).

2. Our submission recognises that the Bill pertains to several pieces of legislation, but our analysis is confined to the following Acts:

   a. *Environmental Protection Act 1994* (**EP Act**);

   b. *Water Act 2000*; and the

   c. *Water Reform and Other Legislation Amendment Act 2014*.

   Our submission does not discuss proposed amendments to the *Queensland Heritage Act 1992*.

3. Our submission comments on three significant areas of proposed reform:

   a. potentially expansive definitions;

   b. concern with the equitable allocation of underground water resources; and

   c. the lack of requirements to consider ecologically sustainable development in granting certain water licences.

4. Kingfisher Law recognises that, in preparing the Bill, the Queensland Government is attempting to redress stakeholder concerns that emerged in response to the *Water Reform and Other Legislation Amendment Act 2014* (QLD) (**WROLAA**), which has not yet commenced. Importantly, the Bill seeks to rebalance the interests and powers of landholders whose groundwater is impacted by resource industry activities, and strengthen laws with respect to groundwater take. In effect, the Bill represents the government determining the aspects of the WROLAA it will maintain and the aspects it will repeal.

5. However, it is our ultimate submission that there are critical issues that either require clarification or amendment in order to firmly restore balance between the competing users that rely on the same water resources but have access to vastly different financial resources.

Definitions in the *Environmental Protection Act 1994* are potentially expansive

6. There is little substantive detail provided with respect to the proposed inclusion of a definition for "underground water rights" in the EP Act, except that it will be defined by reference to other relevant Acts, all of which are related to extractive resources and their activities.

7. The amendment is aimed at ensuring the further, substantive, amendments to the EP Act will apply to the exercise of underground water rights for mineral and petroleum activities. However, there is some concern associated with the definitions of "underground water rights" in the referrable legislation.

8. In particular, the *Petroleum and Gas (Production and Safety) Act 2004* (QLD) explicitly states that underground water rights have no volumetric limit to how much water may be taken and that the water may be used for any purpose and within or outside the area of the associated tenure.[1] Because these rights are subject to compliance with the tenure holder's underground water obligations,[2] it is arguable that any such obligation *has the ability* to impose limits or restrictions on use. However, it is important that the operation of the EP Act is not so vast as to incorporate these aspects of the definition of "underground water rights".

9. This undesirable outcome is prevented to extent by the remaining amendments proposed to the EP Act through the Bill. For example, it is notable that s 207 of the EP Act will be amended to clarify that conditions can be imposed on an environmental authority that is related to the exercise of underground water rights. It is feasible that such conditions could include volumetric and use restrictions.

[1] *Petroleum and Gas (Production and Safety) Act 2004* (QLD) s 185(3) and (5), respectively.
[2] *Petroleum and Gas (Production and Safety) Act 2004* (QLD) s 185(2)(b).

Allocation of underground water resources is not equitable

1. While the Bill will address some of the concerns raised consequential to the WROLAA, it fails to completely restore equity to how underground water resources are allocated across Queensland.

2. Prior to the WROLAA, the *Water Act 2000* (QLD) (and, therefore, the law as it currently stands) required most mining companies operating in Queensland to obtain a licence for taking or interfering with groundwater as a consequence of their approved activity. The licensing process means the public can make submissions to the decision maker with regards to the granting of a particular licence and apply for administrative review of licences through court processes. Once licences were granted, consumption was limited to the volume allocated, and use was required to be monitored in order to assess compliance with licence conditions. In our opinion, this created an equal approach to licensing for all stakeholders that did not favour the extractive resources industry.

3. Industry uncertainty regarding circumstances under which a water licence was required led to reform. Under the *Petroleum and Gas (Production and Safety) Act 2004* (QLD), holders of a petroleum tenure have a broad statutory right to take associated water.[3] A water licence is not required,[4] but water monitoring activities[5] must be complied with.[6]

4. Further uncertainty regarded the requirements for licences to take groundwater under the *Mineral Resources Act 1989* (QLD). Although this Act confers broad rights to holders of mining leases,[7] it also indicates that a mining leaseholder must hold an authority to divert or appropriate water under another Act before taking the water, in circumstances where water may be diverted or appropriated only under authority granted by another Act (such as the *Water Act 2000* (QLD)).[8]

5. In 2014, these provisions were found not to apply to groundwater take or interference, which, therefore, did not necessitate a licence.[9] The finding was in contrast to the provisions of the

[3] *Petroleum and Gas (Production and Safety) Act 2004* (QLD) s 185(1)(a) 'to take or interfere with the water if taking or interference happens during the course of, or results from, the carrying out of another authorized activity for the tenure.' This right is unlimited: s 185(3).
[4] *Petroleum and Gas (Production and Safety) Act 2004* (QLD) s 185(1)(a).
[5] *Petroleum and Gas (Production and Safety) Act 2004* (QLD) s 187.
[6] *Petroleum and Gas (Production and Safety) Act 2004* (QLD) s 185(2)(b).
[7] *Mineral Resources Act 1989* (QLD) s 235.
[8] *Mineral Resources Act 1989* (QLD) s 235(3).
[9] *Hancock Coal Pty Ltd v Kelly and Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12.

Water Act 2000 (QLD), which explicitly deems take or interference not authorised by the Act to be an offence.[10]

6. In seeking to reconcile the common law and statute, the *WROLAA* provided mining tenure holders with equivalent rights to petroleum tenure licensees. It did this by granting a statutory right to utilise water for associated use if the interference is the result of the authorised activity, in the absence of obtaining a licence or undergoing the associated environmental assessment through the removal of s 235.

7. The Bill offers a part remedy to the above issues. The Bill will continue to grant a limited statutory right to take groundwater for mining companies, which will eliminate the need for a separate licence. It is our view that this system does not facilitate the equitable allocation of underground water resources and instead presumptively favours mining companies in the take and use of groundwater and that there is great potential for negative impacts to groundwater resources to arise from non-licensed use of water that is accessed and used by extractive industries.

8. It is important that the statutory right will have limited effect and that associated water licences will be required for projects that have already progressed (in full or in part) through the environmental authority application process or have been notified as a coordinated project with requirements to complete an environmental impact statement. Disappointingly, however, the projects to which this licence will apply are projects that would already have required a licence under current laws.

9. Although it is now clear that mining companies do not need a licence in these circumstances, this certainty does not rebalance the interests and powers of landholders versus extractive industries. In an area as contested as groundwater resources, it is particularly concerning that a licence is not required in all circumstances, particularly those related to take and use by extractive industries. This continued exclusions from licensing requirements has negative implications for the government's ability to monitor use and, therefore, understand the effects of groundwater extraction from mining companies on groundwater systems.

10. In total, the Bill does not completely remove the statutory right to utilise water but simply provides more regulatory oversight of water take and use. Groundwater take by mining activities will be assessed under the EP Act to examine the environmental impacts of take as a part of the approvals processes because the environmental authority application will require

[10] *Water Act 2000* (QLD) s 808(1)(a) specifies take is permitted under the *Petroleum and Gas (Production and Safety) Act 2004* (QLD).

an assessment of the environmental impacts of groundwater extraction by mining tenure holders. This will see groundwater considerations become integrated into the environmental impact statement process, but there is no additional licensing requirement.[11] This process is one step closer to the necessary equitable regulation of water use for all stakeholders, despite continuing to fall short.

11. Further, public comment is restricted to the environmental impact statement stage. Although this stage includes a pre-mining assessment of groundwater impacts from take, there is limited judicial recourse available past this point when actual Underground Water Impact Reports are released.[12] It is foreseeable that the release of such reports would provide further relevant information as to the impacts of activities on groundwater that had not previously been understood or disclosed. Public comment at this stage is critical to ensuring that extractive industries are not sheltered from public scrutiny regarding any new findings. We are of the view that this does not create an equitable system of allocation or take when considered against the resources available to the different categories of groundwater users, which primarily sees farmers pitted against extractive industries.

Associated water licences do not attract ecologically sustainable development requirements

12. The Bill seeks to rectify concerns of water availability, equitable access, and ecological sustainability. While it does remediate some of the measures introduced by WROLAA, it has not sufficiently addressed economic, environmental and social equity concerns.
13. To illustrate, the WROLAA removed the purpose of 'ecologically sustainable development' (**ESD**) in the *Water Act 2000* (QLD) and replaced it with 'responsible and productive management'.[13] The Bill still fails to reintegrate principles of ESD into associated water licences, which authorise the take or interference with underground water that arises during the course of an activity associated with a mining tenure.
14. A brief review of the national context with regard to the principles of ESD is important to understanding the significance of the above change. The *National Strategy for Ecologically Sustainable Development 1992* (Cth) (**Strategy**) espoused a national commitment that was developed by state and territory governments to ensure the effective integration of both long and short-term economic, environmental, social and equity considerations in policy and

[11] We note, however, that a transitional scheme for current developments have been devised in the form of associated water licences, which are discussed below.
[12] Queensland Government, *Current environmental authority application or amendment documents* <https://www.ehp.qld.gov.au/management/non-mining/current-ea-applications.html>.
[13] See Long title replacement and the omission on chapter 2 part 1 to be replaced by s 2 in *WROLAA*.

decision-making. The Strategy was adopted by all levels of Australian government in 1992 in response to the *Rio Declaration* (1992) that was adopted internationally the same year. It was expected that governments would make institutional changes to ensure that ESD was a key objective accounted for in policy.[14]

15. The Strategy specifically accounted for the relationship between water resource management and ESD with the objective of developing ecological resource management methods whilst meeting economic, social and community needs. Up until the WROLAA, the *Water Act 2000* (QLD) reflected the objectives for ESD as a guiding purpose in the allocation and sustainable management of water.[15]

16. The *Water Legislation Amendment Bill 2015* (QLD) to some extent reintroduced the concept of ESD by replacing 'responsible and productive' with the use of the term 'sustainable' in the *Water Act 2000* (QLD).

17. However, the concept of ESD remains absent from necessary considerations in relation to determining an associated water licence in the Bill. It is detrimental to useful resource management to exclude a requirement that necessarily incorporates the precautionary principle from an approvals process for licences extracting and using groundwater through a mining activity.

18. The effect of this concern is highlighted when considered against the requirements of other licences, which continue to be subjected to considerations of "sustainable management" criteria through the application of a separate framework for the granting of non-associated licences. The result is that users (such as farmers and irrigators) are required to meet a higher threshold in order to obtain a water licence than extractive industries users, which arguably have a greater ability to cause harm to a water resource.

[14] Australian Government, *National Strategy for Ecologically Sustainable Development* (December 1992) <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy>.
[15] *Water Act 2000* (QLD) s 10(2)(c)(ii).

Recommendations

19. The proposed reforms run the risk of perpetuating the regulatory concessions for mining tenure holders to have unlimited access to groundwater. Not only are certain concessions unavailable to other water users (for example, statutory rights to take water and different thresholds for associated versus non-associated water licences), but the different application of regulations raises concerns as to unregulated water sharing and consumption patterns. This concern is heightened when it is remembered that the users benefiting from these relaxed regulations are extractive industries, who can have particularly damaging impacts on water resources.
20. In view of the above, Kingfisher Law recommends the following with respect to the Bill:
    a. Ensure that the definition of "underground water rights" is not so flexible as to include provisions from associated legislative instruments that will widen the scope of groundwater use.
    b. Strengthen the equitable allocation of groundwater resources to users by eliminating a statutory right to take water that presumptively favours mining companies.
    c. Expand the opportunity for public comment on applications past the environmental impact statement stage to allow for this (and judicial recourse) to occur after the release of Underground Water Impact Reports, which will foreseeably contain further information relevant to impacts on both the groundwater resources and other users.
    d. Develop a uniformed licensing scheme for all water uses. Transitional associated take licences are a valid option that could be extended to all users perpetually. ESD considerations should be reinstated for associated water licences to ensure that they are not held to a lower threshold than other users. This would appropriately account for the impacts that their use can have on groundwater resources.

Yours faithfully

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