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

By email to: AREC@parliament.qld.gov.au

Dear Sir/Madam

RE: Water Reform and Other Legislation Amendment Bill 2014

This submission to the Water Reform and Other Legislation Amendment Bill 2014 (WROLA Bill) is from Pioneer Valley Water Board (PVWater) that operates an irrigation water supply scheme at Mackay. The Board holds a Distribution Operations Licence (DOL) under the Water Act 2000 and the Pioneer Valley Resource Operations Plan for the irrigation scheme.

PVWater has been in the process of converting from a Statutory Authority to an irrigator owned co-operative for many years and the WROLA Bill will provide some further legislated framework for the move. PVWater needs to ensure that the move to a co-operative, which is in accord with Government objectives to minimise red tape and simplify operations, does not place at risk the viability of the scheme.

This submission deals with the sections of the WROLA Bill directly related to the conversion of PVWater namely Division 4 – Water Allocations and the proposed new Clause 691A.

We are appreciative of the assistance provided by the Department of Natural Resources and Mines in briefings given as the new legislation was being developed and in providing some clarification and further explanation of the relevant parts of the WROLA Bill once it was tabled in Parliament. The proposals in the Bill have provided some additional framework for the conversion to a co-operative for the scheme but there remain some contractual arrangements that necessitate some closer examination by PVWater prior to proceeding further with conversion.

Our comments on the WROLA Bill are also related to a concerning trend of decreasing water use in the scheme and the non-existence of a market for tradeable water allocations. Some customers are facing financial difficulty, are unable to meet the costs to irrigate and have approached PVWater to “hand back” their Water Allocation (WA) as they are unable to divest their allocation through a water market that has fallen well short of promised benefits it would provide.

For completeness we have included in this submission our initial questions and comments to the Department on the WROLA Bill, the response received to date from the Department and our further comments on the responses.

PVWater (1)

The Act seems to only cater for establishing water allocations under new Resource Operations Licence (ROL) areas. In the situation where both a ROL and DOL already apply and water entitlements are being converted under Sec 146 into those areas, is there to be any mechanism for the DOL holder to be made aware of the process and have input as to impact on its infrastructure.

Response

Section 146 (Converting water entitlements) provides for the conversion of existing interim water allocations (and other authorities) to water allocations. Where the water allocations being created are managed under a ROL the conversion necessitates the creation of a new contract for the supply of water.

The water entitlement notice provisions (clause 68, section 70) require that notice of the making of a draft water entitlement notice to be provided to each affected person. An affected person (clause 202, amendment of the dictionary) includes the holder of a DOL. As an affected person, the DOL holder can submit on the draft water entitlement notice, and the chief executive must consider those submissions in finalising the notice.

PVWater further comment

This clarification indicates that it will allow for adequate involvement by a DOL holder in these circumstances.

PVWater (2)

Sec 146(4) puts in place the supply contract between ROL and Water Allocation (WA) holders. In an existing DOL area there is no similar provision for a DOL/WA holder contract and hence DOL Distribution Arrangements can only be enforced if a WA holder voluntarily signs up to those arrangements.

Response

In those areas where future supplemented water allocations are proposed, entities eligible to be DOL holders will be either Category 2 Water Authorities (with statutory rating powers) or have existing contractual agreements with customers. Accordingly, duplication of these existing obligations is not warranted.

In the case of Pioneer Valley Water Board and other transitioning Category 2 DOL holders, the distribution contract provisions of section 691A which will endure on successors in title to the water allocation, will adequately deal with this issue.

PVWater further comment

PVWater will need to seek legal advice on this as part the proposed conversion to a co-operative. Even though the contract will endure to successors there may be specific provisions within the contract that require further formal acceptance by the new WA holder. There would be no legal obligation on the new WA holder to provide this acceptance.

PVWater (3)

Sec 153 requires that WA's to which a DOL applies must have that recorded on the title. This has been in place since 2005 in the PVWB DOL but the Administrative Advice on titles has not been particularly successful in ensuring that the DOL holder is contacted in the early stages of proposed WA dealings. Sec 155 will overcome this for transfer or lease of WA but not for other dealings such a subdivision and location change.

Response

Comments noted.

PVWater (4)

Sec 155 needs to be extended to require a Disclosure Statement for all WA dealings and not just transfer or lease. This is to ensure that a DOL holder is involved in proposed dealings such as location change where Distribution Losses allocation may need to be taken from a WA to allow supply through DOL works.

Response

The provisions of s155 will provide greater certainty and security for all DOL holders through an open and transparent mechanism to ensure that all intending purchasers of a water allocation associated with the PV Water DOL are aware of their financial obligations to the DOL holder and any conditions and limitations under which water can be supplied.

The Board's Disclosure Statement should be available to all customers and any updates should be brought promptly to the attention of existing customers. As such, all existing water allocation holders will already be familiar with their financial obligations and the conditions and limitations under which water can be supplied. Accordingly, there is no need for those dealings that do not involve a change to the ownership of a water allocation to be subject to the disclosure notice process. It should simply be a matter of making it clear to customers, through the Disclosure Statement, that their existing water supply points will continue to apply, despite any amendment or subdivision of a water allocation, unless and until they negotiate alternative arrangements with the DOL holder.

PVWater further comment (3) and (4)

A Disclosure Statement will not be a legally binding document and a WA holder could proceed with a dealing that impacts on a DOL holder (such as the Distribution Loss matter above) without any contact with the DOL holder until the dealing has been completed. This could lead to breach of contract action by either the DOL or WA holders and could be averted by providing a similar legal requirement to that provided for a ROL holder to a DOL holder. This is a further matter that PVWater will need to seek legal advice on for the conversion.

PVWater (5)

Sec 162 Surrender of WA

- Do both ROL and DOL holder need to consent to surrender of a WA or is it proposed that it could be only one?
- Is inability to pay ROL and DOL water charges to be a circumstance warranting surrender of a WA?
- Is Sec 162(3) to apply if the Chief Executive adopts action under Sec 162(4) (c), (d) or (e)? Would like to see included a clause stating that Sec 162(3) applies not withstanding action taken by the Chief Executive under Sec 162(4).

Response

Where a proposed surrender deals with a water allocation that is managed under a ROL and a DOL, both the ROL holder and the DOL holder have to give consent for the surrender to occur.

The acceptance of the surrender of a water allocation does not have particular criteria in the Water Act, but the chief executive has complete discretion to accept or refuse the surrender (noting that consent is required from the ROL and DOL holder where relevant).

Section 162(3) applies while the water allocation continues to exist, but the obligation to pay fees would apply while the allocation was held by the chief executive and would cease ongoing effect from the time that the water allocation was sold under 162(4)(b), transferred to the ROL or DOL holder under (c) or cancelled under (d) or (e). Where the ROL or DOL holder has an unresolved concern regarding the payment of fees into the future, the ROL or DOL holder has the ability to refuse consent for the surrender.

PVWater further comment

As mentioned at the start of this submission, PVWater has had customers enquiring about “handing back” their WA due in part to high costs of irrigation. The proposed surrender provisions will not address this matter as it is very unlikely that any ROL or DOL holder would agree to a customer surrendering a WA which would lead to a reduction in its base and increase unit costs to remaining customers. Consideration should be given to some joint government/industry initiatives to “kick start” a water market and boost agricultural production, as an alternative to offering financially struggling irrigators an opportunity to surrender that could never be agreed to by the ROL and DOL holder if the reason for surrender is purely financial.

PVWater (6)

Sec163 Cancellation of WA

- Chief Executive notice should go to both ROL and DOL holders

Response

Section 163(2) does provide for the notice from the chief executive about the cancellation to go to both ROL and DOL holders where relevant.

PVWater further comment

This clarification indicates that it will allow for adequate involvement by a DOL holder in these circumstances.

PVWater (7)

Sec 164 WA forfeited

- Who is to be responsible for payment of ROL/DOL water charges between forfeiture and sale by the Chief Executive?
- What happens if the Chief Executive can't find a buyer for the forfeited allocation?

Response

Section 164 maintains the framework for cost recovery following a forfeiture that exists in the current Water Act. The provision of the Bill (as per the provision of the current Act) does not oblige the Chief Executive to pay ROL/DOL charges to pay charges that accrue between forfeiture and sale. However, the chief executive is obliged to sell the forfeited water allocation with the proceeds being applied to a range of accrued liabilities including the DOL holder (third) and the ROL holder (fourth).

If, initially, no buyer can be found, the Chief Executive is obliged to continue with a sales process until a purchaser is found. In this context, it is worth noting that the ROL or DOL holder is not excluded from purchasing the forfeited allocation. It is worth noting that in the 14 years that this provision has been included in the Act that no water allocations have been forfeited.

PVWater (8)

Sec 170 Registering interests

- See comments under Sec153 and 155 above – Acknowledgement Notice to cover all WA dealings not just transfer or lease.

Response

Noted issue addressed above.

PVWater further comment

A Disclosure Statement will not be a legally binding document and a WA holder could proceed with a dealing that impacts on a DOL holder (such as the Distribution Loss matter above) without any contact with the DOL holder until the dealing has been completed. This could lead to breach of contract action by either the DOL or WA holders and could be averted by providing a similar legal requirement to that provided for a ROL holder to a DOL holder. This is a further matter that PVWater will need to seek legal advice on for the conversion.

PVWater (9)

Sec 179 Content of ROL/DOL

- Is this clear enough to show what is to be in both ROL and DOL where both licences apply in a scheme?

Response

The intention of this provision is to provide a flexible head of power, recognising that the division of responsibilities between the ROL and DOL holder is not uniform across different schemes.

PVWater (10)

Sec 197 Operations manual

- Will both ROL and DOL holders be required to have manuals where both licences apply?
- Is DOL holder to have any recourse if it is unable, through Sec 198(1) (c) consultation, to resolve concerns with content of ROL manual in areas where both ROL and DOL apply?
- Will there be a template for Operations Manuals?
- What is to be the status of an existing ROP and its interaction with ROL and DOL Operations Manuals?

Response

Section 197 provides flexibility for the chief executive to require either a ROL or DOL holder to prepare an operations manual, and for that operations manual to address range of matters. An operations manual is a mechanism for allowing the licence holder with scope to prepare and amend the operational and other rules for schemes (while retaining the requirement for approval by the chief executive).

The chief executive will be able to impose a condition on a ROL or DOL that requires an operations manual to be prepared, and what matters that operations manual must address. There are circumstances, for example in a scheme with very few operating rules, and limited scope for alternate management arrangements, where an operations manual may not be required for either a DOL and even potentially a ROL holder, and there may be circumstances where an operations manual is required for both the ROL and DOL holder.

There is no formal recourse for a DOL holder who is unable to resolve concerns with the content of the ROL operations manual. The chief executive will have discretion to approve or refuse the operations manual, and the adequacy of consultation, including with the DOL holder, will be a part of that consideration. The chief executive will be bound to refuse an operations manual that is not consistent with the outcomes and measures of the water plan, or one that does not achieve the water allocation security and environmental flow objectives of the plan.

There will not be a template for the operations manuals, however the transitional arrangements in the Bill propose to deem certain parts of the resource operations plan to be operations manuals (see clause 201, section 1259 and 1261). These transitional provisions will establish the first operations manuals, providing an initial template.

Following the commencement of the Bill, the ROP will cease to have effect, other than as it is transitionally deemed to be other documents, including the ROL and DOL, operations manual and water management protocol.

PVWater further comment

This aspect needs much further clarification as it is vital to preserving the foundations of water allocations that a ROL operations manual cannot be manipulated to impact those foundations. This also includes the ROL holder/DOL holder interaction in systems where both licences operate.

PVWater (11) - New Section 691A

This section now allows PVWB to proceed with conversion to a co-operative structure and continue with the ability to raise charges on WA holders in its DOL area.

A matter that may require some consideration is that a converted water authority as a DOL holder under this Section is provided with a “deemed” contract while a DOL holder formed under any mechanism other than converting water authority only has Distribution Arrangements which may not be enforceable if the DOL holder is a corporate entity where membership is voluntary.

It is not intended that the DOL holder contracts will be “deemed” as chief executive approved contracts, but that they will be the responsibility of the transitioning Category 2 to develop in accordance with the requirements of section 691A. The department will act in the process of the development of the draft contracts (by providing advice etc.) to ensure that they meet these requirements, which only apply to transitioning Category 2’s. Following the transition of the Category 2 by regulation, DNRM will have no further involvement with any contractual matters as they will be the responsibility of the entity and the customer.

This provision was not intended to apply retrospectively to those former Category 2 DOL holders which have previously transitioned (Kelsey Creek & Six Mile Creek in the Proserpine area). Those entities transitioned at that time with full knowledge of their circumstances and have established suitable operating arrangements.

Note that section 155 will apply to all DOL holders, irrespective of their organisational status.

PVWater further comment

This effectively establishes a two tier distribution contract arrangement in irrigation schemes in Queensland. In Government schemes operated under a ROL only (no separate entity holding a DOL), customers hold a Chief Executive deemed contract under the Water Act 2000. In the PVWater situation, the level of protection for the DOL holder business will depend entirely on interpretation of section 691A and departmental advice on a proposed contract. This is cause for concern as to the contract status under any challenge.

PVWater (12)

The ROL/WA supply contract and the ROP13 requirement for registration of WA dealings provide a level of financial protection for a ROL holder that is far superior to that proposed for a DOL holder with only the Disclosure Statement requirement. In the situation where the entity acquiring a water allocation or other dealing is an unlisted company or individual(s) with a doubtful financial situation, a ROL holder can require, under the Water Act supply contract, that a guarantee be provided by the WA holder/transferee to cover water charges. The guarantee must be given to the ROL holder before a ROP13 is issued to allow the Registrar to record the WA dealing.

Under Sec 155 for the same circumstances, a DOL holder will only issue a Disclosure Statement setting out details of the distribution arrangements. The DOL holder may well include in those arrangements that a guarantee may be required but that guarantee would only be enforceable if in the appropriate form and signed by the guarantor. With no requirement for notification to the Registrar from a DOL holder for transfer to be registered, the provision of a guarantee to a DOL holder is totally voluntary.

Sec 155 should clarify if a DOL holder can include enforceable guarantees in distribution arrangements and refuse to provide a Disclosure Statement if not given. This will necessitate direct contact between a DOL holder and the WA holder or transferee/lessee which is not currently proposed.

Without these provisions a DOL holder is vulnerable compared to the ROL holder and in distribution schemes, the financial exposure associated with operation and maintenance of infrastructure is much greater than that with the bulk water charges attached to the ROL supply contract.

A further concern is that a DOL holder, even if it has provided a Disclosure Statement, may not become aware of transfers of water allocation for some time and should be part of the ROP13 process. This is to effect that the ROP13 cannot issue until the transferee or lessee acquiring the water allocation has entered into the distribution arrangements and any company directors have provided the personal guarantee to the DOL holder.

Further in regard to guarantees, in a situation where a WA holder may wish to relinquish their WA given the ongoing water charges, it becomes more important that the guarantee is obtained from directors. If the WA holder company went into liquidation, the liquidator may give consideration to disclaiming the WA/distribution arrangements/contract.

In that regard, Section 568 of the Corporations Act provides that a liquidator of a company may disclaim property of the company that consists of for example, property that is unsaleable or is not readily saleable or property that may give rise to a liability to pay money or some other onerous obligation. If there was a concern as to whether or not the liquidator had the ability to disclaim the WA/ distribution arrangements/contract, the liquidator could make application to the court for the court's leave.

Response

The points are noted, but cannot be supported as part of the current legislative reform process. While it appears that these latest comments are based on some new advice that you have obtained, it is disappointing that PV Water seems to have changed its position in relation to matters that have been previously agreed.

In relation to financial guarantees, this is a future matter for contractual agreement between PV Water and its customers. It is noted, however, that such financial guarantees are not part of the existing Board's arrangements with customers and that PV Water will have access to normal debt recovery options. In relation to the potential for Corporations Act liquidators to disclaim property, the scenarios presented would seem highly hypothetical and certainly cannot be accepted as the basis for creating a statutory basis for compelling your customers to provide an enforceable financial guarantee.

PVWater further comment

PVWater refutes that it has “changed its position in relation to matters that have been previously agreed” as claimed by the Department. PVWater and the Department had agreed that PVWater would obtain its own legal advice on the proposal once the full details were available in the draft Bill. This is precisely what has occurred and it is this legal advice that prompted PVWater to raise the matters in PVWater (12) and to indicate that further legal advice will need to be obtained as part of considerations on the conversion to a co-operative.

The proposed legislation appears to indicate that a DOL holder is to be classed as a second class entity compared to a ROL holder in water supply schemes in Queensland. In an irrigation scheme where both the bulk (headworks) and distribution sections are operated by a ROL holder, the ROL holder has been provided with Chief Executive deemed supply contracts with WA holders. SunWater is the ROL holder for major irrigation schemes in this State and has two separate deemed contracts with customers in the schemes. These are the SunWater River Supply Contract covering bulk (headworks) operations and the SunWater Channel/Pipeline Supply Contract for the distribution network to individual farms. It is understood that the WROLA Bill continues these contract arrangements but alters them to standard supply contracts published on either the ROL holder or Department websites.

Evidence that a customer has entered into the ROL contracts must be provided by the ROL holder to the Registrar of Titles before any WA dealing including subdivision can be recorded by the Titles Office. This provides for all matters associated with a particular WA dealing to be negotiated with the ROL holder and resolved prior to the title registration being recorded.

This is not proposed for a scheme operated by a DOL holder where that entity will need to rely on customers observing non-enforceable requirements set out in a Disclosure Statement or resort to breach of contract actions after a dealing has been processed. Buyer beware is a catch phrase often quoted as the fall back for these situations but, any process that minimises recourse to legal proceedings must be significantly more beneficial for all parties.

Without this in the PVWater scheme, customers will be required to sign a new contract or amendment to an existing contract with the ROL holder (SunWater) for all WA dealings in the PVWater distribution scheme before submission to the Titles Office. This is while PVWater can only provide a Disclosure Statement setting out its requirements which then rest solely with the customer as to those requirements being met.

In regard to financial security it is worthy to note that, in the PVWater scheme, ROL holder bulk water charges under legislated contracts comprise only some 20% of the total water charges paid by customers with the remaining 80% subject to a lower level of security with a DOL holder.

PVWater's legal advice to date is that the proposed arrangement under the WROLA Bill places some uncertainty as to the future viability of the scheme.


As a co-operative and a membership based service provider, to maintain viability PVWater would need either to be providing a product which is highly desired, or servicing a captive market.

Instead, PVWater would find itself with a supplementary product having decreasing appeal to a price-taking sector with increasing input costs, one of which (energy) directly impacts product appeal and uptake. This, against a backdrop of government unwilling to legislate to adequately protect future viability.

Government has undertaken a major investigation into moving its channel based irrigation schemes to local control. If these schemes are to be treated similarly to PVWater under the WROLA Bill, it raises serious concern as to the intent particularly for those schemes where cost driven declining water use and failed water markets exist. The prospect for failure in those schemes is increased by rendering local control ineffective by not providing the same viability protections to the local entities as afforded by Government while under its control.

It is considered appropriate that further consideration be given to these important matters within the WROLA Bill that could significantly impact on the viability of a DOL holder in an irrigation scheme.

Yours sincerely



JR Palmer
MANAGER