
The Research Director
Agriculture, Resources and Environment Committee
Parliament House
Brisbane, QLD 4000

***By email only***: AREC@parliament.qld.gov.au; edoqld@edo.org.au;

9 October 2014

Dear Sir/Madam,

**Submission on the Water Reform and Other Legislation Amendment Bill 2014**

**About BSA:**

The Basin Sustainability Alliance (BSA) is a Queensland-based group representing the concerns of landholders and rural communities.

As our name implies BSA's charter is focused on ensuring the sustainability of water resources for future generations. Issues concerning water are at the heart of the reasons for the formation of our group in 2010. Our Charter reflects our conviction of the need to work towards sustainable management of rural land and water resources for future generations and to encourage and promote fair and proper legislative and administrative processes to ensure proper planning of resource activity with the potential to impact on the Great Artesian Basin. Our organisation also plays a role as an advocate for landholders in relation to resource development on their land and in their communities.

More information about BSA and its official charter can be found at: www.notatanycost.com.au.

Please note that this submission is largely authored by Peter Shannon, a committee member of BSA, a landholder, and a Legal Partner at Shine Lawyers, who practices extensively in the resource law area for landholders – including in particular the negotiation of make good agreements.

**Introduction:**

BSA is concerned that the Bill is inconsistent with fundamental legislative principles for the reasons elaborated herein.

Our concerns revolve around the (acknowledged) loss of landholder entitlement and loss of property rights, the lack of ability to have a say in the loss of those rights, and the lack of assurance of reasonable compensation or protection against the adverse consequences of the inevitable loss of those rights. These are all key legislative standard concepts that are unacceptably breached by the Bill in its current

form and we urge the Committee accept our submission and act so as to redress this lack of attention or regard to landholder rights and liberties and to maintain acceptable standards of legislation in this vital area.

The inevitability of Landholders losing rights and entitlements is a fundamental fact acknowledged by the very cornerstone of the amendments – the obligation to "make good". The very expression accepts the inevitability of loss and a need to remedy that loss. This Bill does nothing to ensure the success of that process or to ensure just compensation to the individuals that will suffer such loss. It removes existing rights and processes that would otherwise have allowed the affected landholders to insist on a licensing approach for mining projects, and involvement in a robust process of challenging projected impacts and contesting whether the project should be allowed to proceed at all. These current rights place the landholder in a compelling position to ensure an appropriate outcome but will now be lost and replaced by an unsatisfactory process that falls short of an appropriate legislative standard requirement.[1]

**Elaboration:**

The obvious and inevitable realisation of significant impacts on landholders rights is exacerbated by several of the Bills approaches which not only apply to the introduction of unlimited take rights to mining but equally explain the problem with the existing legislation which will now be compounded if the Bill proceeds.

**The Change in Purpose:**

We understand that the current Government wants to encourage and stimulate the resource industries in our State, but the proposed change in the legislative purpose in the Bill is of significant concern.

The "purpose" of an Act governs the Courts approach to its interpretation. It is therefore an important insight into understanding why these amendments are being made and the extent to which court interpretation may assist in protecting existing rights and liberties or see to the balancing of competing interests (and consequently how extensive the impacts might become).

The proposed **Section 2** alters the entire emphasis of the Water Act. The previous emphasis, such as in the current **Sections 10 and 11** had a completely different emphasis and relied on widely understood concepts such as "ecologically sustainable development", the "precautionary principle" and "intergenerational equity". Those considerations are made largely redundant and have all but disappeared. **Section 2** now introduces and places complete emphasis on "responsible and productive management" and places emphasis on the "efficient use of water".

The need for, and relevance of, the previous concepts of "ecologically sustainable development" and "intergenerational equity" are concepts well understood by rural people, because of the extent of dependence we have had over many years for direct physical and financial survival. Many Queensland country towns depend entirely on underground water and most rural activity relies upon it. Short term resource projects have no need to concern themselves with issues of sustainability and do not share the long term need and emphasis that rural communities necessarily place upon it.

[1] See "*Hancock Coal Pty Ltd v Kelly and Others*" and DEHP (No. 4) [2014] QLC 12

It is this long term sustainability that has underpinned water reform and planning in Queensland over many years and which has ultimately gained acceptance within rural communities. Long term sustainability has been said to ultimately require an holistic assessment of all water sources within relevant catchments and an appropriate allocation made of the assessed water availability between the competing water users within the respective water planning areas over time.

The need for a change in purpose can only therefore be to reduce focus on the "old" concepts and to place more focus on the economic use of water at the expense of sustainability, and to facilitate the development of resource industries.

It seems clear that before these amendments, the Courts of Queensland were signalling concern in respect of the approach to the management of water impacts on landholders rising from resource development – such as was illustrated in the "Hancock" decision referred to above.

The Court had in other cases made similar noises concerning its intent to ensure water impacts are properly and responsibly addressed. For instance, in the Xstrata decision[2] her honour commented:

> *"…the impacts of water diversions and extractions associated with the projects seem to me to be highly relevant to any consideration of whether the project should be approved or refused*".

In light of the clear indication of the Courts concerns, it is difficult to see the Bill as doing anything other than avoiding court scrutiny of the inadequacies of the regulators approach to mining water impacts that was clearly beginning to manifest.

The full extent of the difference in this deliberate and very specific change to the "purpose" of the legislation will in due course be revealed but it is clear:

1) the procedures and discretion of the court reflected in the aforementioned cases will no longer apply (due to a combination of recent changes to the Mineral resources Act and now the statutory grant of unlimited take to mining companies proposed in the Bill);
2) the whole approach of accommodating resource industries outside of the broader water planning process, as reflected in this Bill; and
3) justifying doing so on the availability of a concept of make good availability and therefore focussing on a compensatory approach, rather than general concepts of sustainability (including the precautionary principle).

will necessarily tie the Courts to interpret the legislation from that new and limited approach.

What little oversight or involvement the Courts may retain must therefore lead to exacerbation of the loss of current rights and entitlements of landholders, given the preferential treatment of resource interests and the requirement of this new approach.

That concern is aggravated by the extent to which the concept of unlimited take has gained currency and is now extended to mining.

[2] See "*Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth – Brisbane Co-Op Ltd & Ors, and Department of Environment and Resource Management*" [2012] QLC 013

**Unlimited take is a Misnomer:**

Section 185 of the *Petroleum and Gas (Production and Safety) Act 2004* relevantly provides (amongst other provisions) as follows:

> *(1) A petroleum tenure holder may do any of the following in relation to underground water in the area of the tenure—*
> *(a) take or interfere with the water if taking or interference happens during the course of, or results from, the carrying out of another authorised activity for the tenure;*
>
> *(3) There is no limit to the volume of water that may be taken under the underground water rights.*

Section 185 has long been suggested by the regulator to give an absolute right to unlimited quantity of water free from oversight under the Environmental Authority process required under the Environmental Protection Act ("EPA") – hence the concept of an unlimited take.

That has never been a correct proposition at law and is an incorrect basis on which to justify applying a similar approach in respect of mining.

In fact the unlimited take ascribed to the Petroleum and Gas industry, has never truly been the case. The regulator has never chosen to apply restrictions to the quantity of water that can be taken by invoking the Environmental Protection Act and in particular the clear predominance of that Act over Section 185 contained in Section 23 of the *Environmental Protection Act 1994* (EPA). The argument has never been fully aired and determined by a court in Queensland but a reading of the Section makes apparent the extent to which this misconception of the petroleum and gas companies having unlimited rights to even associated water has been built upon – and now founds a similar misconception for mining.

The regulator could have curtailed or properly regulated the take by conditioning through EA processes – it chose not to, just as the Bill now seeks to not only entrench that misconception but now to extend that fundamentally flawed approach to associated water to mining.

By allowing mining to stand with petroleum and gas outside of the general licensing and water planning regime applicable to all other water users in the various catchments, the Bill will only further exacerbate the inherent flaws in ignoring the effect of enormous quantities of water being withdrawn from some catchments, and further ensure inevitable expansion of the individuals whose rights will be lost or severely affected. That is an unacceptable approach by legislative standards without appropriate counter balancing and/or justification.

If the unlimited take is in fact to be unfettered by the EA/EPA process it is illogical in the extreme to allow unlimited take **regardless** of consequences and no matter how much is taken. Such a concept would be repugnant to any sense of governmental prudence and could conceivably lead to all other forms of water usage (including extensive domestic access being impacted) and having potentially unlimited interference with rights and liberties permitted without impacted parties having any kind of adequate recourse or involvement in the process whatsoever. It would also completely undermine the promised Adaptive Management Regime which underpinned government assurance of the responsible regulation of the coal seam gas industry – now extended to mining as well.

The deletion of the precautionary principle, which largely underpinned the Adaptive Management Regime approach as a "purpose" of the legislation (as detailed above) adds weight to this concern and only further exacerbates the critical importance of the Bills reliance on make good as hereafter detailed.

**THE GAPING HOLE APPROACH**

The Bill will compound a fundamental flaw in water planning in Queensland, namely the fact that the impact of CSG activities is effectively ignored due to the emphasis on the unlimited take concept. Under the Bill that flaw is now to be extended to mining as well – and for projects that could have enormous impacts on bore users for many kilometres as recent cases acknowledge[3]. Again, this necessarily ensures the inevitability of increased loss of individual rights and liberties and the exacerbation of the number of individuals to be so affected.

The Bill would currently see the incredible situation whereby these large water users are exempted from moratoriums, emergency measures and all the other ways in which agriculture, town, and other users are subject to changing water circumstances and availability. That leaves a gaping hole in the ability of water planning in catchment areas to be reliable and meaningful.

We are taught from an early age that all our water systems are ultimately interconnected (whether above or below ground). Surely all water users and interaction between water systems should be factored into the allocation of that resource. Even if preference is given to one group, at least the "one house" approach ensures a complete overall understanding of the available water and enables long term planning. All usage should surely be based on sustainable diversion limits from underground and above ground water resources.

It is abundantly clear, and widely acknowledged, that we do not have an adequate understanding of all the characteristics of the underground hydrogeology throughout the Surat Basin water systems. The first Underground Water Impact Report, with its acknowledged inadequacies, is intended to allow a developing understanding of those characteristics. We cannot hope to have meaningful insight into the extent of interplay between our water resources if we ignore the impacts of major impactors because we seek to stimulate their usage.

About all we can be sure of, from a legislative standards viewpoint, is:

1. that many individuals will be badly impacted and lose the enjoyment of their existing water rights with no say in the process;
2. that the category of affected individuals will now be expanded to accommodate and include mining; and
3. that the extent of the rights to address the loss of these rights and compensation for them is complete reliance upon "make good" as the "cure all" justification.

It is again important to understand that the underpinning justification for ignoring the scientific uncertainty surrounding the regulation of the major CSG export projects was the Adaptive Management Regime promised by the Queensland Government to not only address federal government concerns but the broader Queensland community generally. This was a regime that was said to allow the Government to take action through the regulatory process to address unexpected or

[3] See "*Hancock Coal Pty Ltd v Kelly and Others*" and DEHP (No. 4) [2014] QLC 12.

unacceptable impacts of the CSG industry on underground water reserves and generally.[4] (It is useful to revisit the paper footnoted to understand the extent of that assurance).

That assurance was the justification for not comprehensively addressing all the unknowns of the anticipated water impacts – and even for not requiring comprehensive analysis of individual hydrogeological characteristics. It becomes farcical if all that is left to government and the regulator under that Adaptive Management Regime is Chapter 3 of the Water Act, and its sole reliance on a "make good" framework which is still in its infancy; has clearly not properly assessed in terms of its capacity to be realised, and which is not adequately drafted to ensure just outcomes for those affected individuals.

If this is what has become of the "Adaptive Management Regime" then how will government deal with drastic miscalculations of impacts or unpredicted impacts of quantity and quality impacts attributable to the take of associated water under the supposed "unlimited take" concept – now to be extended to mining? Is the entire state to be left with reliance on "make good" as the only Adaptive Management Regime measure available to it?

Overemphasis on unlimited take, overemphasis on "make good" as the only measure of redress, and failure to include the water take of resource industries, in the regulation of the interconnected water systems on which catchments depend, has the potential to leave our community devoid of any sensible ability to regulate and protect our water reserves. We will see mining companies argue reliance upon the assurance of unlimited take in planning projects to counter future measures that government may need to adopt.

Given the clear forewarning of the Auditor General as to the potential consequences of poor regulation of the resource industry and the financial costs ultimately facing the people of Queensland by poor regulation and oversight it seems difficult to accept that our Government would contemplate such an approach.[5]

Again, from a legislative standards view point it must surely, at the very least, protect the interests of those who will necessarily be impacted in accordance with fundamental legislative standards lest the true cost of the facilitation of resource activity be borne by those parties and inadequate compensation realised.

<u>The Make Good Overemphasis</u>

We are already informed by governments that our aquifers are over allocated in areas and that the underground hydrogeology varies extensively throughout the state.

Some landholders have very limited access to alternative water sources in some areas. How can "make good" create more water where there is none available? Where is the analysis of the long term "make good" needs and the assurance of capacity to ensure it is even possible?

Make Good cannot "justify" the legislative standard defects of the Bill in its current form. In fact, the overemphasis upon it and the inadequacies of it as a justification for the loss of rights, the loss of a

[4] See "*Regulating Coal Seam Gas in Queensland: Lessons in an Adaptive Environmental Management Approach?*" by Dr Nicola Swayne, Published in (2012) 29 Environmental and Planning Law Journal 163 – 185.
[5] See report of the Queensland Audit Office "*Environmental Regulation of the Resource and Waste Industries*", report 15, 2013-2014.

say in the loss of those rights and the ability to truly remedy the damage the Bill permits is at the very core of the legislative standards inadequacies of the Bill.

Another fundamental legislative concept is the requirement that where rights are dependent on administrative power, that power must be clearly defined and subject to review.

Excluding landholder bore owners from the ability to have a say in respect of the water requirements and impacts of resource company projects and thereby preventing them from having a say in the inevitable loss they face renders them completely dependent on administrative decision making over which their only control or input is an entitlement to embark on make good negotiation process. That does not assure them of any outcome nor does it protect them adequately from sharp conduct by resource companies. Further the entitlement to embark on a make good negotiation is only available to them where they can discharge the onus of proof that the impacts they suffer are due to the resource activity (a not inconsiderable onus for reasons elaborated hereafter).

The Bill does very little to assist landholders in this process notwithstanding that the administrative arm of government is relevant to the process. The administrative arm is involved in UWIR processes, and in facilitating negotiations but does not descend into the make good process or even to ensure fairness in the outcome or oversight over the company behaviour.

The individuals whose rights and liberties are affected and who effectively face a form of compulsory resumption is only provided a framework to negotiate with the (far more powerful and resourced) beneficiary of the permitted impact. i.e. the relevant resource company.

Not only should that power imbalance be addressed, but so too should the rights be clear and very distinctly secured in favour of the impacted party. At the moment there are many failings in the current make good regime – for instance there is no requirement for the resource company to pay for the landholder to access hydrogeological advice or broader reasonable expenses of experts that a landholder lawyer may need to engage for the affected landholder. These necessary expenses should be allowed for. Furthermore, there are many other ways that certainty and better and clearer processes should apply to the make good process.

We are aware of a host of such problems and deficiencies and yet we are unaware of any attempt by government to consider or address those inadequacies to "justify" (in the legislative standards sense) the severe intrusions the Bill allows.

We urge this Committee to undertake a genuine enquiry as to how the make good process is playing out – what problems it suffers, what inadequacies it may face going forward and just how it may warrant being the **only** legislative standard **"**justification" for such an extraordinary imposition on affected landholders and the extensive curtailment of their rights and liberties the Bill allows.

We are aware of cases where the companies have threatened to merely pay monetary compensation rather than to undertake what we understood to be the intended and preferred substitution of water. Payment of money instead of the substitution of a water supply may well mean the end of the landholder's productive enterprise. That is a highly offensive and disturbing outcome for landholders and we do not believe it is "just" compensation to allow companies to resort to paying monetary compensation rather than providing alternative water for all affected bores.[6] For a discussion on the

[6] See "*The Measure of Just Compensation*" by Katrina Wyman, Associate Professor New York University School of Law (attached).

appropriate approach to compensation see "*The Measure of Just Compensation*" by Katrina Wyman, Associate Professor New York University School of Law (attached).

Landowners often see bores as important back-up options or don't immediately fully develop all bores but the value and importance to them is often unable to be adequately measured in money. Even highly utilised and critical bores may not add significant value from a purely monetary viewpoint but the reliability factor of those bores over many years (now to be lost) is an incredibly important and much treasured aspect of many operations such that traditional approaches to monetary compensation simply do not reflect "just" compensation. It should always be a landholder's choice as to the option he requires – and that is not something made clear in the current framework. A sensible attempt to cure these defects and to truly secure the make good process as a satisfactory justification is the beginning of the steps we would urge on the Committee.

We also hear stories of companies behaving in inappropriate ways and taking advantage of ill-educated or poorly advised bore holders in securing make good agreements under the current regime. If such emphasis is to be placed on the "make good" process as the only recourse of affected bore owners or landholders, then BSA urges that fundamental legislative standards require that the make good process must work, it must work fairly and it must be strongly secured to do so to landholders. A Code of Conduct requiring honesty, transparency and good conduct in all such dealings, must surely be part of the beginning of adequate "justification" for such loss of individual rights and liberties - and the effective compulsory acquisition it involves – basic legislative standards surely demand it. Recourse to an Ombudsman as occurs in other monopoly industry situation such as banking and telecommunications could be mirrored.

These kinds of impacts have very severe consequences for landholders. The extent of current rural depression is partly a consequence of the impacts of resource intrusion. Thus far there is widespread perception that inadequate regard has been held for the rights of landholders. It seems that landholders have been treated as mere speed bumps in some kind of interstate resource race, the activities for which are undertaken all over the properties of honest hardworking Queenslanders. It is a moral and social imperative that the make good process not only be shown as being able to work (i.e. is there water available to make good?) but that the process ensures that the landholder is truly and justly compensated in an appropriate manner having regard to their particular situation and requirements.

**Other Issues**

Planning Holiday

The introduction of a requirement for capture within the regulatory regime of non-associated consumptive water is applauded in order to at least partially reduce the "gaping hole" effect (i.e. at least that use will become part of the general water planning regime with other water users in the relevant catchments presumably).

The Explanatory Notes suggest this involves a loss of rights of the companies, and "justification" in the legislative standards context is said to be addressed by allowing 5 years in the Surat Basin for them to address the licensing requirements.

The allowance of 5 years in fact improves the position of the companies. Gas companies never identified non-associated use for the kind of activities it is said may now be addressed to our knowledge. Further, non-associated water was not previously able to be used as the companies

wanted in any event and even if the right was said to be unlimited it would fall under the unlimited take misnomer referred to above. In our view the five (5) year period is inordinate, unwarranted, and will see to a rush of water use and activity in that time.

Public Access to Information

BSA has considerable concern in respect of the transparency of much of the water consumption of the resource industry and seeks the assurance of ready public access to all water information if landholders are to have any hope of making informed and independent assessments of make good options and reliability.

All information available to the regulator concerning hydrogeological assessments and issues throughout resource tenement areas should be available to the public to ensure the dissemination of information to assist landholders in making their own evaluation of water impacts and risks and being able to be informed in the make good negotiation process.

This should extend to Fracking Risk Assessments and records of fracking etc. Landholders cannot assess the causes or possible explanations for changes to bore characteristics, and even the likely long term water make good options, without understanding what has been done in an area, and what the underlying characteristics are etc. The information is clearly in the public interest and the suggestion of commercial sensitivity must surely be overridden by the broader public interest. Again, with such emphasis being placed on make good as the panacea for all the Bills shortcomings, it seems the minimum justification required to ensure the landholder is fully assisted in the make good process.

It is a small price for the companies to pay for the right to avoid the licensing process and court scrutiny that the Bill allows and it better enables landholders to make their own assessments in the make good process to which they are thrown under the Bill.

WDO's

The Bill proposes to introduce Water Development Options which are said to allow government to secure and assure to large projects a commitment to make available large volumes of water at an early stage in the environmental assessment process.

Given the pressure on our water resources in a growing number of areas the proposal to leave this to administrative discretion making, before community consultation, and without rights of appeal or input to all likely impacted water users is an enormous concern.

The extent to which proponents simply "get it wrong" early in major development proposals can be no better illustrated then when Arrow Energy in its Surat Gas Project Application contended initially that the Walloon Coal Measures were separated from the Condamine Alluvium by significant intervening layers and that there was **no** interconnectivity between them. Only after community input was it ultimately required to admit that in fact not only was there clear interconnection between the two, but in fact the WCM's sat **within** the Condamine Alluvium in some areas.

A number of recent Court cases in both Queensland and New South Wales have found significant inconsistencies or inaccuracies in the early advice of large projects that have only come to light after public input and comment. If existing entitlements are to be put at risk by WDO's there must be extensive community input and rights of appeal and/or ultimately assured make good and "just"

compensation as aforesaid secured to the landholder and warranted by the both the proponent and the State if fundamental legislative principles are to be observed.

Further, as "justification" for such inordinate administrative power and benefits to be conferred on proponents there must be clear and significant obligations placed on proponents to be accurate and truthful in all information and disclosures made to government as to consumption requirements with inaccuracies or material non-disclosures for any reason, being "punishable" by penalties and/or revocation of any assurances given on the strength of such inaccuracies.

**Closing**

Restoring legislative standards is not only in the interests of sound governance, it is a moral and social imperative which is very much in the interests of the resource companies in the long run. Studies have repeatedly shown that issues concerning water and competing project developments are the most difficult and volatile to manage, and, handled poorly, can almost guarantee failure for long term project developments.[7]

The BSA urges upon the Committee a vigorous approach to maintaining the legislative standards that are so important to our functioning democracy – and where they are so clearly poorly "justified" to date.

Dated this 9th day of October 2014

**PETER SHANNON**
COMMITTEE MEMBER
BASIN SUSTAINABILITY ALLIANCE

[7] See "*Water, Communities and Mineral Resource Development – Understanding the Risks and Opportunities*", D Brereton and J Parmenter, delivered at Water in Mining Conference, November 2006 (attached).