Parliamentary Committees



Mineral, Water and Other Legislation Amendment Bill 2018

Report No. 4, 56th Parliament
State Development, Natural Resources and Agricultural Industry Development Committee
April 2018

State Development, Natural Resources and Agricultural Industry Development Committee

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Acknowledgements

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Contents

Abbreviations

2017 Bill /MWOLA	Mineral, Water and Other Legislation Amendment Bill 2017
AA	Alternative Arrangements
ADR	alternative dispute resolution
ADREN	ADR election notice
AgForce	AgForce Queensland
AMEC	Association of Mining and Exploration Companies
APPEA	Australian Petroleum Production and Exploration Association
ATSI	Aboriginal and Torres Strait Islander
Bill/ MWOLA	Mineral, Water and Other Legislation Amendment Bill 2018
BSA	Basin Sustainability Association
CCA	conduct and compensation agreement
CM&N	Conciliation, mediation and negotiation
committee	State Development, Natural Resources and Agricultural Industry Development Committee
DEHP	Department of Environment and Heritage Protection
department/DNRME/DNRM	Department of Natural Resources, Mines and Energy / Department of Natural Resources and Mines
EA	environmental authority
EDO Qld / EDO	Environmental Defenders Office Qld
EPA	Environmental Protection Act 1994
GBRMPA	Great Barrier Reef Marine Park Authority
GFC	GasFields Commission Queensland
IPNRC/predecessor committee	Infrastructure, Planning and Natural Resources Committee
Land Court	Land Court of Queensland
LGAQ	Local Government Association of Queensland
LSA	*Legislative Standards Act 1992*

LTGA	Lock the Gate Alliance
MERCP Act	*Mineral and Energy Resources (Common Provisions) Act 2014*
MGA	make good agreement
MLES	matter of local environmental significance
MNES	matter of national environmental significance
MRA	*Mineral Resources Act 1989*
MSES	matter of State environmental significance
NQMA	North Queensland Miners Association
OQPC	Office of the Queensland Parliamentary Counsel
P&G Act	*Petroleum and Gas (Production and Safety) Act 2004*
QBOA	Queensland Boulder Opal Association
QFF	Queensland Farmers' Federation
QLS	Queensland Law Society
QRC	Queensland Resources Council
QSMA	Queensland Sapphire Miners Association
QSMC	Queensland Small Miners Council
review report	*Independent review of the Gasfields Commission Queensland* report
RI	Resolution Institute
RWUE-IF	rural water use efficiency - irrigation futures
SCRP	Stanthorpe Community Reference Panel
SDRC	Southern Downs Regional Council
Water Act	*Water Act 2000*
WWF	World Wildlife Fund

Chair's foreword

This report presents a summary of the State Development, Natural Resources and Agricultural Industry Development Committee's examination of the Mineral, Water and Other Legislation Amendment Bill 2018.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The committee was greatly aided in this undertaking by the work of our predecessor committee, the Infrastructure, Planning and Natural Resources Committee (IPNRC) of the 55th Parliament, which considered an early version of the Bill. The IPNRC's public consultation process and thorough scrutiny of the provisions of the earlier Bill helped ensure that this committee was well-placed to understand and develop a position on the Bill in the given timeframe.

I would like to thank my fellow committee members for their contributions to this inquiry.

I also thank our committee secretariat staff, Hansard reporters, all submitters and stakeholders who gave evidence to this inquiry and the department for their assistance.

I commend this report to the House.

Chris Whiting MP

Chair

Recommendations

The committee recommends the Mineral, Water and Other Legislation Amendment Bill 2018 be passed.

The committee recommends that the Minister in his second reading speech clarify the effectiveness of the current arrangements in addressing compensation for landholders who do not have resource tenure activity on their land but may be affected by the impacts of such activity.

The committee recommends that:

- the Department of Natural Resources, Mines and Energy develops an extensive suite of educational material regarding the arbitration process and that this material be readily available and easy to find on the Department of Natural Resources, Mines and Energy website
- the Department of Natural Resources, Mines and Energy conducts information sessions with peak bodies, key stakeholder and affected communities to provide, and advertise, the availability of this material
- the Department of Natural Resources, Mines and Energy reports to the committee in November 2018 on the development and distribution of this material.

The committee recommends that proposed s 91C be removed and that the Bill be amended so that parties have the right to legal representation during arbitration.

The committee recommends that the Department of Natural Resources, Mines and Energy collaborates with stakeholders to investigate developing a methodology to determine reasonable landholder time-related costs and how this could be included in legislation.

The committee recommends that the Bill be amended to:

- remove proposed s 91 from cl 46 of the Bill
- retain the current provisions with respect to professional costs as set out in s 81(4)(b) of the *Mineral and Energy Resources (Common Provisions) Act 2014* (under cl 38 of the Bill), with a minor amendment to include the costs of an agronomist as follows:

  81(4)(b) accounting, legal or valuation or agronomist costs the claimant necessarily and reasonably incurs to negotiate or prepare a conduct and compensation agreement, other than the costs of a person facilitating an ADR.

The committee recommends the Minister for Natural Resources and Mines clarifies, during his second reading speech, the timeframe proposed for an official to report on a direction given to a relevant entity to take action on a water quality issue.

1 Introduction

1.1 Role of the committee

The State Development, Natural Resources and Agricultural Industry Development Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's areas of portfolio responsibility are:

- State Development, Manufacturing, Infrastructure and Planning
- Natural Resources, Mines, and Energy
- Agricultural Industry Development and Fisheries.

Section 93(1) of the *Parliament of Queensland Act 2001* provided that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Mineral, Water and Other Legislation Amendment Bill 2018 (Bill) was introduced into the Legislative Assembly and referred to the committee on 15 February 2018. The committee is to report to the Legislative Assembly by 9 April 2018.

1.2 Inquiry process

A previous version of the Bill was introduced to the 55th Parliament as the Mineral, Water and Other Legislation Amendment Bill 2017 (2017 Bill) and referred to the former Infrastructure, Planning and Natural Resources Committee (IPNRC). The IPNRC was due to report on 3 November 2017 but was unable to do so as the Parliament was dissolved on 28 October 2017.

The current version of the Bill replicates the contents of the lapsed 2017 Bill but also includes further amendments which address some issues which were canvassed during the 2017 Bill inquiry.[2]

The committee examined the evidence of the IPNRC inquiry during its examination of the Bill.

On 19 February 2018, the committee wrote to the Department of Natural Resources, Mines and Energy (department/DNRME) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions by 27 February 2018.

The committee received 17 submissions (see Appendix A). On 2 March 2018, the committee received written advice from the department in response to matters raised in submissions.

The committee held a public briefing with DNRME on 5 March 2018 (see Appendix B).[3] The committee held a public hearing in Brisbane on 9 March 2018 (see Appendix B).

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1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 Hon Anthony Lynham MP, Minister for State Development and Minister for Natural Resources and Mines, Queensland Parliament, Record of Proceedings, 15 February 2018, p 117.

3 The Department of Natural Resources and Mines (DNRM) and the Department of Energy and Water Supply were combined to create the new Department of Natural Resources, Mines and Energy (DNRME) after the 2017 election. In this report, 'department' refers to DNRME or its predecessor DNRM.

1.3 Inquiry process of the Infrastructure, Planning and Natural Resources Committee

The IPNRC received 19 submissions (see Appendix C), took a departmental briefing on 6 September 2017 with the Department of Natural Resources and Mines (DNRM/department) and held a public hearing on 11 October 2017 (see Appendix D).

Information on the IPNRC inquiry process, including submissions received and transcripts from the briefing and hearing can be found on the 2017 Bill inquiry website.[4]

1.4 Policy objectives of the Mineral, Water and Other Legislation Amendment Bill 2018

The explanatory notes state that the primary policy objectives of the Bill are to:

- give effect to the Queensland Government's response to four recommendations of the Independent Review of the Gasfields Commission Queensland and Associated Matters
- remove the automatic referral of compensation matters to the Land Court of Queensland under the *Mineral Resources Act 1989*
- ensure the consideration of the water-related effects of climate change on water resources is explicit in the water planning framework
- provide for the inclusion of cultural outcomes in water plans to support the protection of the cultural values of water resources for Aboriginal peoples and Torres Strait Islanders
- provide a mechanism to allow for temporary access to unallocated water held in strategic water infrastructure reserves
- establish new powers for dealing with urgent water quality issues.[5]

Further, the explanatory notes state streamlining and minor and miscellaneous amendments are also proposed to the *Mineral Resources Act 1989* and associated regulation, the *Mineral and Energy Resources (Common Provisions) Act 2014* and associated regulation, the *Coal Mining Safety and Health Act 1999*, the *Petroleum and Gas (Production and Safety) Act 2004*, the *Petroleum Act 1923*, the *Geothermal Energy Act 2010*, the *Greenhouse Gas Storage Act 2009* and the *Water Act 2000*.[6]

1.5 Consultation on the Bill

The explanatory notes advise that on 5 July 2017, the following stakeholders were provided with a consultation draft of the Bill and a summary of amendments for feedback:

- Association of Mining and Exploration Companies (AMEC)
- Australian Petroleum Production and Exploration Association (APPEA)
- Gasfields Commission Queensland (GFC)
- Queensland Resources Council (QRC)
- Queensland Farmers' Federation (QFF)
- AgForce Queensland (AgForce)
- Environmental Defenders Office (EDO)
- Lock the Gate Alliance (LTGA)
- World Wildlife Fund (WWF)

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[4] The IPNRC inquiry webpage is accessible at: https://www.parliament.qld.gov.au/work-of-committees/former-committees/IPNRC/inquiries/past-inquiries/MWOLA2017

[5] Explanatory notes, p 1.

[6] Explanatory notes, p 1.

- Resolution Institute (RI)
- Local Government Association of Queensland (LGAQ)
- Queensland Law Society (QLS)
- North Queensland Miners Association (NQMA)
- Queensland Sapphire Miners Association (QSMA)
- Queensland Boulder Opal Association (QBOA), and
- Queensland Small Miners Council (QSMC).[7]

The department held meetings to discuss the amendments in detail throughout July 2017 with all stakeholders except AMEC, QFF, LTGA, LGAQ, RI, QBOA and QSMC and received written submissions regarding the draft Bill from AgForce, APPEA, AMEC, GFC, QLS, QRC, NQMA and QSMA.[8]

During the IPNRC inquiry, in regard to consultation on amendments related to the resources acts, DNRM provided the following additional information:

> *We would also point out that a large number of amendments related to the resources acts are derived from Professor Scott's report. Members, I am sure, are familiar with the process that Professor Scott utilised. There has been a lot of consultation around the processes associated with getting better dispute resolution around conduct and compensation payments and make-good agreements.*[9]

In regard to amendments relating to water, the explanatory notes stated that DNRME's Water Engagement Forum was consulted on the proposals on 8 March, 2 June, 10 July and 2 August 2017, including receiving a consultation draft of the provisions for comment.[10]

During the IPNRC inquiry DNRM provided further advice regarding consultation with the Water Engagement Forum:

> *It* [the consultation] *was done over a series of face-to-face meetings. I think it is important to recognise that many of the amendments came from feedback that those groups had provided to the department initially. They were then provided drafts of the changes. Their comments were taken into account as we crafted the legislation, and as we did it we attempted to deal with any issues that they raised in the drafting process. It was over an extended period. There were a number of face-to-face consultations and a review of documents and written submissions.*[11]

In regard to the proposed amendment to include cultural outcomes in water plans, the following groups were consulted:

- Georgina Diamantina Aboriginal Group
- The Northern Basin Aboriginal Nations

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7 Explanatory notes, p 11.

8 Explanatory notes, pp 11-12.

9 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 4.

10 Stakeholders of the Water Engagement Forum include AgForce, AMEC, Australian Bankers' Association, APPEA, EDO, Great Barrier Reef Marine Park Authority, Irrigation Australia, LGAQ, Local Management Area, Support Services Pty Ltd, Natural Resource Management Regions Queensland, Queensland Conservation Council, QFF, QRC, State Council of River Trusts, Queensland Seafood Industry Association, Seqwater, SunWater, The Wilderness Society, and WWF: explanatory notes, p 12.

11 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 4.

- The Girringun Aboriginal Corporation
- Reef Catchments Traditional Owners Reference Group
- Chuulangun Aboriginal Corporation
- Northern Gulf Resource Management
- Burnett Mary Regional Group – Bunya Peoples Aboriginal Corporation
- Torres Strait Regional Authority
- Southern Gulf Natural Resource Management.[12]

DNRM further advised the IPNRC that:

> *Separate to the Water Engagement Forum, which was probably our primary activity, we did a deep dive into consulting with Indigenous communities about the changes there. We had separate engagement with a total of 19 groups and that involved some regional activity as well as a series of face-to-face meetings and workshops.*[13]

1.5.1 Stakeholder feedback

During the predecessor inquiry the IPNRC heard two differing views on the department's consultation on the Bill.

QRC commented positively on the Bill's consultation process and the detail provided in the explanatory notes:

> *There has been a good consultation process go into most of it, so people were aware of the intent of the changes and have had a chance to comment on how they might come into play. It is noted in the explanatory memorandum that there is some discussion around consistency with fundamental legislative principles, and I think the notes do a good job of balancing those concerns. They call out some of the risks, but on balance we tend to fall in the same camp as the drafter of the notes. We think those considerations have been given appropriate weight and properly recognised.*[14]

In contrast, the QSMA, expressed its disappointment with the consultation in its submission and during the public hearing. QSMA stated:

> *Previously we have sent submissions in regards to the MOLA Bill 2017, these submissions and those of NQMA … were not considered for the final draft of this bill.*
>
> *…*
>
> *Firstly, we will inform you we were not consulted on this proposed Bill until the 11 hour! Sent to us on the 5th July 2017 to be responded to by 21st July. We the QSMA were not in agreement with this bill whatsoever (contrary of Mr Lynham's, Bill statement) as it effects many of our members who are the backbone explorers for our area. Our submissions (due to their 11th hour notification & consultation) were to the point and it explained the ramifications these amendments would have on all small Miners in Queensland should they be passed.*[15]

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[12] Explanatory notes, p 12.

[13] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 4.

[14] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public hearing transcript, Brisbane, 11 October 2017, p 16.

[15] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Sapphire Miners Association, submission 10, p 1.

During the public hearing, the QSMA stated its view that the lack of consultation on mining legislation with small and medium miners was becoming more common.[16] The NQMA echoed QSMA's view on consultation:

> *When the legislation was first proposed or the amendment bill was first proposed, we got it in an email which was private and said 'not for distribution'. Through the NQMA meeting we asked for a meeting with the minister at that stage. We had a Skype meeting with representatives of the minister's office and explained our great concerns very vocally at that time, and that was in July. We also asked for submissions and we lodged submissions in writing at that time. The next thing was that the bill was introduced to parliament and we were asked for submissions again, so we have not had any feedback from our submissions.*[17]

In response to these concerns, the department advised:

> *We acknowledge their feedback. We have been consulting on this particular bill, as I think I outlined in the briefing that we provided a few weeks ago, and this has been a long process. We started obviously talking more to the peak bodies, and in that space I guess that includes AMEC, … and small miners are members, including the North Queensland Miners Association. We did get the vibe from there that there were particular interests with some of those small mining associations and that is why we took the effort to provide them with an exposure draft of the bill—not everyone gets an exposure draft of legislation—and we had officers who attended to provide a face-to-face briefing. We totally accept that we could not incorporate all of the feedback that they got. There were some issues that are policy matters that were beyond our remit to accept in the process of finalising this bill, but we certainly do value their input and we did go to significant lengths to consult with them and we will continue to do so.*[18]

Committee comment

The committee acknowledges that DNRME consulted widely with peak bodies, and that some peak bodies, such as the QRC, commended the significant level of departmental consultation. The committee notes that the department's consultation included the engagement with the AMEC, the peak body for small to medium tier miners and their associations. However, given the substantial concerns of some stakeholders, there is clearly a need for DNRME to consider additional methods of consultation so that small and medium tier organisations are involved in the consultation process and are allowed adequate time, given the limited resources of these smaller representative groups, to provide feedback. The committee strongly encourages the department to do this in the future.

[16] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public hearing transcript, Brisbane, 11 October 2017, p 16.

[17] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public hearing transcript, Brisbane, 11 October 2017, p 2.

[18] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public hearing transcript, Brisbane, 11 October 2017, p 33.

1.6 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, including the policy objectives which it will achieve and consideration of the information provided by DNRME, the Department of Environment and Heritage Protection (DEHP) and from stakeholders, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Mineral, Water and Other Legislation Amendment Bill 2018 be passed.

2 Examination of the Mineral, Water and Other Legislation Amendment Bill 2017

This section examines stakeholder issues raised during the committee's and the IPNRC's examination of the Bill.

2.1 General liability to compensate

Landholder and legal groups raised their significant concerns regarding cl 38 (cl 37 of the 2017 Bill) and the proposed amendment to s 81 of the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCP Act), which establishes the general liability of resource authority holders to compensate the owners and occupiers of public and private land. Non-mining sector stakeholders did not support amendments to s 81(4)(a) that state the compensatable effects only apply where authorised activities have been carried out 'on the eligible claimant's land'. It was argued that the amendment removes the rights of neighbours within the resource authority area, but without authorised activities on their land, to claim compensation for the impacts of nearby activities.[19]

Currently, s 81(1) of the MERCP Act provides:

> *A resource authority holder is liable to compensate each owner and occupier of private land or public land that is in the authorised area of, or is access land for, the resource authority (each an eligible claimant) for any compensatable effect the eligible claimant suffers caused by authorised activities carried out by the holder or a person authorised by the holder.*

Further, s 81(4) of the MERCP Act currently provides:

> ***compensatable effect*** *means any or all of the following-*
>
> *(a) all or any of the following relating to the eligible claimant's land-*
>
> *(i) deprivation of possession of its surface;*
>
> *(ii) diminution of its value;*
>
> *(iii) diminution of the use made or that may be made of the land or any improvement on it;*
>
> *(iv) severance of any part of the land from other parts of the land or from other land that the eligible claimant owns;*
>
> *(v) any cost, damage or loss arising from the carrying out of activities under the resource authority on the land.*
>
> *(b) accounting, legal or valuation costs the claimant necessarily and reasonably incurs to negotiate or prepare a conduct and compensation agreement, other than the costs of a person facilitating an ADR;*
>
> *(c) consequential damages the eligible claimant incurs because of a matter mentioned in paragraph (a) or (b).*

Proposed new s 81(1) of the MERCP Act provides:

> *A resource authority holder is liable to compensate the following persons (each an **eligible claimant**) for each compensatable effect suffered by the eligible claimant because of the holder—*

[19] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Shine Lawyers, submission 1, Shay Dougall, submission 3; John Jenkyns, submission 14; Landholder Services, submission 16 addendum, QLS, submission 17, Property Rights Australia, submission 18.

(a) an owner or occupier of private land that is—

(i) in the authorised area of the resource authority; or

(ii) access land for the resource authority;

(b) an owner or occupier of public land that is—

(i) in the authorised area of the resource authority; or

(ii) access land for the resource authority.

Proposed new s 81(4) of the MERCP Act provides:

***compensatable effect**, suffered by an eligible claimant because of a resource authority holder, means-*

*(a) any of the following caused by the holder, or a person authorised by the holder, **carrying out authorised activities on the eligible claimant's land**-(QLS emphasis added[20]):*

(i) deprivation of possession of the land's surface;

(ii) diminution of the land's value;

(iii) diminution of the use made, or that may be made, of the land or any improvement on it;

(iv) severance of any part of the land from other parts of the land or from other land that the eligible claimant owns;

(v) any cost, damage or loss arising from the carrying out of activities under the resource authority on the land; and

(b) consequential loss incurred by the eligible claimant arising out of a matter mentioned in paragraph (a).

Lock the Gate Alliance argued that the proposed amendment to s 81 would result in a substantive change:

Clause 38 of the Bill amends section 81(4)(a) of the Mineral and Energy Resources (Common Provisions) Act 2014. Those amendments will limit compensation such that it will only apply to compensatable effects from resource activities which happen on the claimants own land.

Currently, under that section, a landholder is liable for compensation from resource activities 'in relation to the eligible claimants land'. This is a broad clause which allows neighbours and other landholders who may be affected by resource activities occurring on other land titles, to claim compensation. Gas activities frequently cause extensive off-site and downstream impacts, including noise and air pollution impacts. The concern is that landholders can be heavily affected by noise and air pollution, but if it is occurring just outside their land, they will have no claim for compensatable effects.

This represents a very substantive change that would have major impacts on families, landholders and communities forced to live in industrial gasfields. We have members and supporters who believe this will substantially impede their ability to protect themselves from gas company excesses, particularly noise.[21]

Shine Lawyer's 2017 submission outlined concerns in regard to the proposed amendments to s 81 and the lack of explanation for the policy amendment in the 2017 explanatory notes:

[20] QLS, submission 5, pp 3-4.

[21] Lock the Gate Alliance, submission 6, p 1

Those amendments have very serious ramifications for landholders and the lack of attention in the [2017 Bill] explanatory notes belies the importance of the issue.

Firstly, the proposed clause 37 [now clause 38] *unequivocally removes the existing obligation of resource authority holders to compensate landowners within their tenure area, who suffer a compensatable effect in circumstances where the activity is not actually being conducted on the land of the landowner. That is, it removes the right of neighbours who are within the tenement area to claim compensation for the impacts of activities carried on next door to them. Resource activity, particularly gas activity, typically has a huge and very widespread impact and does not only affect the landowner on whose land the activity is conducted. Given its nature it sometimes affects neighbouring landowners – and sometimes very significantly. This will be even more so as new forms of extraction, with potentially more significant and intrusive impacts, are developed and adopted.*

… We are unable to fathom why the obligation to compensate in these circumstances would be removed. The removal is not identified in the explanatory notes but its form is very deliberate, subtle and effective.[22]

QLS argued that the amendments to s 81 would limit the resource authority holder's liability to compensate where impacts caused by authorised activity were not limited to property boundaries.[23] QLS explained:

QLS is concerned that the proposed changes to the definition of compensatable effect may result in an unintended change to the nature of resource authority holders' liability to compensate public and private landholders.

Under the current regime, there is some debate as to whether it is the legislature's intention that the liability of resource authority holders extends to encompass liability for the effects and impacts suffered by eligible claimants arising from activities undertaken off their properties.

Under the new draft as proposed, it is clear that a resource authority holder's liability to compensate will only extend to those owners and occupiers of properties on which the activities are undertaken. Resource authority holders will not owe a liability to compensate owners of properties nearby to their activities, at least under the MERCP Act.[24]

The department advised in 2017 that:

There is no change to the obligation to compensate neighbouring landholders as a result of the changes to section 81. The provision has always only been about compensation for landholders upon whose land the advanced activities are being carried out on.

This is clear when the existing section is read in the context of the Act as a whole. A conduct and compensation agreement (CCA) is only required where a resource authority intends to enter private land to carry out an advanced activity. There is no requirement for a CCA on private land where no advanced activities are proposed.

Furthermore, the Act only allows for the Land Court to make determinations about compensation where either preliminary activities have occurred, where there is a CCA in place or where the parties are in the process of negotiating a CCA and cannot reach agreement.

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22 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Shine Lawyers, submission 1, p 2.

23 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Property Rights Australia, submission 18, p 3.

24 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, QLS, submission 17, pp 4-5.

> *There is no head of power for the Land Court to determine compensation for neighbouring landholders if activities are not carried out on their land.*
>
> *Section 81 relates to compensatable effects for the purposes of the* Mineral and Energy Resources (Common Provisions) Act 2014*. It has no impact on enforcement of environmental authorities which is regulated under the* Environmental Protection Act 1994*.*[25]

DNRME set out the purpose of s 81 and the alternate 'heads of power' under which neighbouring property could seek compensation:

> *I would also like to clarify that nothing in the redrafting of section 81 will affect alternative arrangements or an environmental authority under the Environmental Protection Act 1994. Nuisance issues like noise, light and dust are managed under a resource authority holder's environmental authority obligations. Under this framework, affected landholders—even those who do not have resource activities on their land—may enter into an alternative arrangement with the resource authority holder. This may include things like compensation or alternative accommodation during the term of the nuisance impact.*[26]

Further, the department advised:

> *The environmental authority regulates nuisance impacts such as noise, odour and dust. A resource authority cannot be granted unless an environmental authority is approved. The environmental authority conditions also allow alternative arrangements to be negotiated by the parties where a landholder is affected or likely to be affected by amenity impacts. An alternative arrangement outlines how the impacts will be dealt with, which may include installing abatement measures or alternative accommodation for the duration of the relevant impact.*[27]

The committee took evidence which questioned the effectiveness of Alternative Arrangements (AA) to provide a mechanism for neighbouring landholders to seek redress or compensation for the impacts of resource activity. Shine Lawyers submitted that:

> *1. Unlike CCA's, an AA is not available to a Landholder as of right under the P&G or MERCP Acts, and the CCA process – it arises purely as a creature of the EPA/EA process.*
>
> *2. In particular, restrictions are imposed on allowable noise, dust, light and other potential "nuisance" impacts in the Environmental Authorities – that is, the Tenure Holder is allowed to emit certain levels of noise, light, dust etc.*
>
> *3. [Under] Environmental Authority condition where AA's arise…Tenure Holder is authorised to exceed the prescribed EA limits if it secures an AA with an impacted neighbour.*
>
> *4. In practice, this usually only arises if a Landholder complains about breaches of the limits imposed. Not all Landholders are strong enough to complain, or aware of their rights.*
>
> *5. Where a complaint is made, the Department will usually investigate. If it secures evidence of the breaches, it will usually directly or indirectly, place pressure on the relevant Tenure Holder to secure an AA from the Complainant. Given the distances involved, the lack of staff and the fact exceedances can be intermittent (depending on activity), that assistance is not always easily secured…*
>
> *9. Unlike CCA's, there is no formal process prescribed for the AA arrangements and there is no entitlement to professional assistance, including legal assistance. A Landholder is left to their own devices. Those that do seek legal advice will usually have their lawyer insist on the*

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[25] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 2.

[26] Public briefing transcript, Brisbane, 5 March 2018, p 2.

[27] Department of Natural Resources, Mines and Energy, correspondence dated 27 March 2018, p 2.

> *Tenure Holder covering legal fees before negotiating further but that is not always agreed to, and/or is met with the usual toing and froing on that issue, leaving a Landowner under pressure not knowing whether he can press recovery of "reasonable and necessary" assistance.*
>
> *10. These are matters that Tenure Holders, understandably from their commercial perspective, now try to address "ahead of the issue" in the CCA process - almost "as of course" lately... If a Landowner does not appreciate the importance of this issue, they can easily give away vital rights.*[28]

At the departmental briefing on 5 March 2018, DNRME again stated:

> *Section 81 imposes a liability on the resource tenure holder to compensate each owner or occupier of private or public land that is in an area of the resource authority for any compensatable effect caused by the authorised activities. Neighbours whose land is not being accessed to carry out these activities are not entitled to have a conduct and compensation agreement under the land access framework. There is also no provision for a neighbouring landholder to apply to the Land Court for a compensation determination. As such, the view that changes to the wording of section 81 remove landholder rights cannot be sustained.*[29]

The department argued that changes to the wording in s 81 did not alter the intent of the MERCP Act:

> *These stakeholders submitted that a proposed minor change to the wording in section 81 of the Mineral and Energy Resources (Common Provisions) Act 2014 represents a significant change to landholders' rights to claim compensation for the impacts of resource activities. This is not the department's view. The minor wording change to section 81 does not alter the compensation entitlement of landholders and does not reflect a change in policy.*[30]

Legal witnesses to the committee challenged the interpretation that changes in the wording of the legislation were insignificant. Mr Shannon, from Shine Lawyers, told the committee:

> *As lawyers, we focus on words. There could be no more important area than words in the legislation. Since we do not have hundreds of years of interpretation of mortgage-type arrangements or leases or easements, the conduct and compensation agreement is a whole new creature. It attaches to the land indefinitely. It guides everything for the landholder and the company from that point, so it is an incredibly important negotiation to the landholder … There will often be hours spent on one word in a conduct and compensation agreement. That sounds silly, but if you think about the difference between the words 'may' and 'must' it can be critical to a landholder.*[31]

Landholder and legal sector submitters disagreed with the department's assertion that:

> *Deleting from section 81 of the Common Provisions Act the term* ***in relation to the eligible claimant's land*** *and substituting it with the term* ***on the eligible claimant's land*** *will not change landholder's compensation entitlements, and that the entitlements to compensation has always been limited to effects of authorised activities on the claimant's land.*[32]

In relation to the 2017 Bill, Mr Houen argued that:

> *DNRM has not provided any evidence nor any valid argument to support its claims that Clause 37* [now cl 38] *of the Bill does not change any compensation provisions and that in any*

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28 Mr Peter Shannon, Shine Lawyers, correspondence dated 15 March 2018.

29 Public briefing transcript, Brisbane, 5 March 2018, p 2.

30 Public briefing transcript, Brisbane, 5 March 2018, p 2.

31 Public hearing transcript, Brisbane, 9 March 2018, pp 2 - 3.

32 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Mr Houen, Landholder Services, submission 16.2, p 1.

case compensation has only ever been available for effects of activities on the eligible claimant's land.

DNRM has not given any reason why, if its claims are correct, the proposed amendment replacing ***relating to the eligible claimant's land*** *with* ***on the eligible claimant's land*** *is necessary.*[33]

Further, Mr Houen asserted that:

The proposed amendment replacing relating to the eligible claimant's land with on the eligible claimant's land would:

- *substantially alter the meaning of the provisions in place since commencement of the P&G Act in 2004;*
- *consequently reduce eligible claimants' existing right to compensation; and*
- *disqualify others who are presently eligible claimants.*

That is, owners of land within a tenement but on whose land no resource activities are undertaken, who clearly have a statutory right to compensation now in respect of compensatable effects such as loss of value of the property, costs, damage or loss or consequential damages caused by noise, air pollution etc., would be stripped of that right.

Such arbitrary cancellation of existing rights is not excused by the fact the legislation as it stands fails to provide a process for those eligible claimants not directly affected by resource activities to apply to the Land Court to have their compensation determined. That situation is clearly due to an official oversight which the Government is duty bound to correct.[34]

In relation to the 2018 Bill, Mr Houen provided further advice on the application of s 81.[35]

In response the department advised that:

The Department notes Mr Houen's concerns that the proposed minor amendment to section 81 of the Common Provisions Act would effect a change in the legal position for section 81. However, when considered in the context of the broader provisions of the land access framework contained in Chapter 3 of the Common Provisions Act, in the Department's view, this is a clarifying amendment without practical consequence…

The Department would like to further reiterate that the existing land access framework, which has been in place since 2010, already precludes, for all practical purposes, an owner of land that is within the authorised area of a resource authority from claiming compensation when no authorised activities are being carried out on their land. The proposed amendment merely clarifies section 81 so that it reflects the policy intent of the broader land access framework.[36]

The committee notes that when introducing the Mineral, Water and Other Legislation Amendment Bill 2018, the Minister sought to put beyond doubt that the changes to s 81 did not alter the application of compensatable effect or signal a significant policy shift. The Minister stated:

During the then Infrastructure, Planning and Natural Resources Committee's consideration of this bill, some stakeholders asserted that the proposed redrafting of section 81 of the Mineral and Energy Resources (Common Provisions) Act 2014 would reduce the compensation

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33 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Mr Houen, Landholder Services, submission 16.2, p 2.

34 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Mr Houen, Landholder Services, submission 16.2, pp 5-6.

35 Mr George Houen, Tabled Paper, 5 March 2018.

36 Department of Natural Resources, Mines and Energy, correspondence dated 27 March 2018, pp 2 - 3.

entitlement of affected landholders where resources activities do not occur on their land. This was claimed to be a significant policy shift. I would like to clarify that this is not the case. The policy intent of section 81 is that compensation should be payable for any compensatable effect suffered by a landholder on the land on which the resource activities are being carried out. This is borne out by the explanatory notes to the Mineral and Energy Resources (Common Provisions) Bill 2014, which state—

> *A compensatable effect is a cost or impact that arises from the authorised activities being carried out on the land or entering an agreement for the chapter.*

In addition, when the section is read in conjunction with the other provisions in the act, the view that this redrafting changes the policy intent of the section is not supported. There is nothing in the redrafting of section 81 that changes this policy intent, and in fact the redrafting will further clarify the parliament's intent in relation to these provisions.[37]

QLS told the committee while it had concerns with the introduction of the 2017 Bill, these concerns had been addressed by Minister Lynham in his introductory speech of the 2018 Bill:

We note that, upon reintroduction of the bill, Minister Lynham clarified that it has always been the government's intention and policy to limit the statutory liability regime in this way, and reference was made to the explanatory memoranda that was produced on the release of the initial iteration of the MERCP legislation.

From the perspective of the QLS, we are comfortable that the mechanism contemplated by the bill in its current form achieves the government's policy and intention. It is our perspective that, as long as the legislation gives effect to the policy and intent of the government, we are satisfied that that is enough.[38]

However, Mr Houen disputed this interpretation of the policy intent of the 2018 Bill:

The reference in the Minister's introduction of the Mineral, Water and Other Legislation Amendment Bill on 15 February 2018 to the statement in the Explanatory Notes that: "A compensatable effect is a cost or impact that arises form the authorised activities being carried out on the land or entering into an agreement for the chapter", to confirm that there has been no policy shift, takes the sentence out of context. The reference to "land" in the second paragraph must necessarily be a reference to the "land" referred to in the first paragraph of the Explanatory Notes.[39]

Similarly, Mr Marland argued:

The Minister in his second reading speech states that the redrafting of s81 of MERCP will not reduce the compensation entitlement of affected landholders where resource activities do not occur on their land and that there has been no "policy shift". Quite clearly, based on the current drafting of MERCP and the historical drafting and interpretation of compensable effect, the amendments will have a significant reduction in the compensation entitlements of landholders.[40]

This view was not shared by representatives of the resource sector. APPEA submitted:

APPEA submits that this view is not correct and does not align with how the existing legislation operates. Under existing law, the oil and gas industry pays compensation under s81 in line with the policy intent stated by the Minister in his introductory speech, being for any compensatable effect suffered by the landholder on the land on which the resource activities are being carried

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37 Hon Anthony Lynham MP, Minister for State Development and Minister for Natural Resources and Mines, Queensland Parliament, Record of Proceedings, 15 February 2018, p.117.

38 Public hearing transcript, 9 March 2018, p 25.

39 Mr George Houen, Tabled Paper, 9 March 2018.

40 Mr Tom Marland, submission 16, p 3.

out. Compensation is not paid to neighbouring landholders under s81. This application of existing law has been industry practice for many years.

It also important to recognise the broader context within which s81 operates. In particular, there are separate and distinct requirements on industry proponents to, in effect, provide compensation to neighbouring landholders for specified impacts of resource activities … s81 should be read within this broader context and in the context of the policy intent articulated by the Minister in his introductory speech.[41]

Committee comment

The committee acknowledges that resource tenure holders now go to great lengths to be good neighbours and have worked with landholders to address issues of compensation.[42] The committee is aware that many landholders have established a positive and mutually beneficial relationship with resource tenure holders.[43]

The committee notes significant stakeholder comments and concerns in regard to cl 38 of the Bill (cl 37 of the 2017 Bill) and the highly contested interpretation of the amendments to this section. The committee acknowledges that the department and the resource sector have sought to clarify that the amendment relates to access to private land to carry out advanced activities in the *Mineral and Energy Resources (Common Provisions) Act 2014.*

The committee notes that 'compensatable effect' hangs on complex legal interpretation. Clause 38, in amending s 81 puts beyond doubt the ability of neighbouring landholders to seek compensatable effects. In its current form the Bill achieves the government's policy intention. The committee is satisfied with the department's explanation that:

There is no mechanism under the Common Provisions Act for land owners to claim compensation when there are no authorised activities occurring on their land. Indirect impacts from authorised activities in these scenarios are dealt with through the environmental authority conditions and alternative arrangements. Groundwater impacts from resources activities are regulated under the Water Act 2000.

The Common Provisions Act provides that compensation under the land access framework can only occur where a resource authority holder initiates the process for a conduct and compensation agreement. This will practically only occur when a resource authority holder requires access to land to undertake authorised activities that are considered advanced activities.[44]

The committee notes that while outside the scope of this Bill, evidence to this inquiry suggests that often it is landowners who do not have resource tenure activity on their properties who are often the ones that are most vulnerable as they have limited legislative protections. The committee acknowledges the argument put by the department that neighbouring landholders have alternative frameworks under which to seek compensation. However, the committee has formed a view that compensation under the *Environmental Protection Act 1994* does not always provide a viable mechanism for affected neighbouring landholders to seek redress or compensation for the impacts of resource tenure activity.

The committee was told of one current case:

They are surrounded by hundreds of coal seam gas wells. They have been previously unrepresented and yet they are now faced with a situation where their property is effectively worth nothing because no-one wants to buy a rural property in the middle of a coal seam gas

41 APPEA, submission 17, pp 1-2.

42 Public hearing transcript, 9 March 2018, p 18.

43 Public hearing transcript, 9 March 2018, p 17.

44 Department of Natural Resources, Mines and Energy, correspondence dated 27 March 2018, p 4.

field, as opposed to their next-door neighbours, who have coal seam gas wells on their property, who are getting compensated. They are getting paid. They are at least getting something back for their loss. The people with no infrastructure on their land, these poor people that I am acting for, with the current amendment to this bill will have no rights and they will just have to put up with it and they will have to suffer. They are the most vulnerable through this process.[45]

Recommendation 2

The committee recommends that the Minister in his second reading speech clarify the effectiveness of the current arrangements in addressing compensation for landholders who do not have resource tenure activity on their land but may be affected by the impacts of such activity.

2.2 Implementing the recommendations of the Gasfields Commission

The Bill proposes amendments to give effect to recommendations 4, 7, 8 and 9 from the *Independent review of the Gasfields Commission Queensland* report (review report),[46] which were supported in-principle by government.[47] These recommendations relate to the statutory negotiation process for the negotiation of a conduct and compensation agreement (CCA) and a make good agreement (MGA) under Chapter 3 of the MERCP Act and Chapter 3 of the *Water Act 2000* (Water Act) respectively.[48]

The review recommended:

- to remove the option of a conference with an authorised officer to satisfy the alternative dispute resolution (ADR) requirement prior to a party being able to make an application to the Land Court of Queensland (the Land Court) to determine a CCA
- to provide that the President of the Queensland Law Society (or a similarly independent person) can decide on the ADR process to be undertaken and the ADR facilitator for CCAs and MGAs if the parties cannot agree on a process or facilitator
- to introduce a distinct arbitration process for CCAs and MGAs as an alternative to making an application to the Land Court
- to extend the resource authority holder's liability to pay the landholder's necessary and reasonable costs incurred in negotiating and preparing a CCA (currently legal, valuation and accounting costs) to include the cost of an agronomist
- to provide that the resource authority holder is liable to pay a landholder's necessary and reasonable costs incurred in negotiating and preparing a CCA where the resource authority holder has abandoned negotiations

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45 Public hearing transcript, 9 March 2018, pp 5-6.

46 After operating for almost three years, in March 2016, it was considered timely to conduct an independent review of the Gasfields Commission as the industry transitioned from rapid expansion to an operational phase. The review was undertaken by Mr Robert Scott, a retired member of the Land Court of Queensland. The review received and considered 58 online and written submissions from a range of stakeholders and conducted interviews with 82 individuals including landholders, peak producer groups, industry, industry peak bodies, government agencies, local governments, community groups and other interested stakeholders. Eighteen recommendations were made. Gasfields Commission and Other Legislation Amendment Bill, explanatory notes, p 1.

47 Both the report on the review and the Queensland Government's response to the report were released on 1 December 2015. The government response can be found: https://www.statedevelopment.qld.gov.au/resources/report/government-response-to-the-independent-review.pdf.

48 Explanatory notes, p 2.

- to provide the Land Court with jurisdiction to determine the liability for necessarily and reasonably incurred negotiation and preparation costs in preparing a CCA.[49]

MGAs under the Water Act

The committee notes the range of issues raised regarding amendments to MGAs under the Water Act and that they reflect stakeholder comments regarding amendments to the CCAs under the MERCP Act. As the majority of stakeholders specifically referred to CCAs in their evidence, the committee generally has responded to those comments in this section of the report. The committee notes that amendments to the statutory negotiation process for CCAs apply similarly to the amendments to the statutory negotiation process for MGAs.

The committee also notes that in 2017 DEHP responded to queries on amendments to MGAs[50] and that the responses are consistent with DNRM's 2017 responses to similar queries raised regarding amendments to CCAs under the MERCP Act. The committee notes that DEHP has confirmed that the amendments to MGAs under the Water Act reflect the recommendations of the review report.

2.2.1 Alternative dispute resolution process

Under cl 46 (cl 45 2017 Bill), the Bill proposes to replace ss 88 to 91 of the MERCP Act. The explanatory notes outline that these sections:

- provide that if, at the end of the minimum negotiation period, the resource authority holder and eligible claimant have not entered into a CCA, either party may give the other an ADR election notice requiring the other party to participate in an ADR process
- provide details about what an ADR election notice must include
- provide that once a party receives an ADR election notice, they must accept or refuse the type of ADR and the proposed ADR facilitator within 10 business days of receiving the notice
- provide that where parties cannot agree on the ADR type or facilitator, the party that has requested the ADR will then be required to apply to the Land Court or a prescribed ADR institute, which will then decide the ADR type and facilitator to be used by the parties to negotiate a resolution of the dispute. The resource authority holder will be responsible for the cost of the ADR practitioner. Currently, the party that issues the ADR election notice is responsible for the cost of the ADR practitioner.[51]
- provide how an ADR must be conducted
- provides for the payment of costs if one party does not attend the ADR process
- provides that the resource authority holder is liable to pay the eligible claimant's necessarily and reasonably incurred negotiation and preparation costs
- enable a party to give an arbitration election notice to the other party
- defines 'prescribed arbitration institute'
- provides the arbitrator with authority to decide the dispute by issuing an award
- outlines the circumstances in which a party may be represented by a lawyer in the arbitration

[49] Explanatory notes, p 2.

[50] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017.

[51] These amendments will implement recommendation 7 of the review report.

- provides that where parties have not participated in an ADR process about the dispute before the arbitrator was appointed, the resource authority holder will be liable to pay the fees and expenses of the arbitrator and that if the parties participated in an ADR process before the appointment of an arbitrator, the parties pay the fees and expenses of the arbitrator in equal shares
- provides that the arbitrator's decision is final and has the same effect as if the parties had entered into a binding and enforceable agreement to the same effect as the decision.[52]

While there was support generally for amendments to ss 88 to 91 of the MERCP Act, stakeholders raised a number of concerns, which are detailed below.

2.2.1.1 Uncertainty in timeframes to the statutory negotiation process

According to QRC and APPEA, the Bill would introduce uncertainty within the statutory negotiation process by failing to provide a timeframe for appointing an ADR facilitator under section 88.[53] APPEA submitted:

> *APPEA is, however, concerned that MWOLA is corroding the clear timeframes currently set out in the statutory negotiation process to seek Land Court relief… MWOLA would remove the clear timeframes that exist and which are critical for investment. We understand this is not the intent of the Bill …*
>
> *… holders are currently able to rely on the statutory negotiation process with absolute confidence in the minimum 50 business day timeframe to gain access to private land under the Land Court exemption. The process sets out clear minimum timeframes and there is a clear circuit breaker to move from one stage of the process to the next (i.e. 20 business days to negotiate under a Notice of Negotiation; 20 business days to attend a conference or ADR; and 10 business days under an Entry Notice and Land Court application). The amendments to the ADR step under section 88 proposed by MWOLA remove this certainty in timing and the process by:*
>
> > *1. connecting the criteria to make an application to the Land Court under section 96(1)(b) to a 30 business day timeframe that is calculated from the day the ADR Facilitator is appointed (s 89(2)) but failing to place a timeframe on the parties to appoint an ADR Facilitator under section 88; and*
> >
> > *2. including case appraisal as a type of ADR that may be selected as a prerequisite to Land Court relief but failing to place case appraisal under an effective timeframe (as the 30 business day timeframe in s 89(2) is calculated from the day the Case Appraiser is appointed and does not recognise that the parties are unable to negotiate a resolution under case appraisal until after the Case Appraiser's decision is made).*[54]

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[52] Explanatory notes, pp 4, 23, 24, 25, 26; IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 2; Recommendation 7 of the review report states: That the *Petroleum and Gas (Production and Safety) Act* and the *Water Act* be amended to provide that if the parties cannot agree on an ADR process or practitioner, the President of the QLS or similar office can decide on the ADR process to be undertaken (apart from arbitration) by the parties (depending on the nature of the dispute) and select an appropriate practitioner from the ADR panel.

[53] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017: QRC stated that the current statutory negotiation process gives certainty to stakeholders by providing 'a clear timeframe for access to land with minimum timeframes (20 business days to negotiate under a Notice of Intent to Negotiate; 20 business days to attend a conference or Alternative Dispute Resolution (ADR); and 10 business days under an Entry Notice and Land Court application) and a clear circuit breaker to keep progressing through the process.' QRC, submission 15, p 3.

[54] APPEA, submission 17, p 2.

APPEA additionally argued that s 88(6) threatens to remove clear and reliable timeframes to appoint an ADR Facilitator after an ADR refusal.[55] Similarly, QRC explained:

> *The process is that a party receives an election notice and accepts the proposed ADR option and facilitator within 10 business days (88(5)) and then the parties have 30 business days, starting from the day the ADR facilitator is appointed to reach an agreement. There seems to be a missing circuit breaker for appointing the ADR facilitator. In addition to this, the ADR facilitator is not under an obligation to use reasonable endeavours to make a decision within a set timeframe under s 88(6).*[56]

APPEA recommended:

> *The Bill should be amended to ensure there is a clear and reliable minimum timeframe established under s 89(2) to satisfy triggering the next step in the statutory negotiation process under s 96(1)(b). This certainty could be maintained by:*
>
> *1. amending s 89(2) to calculate a period of time from the date the ADREN* [ADR election notice] *was given; or*
>
> *2. amending s 88 to: require the ADR Institute to make a decision by a certain time; and require the parties to appoint an ADR Facilitator by a certain time.*[57]

The department, however, did not support the proposed recommendations and explained why the Bill does not provide statutory timeframes for decisions on regarding an ADR:

> *The Land Access Review in 2012 found that many resource companies suggested that while the statutory timeframes associated with negotiating a CCA were clearly in the legislation, they did not reflect reality, with negotiations taking much longer than 20 business days.*
>
> *New section 89(2) reflects the drafting of current section 90(3), with the exception that the timeframe is now 30 business days after the ADR facilitator is appointed, instead of 20 business days after the notice being given.*[58]

The department addressed APPEA's recommendation to allow parties by agreement to extend the timeframe for negotiating a resolution as follows:

> *The framework allows for this timeframe to be extended by agreement. The parties must still use reasonable endeavours to negotiate the resolution of their disputes.*
>
> *The onus is on the party giving the notice to make another proposal or obtain a decision from the Land Court or a prescribed ADR institute in order to resolve the matter in dispute.*
>
> *The legislation does not provide for a statutory timeframe in which the Land Court or prescribed ADR institute must make a decision regarding the type of ADR and/or facilitator. Timeframes could differ because of the volume and complexity of the matters being referred.*[59]

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55 APPEA, submission 17, p 3.

56 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, QRC, submission 15, p 3.

57 APPEA, submission 17, p 4.

58 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 3.

59 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 3.

Committee comment

The committee is satisfied with the department's response regarding the non-inclusion of statutory timeframes within the Bill for the appointment of an ADR facilitator to allow for the differences in complexity and volume of matters being referred.

2.2.1.2 Case appraisals

APPEA expressed its support for case appraisal as an option to resolve disputes in the statutory negotiation process. APPEA argued that case appraisals would provide parties with a better view of their case and encourage parties to entertain further settlement discussions and reach resolutions without going to the Land Court. [60] However, APPEA was concerned that:

> *MWOLA does not currently support Holders and Landholders first trying to resolve the dispute under a non-determinative ADR type such as conciliation, mediation and negotiation (CM&N) and subsequently participating in a case appraisal where appropriate. It is implied that, after a party had sought one type of ADR under one ADR Election Notice (ADREN), a party could not then serve another ADREN requiring the parties to participate in a different type of ADR. In order for case appraisal to be used as an effective alternative dispute resolution option, it needs to be removed from the general ADR step in section 88 and established as a distinct avenue that can be opted into after the parties have participated in a CM&N.* [61]

In response to APPEA's recommendation that case appraisal should be a separate ADR step and available to parties prior to an application to the Land Court, the department advised:

> *The Independent Review of the Gasfields Commission Queensland did not recommend the creation of a further step in the statutory negotiation process. Instead, Professor Robert Scott recommended that parties be further educated on the advantages of using case appraisal as the elected ADR type within the existing ADR step.* [62]

In respect to case appraisal, the committee notes QRC's support of the Bill's provisions in this regard, and QRC's contrary view regarding APPEA's recommendation to separate case appraisal from the ADR step:[63]

> *QRC agrees with the approach adopted by the Government, which allows case appraisal as an ADR option. Providing diverse options for ADR allows the process to have genuine flexibility and therefore to be suitable for different disputes and situations.*
>
> *Due to the complexity of the proposed statutory negotiation process, QRC does not think that case appraisal should be isolated as a stand-alone option before bringing a dispute to the Land Court. If parties wish to utilise case appraisal as their method of ADR, they are free to do so. QRC believes there is little benefit to adding mandatory steps to a process which is already in danger of being complex and frustrating (particularly to landholders).* [64]

The department responded to concerns about how the provisions would adversely impact the duration of case appraisals and AgForce's request for clarity around the process:

> *In relation to concerns raised about the duration of case appraisal, this will depend on the complexity of the issues to be considered. According to the Administrative Appeals Tribunal*

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60 APPEA, submission 17, p 5.

61 APPEA, submission 17, p 5.

62 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 3.

63 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Resources Council, submission 15, p 5.

64 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, QRC, correspondence, 11 October 2017.

website, case appraisals typically take between 2 to 3 hours. In more complex matters, the appraiser may issue a written opinion within 48 hours of the appraisal.

Case appraisal is a form of ADR where an independent facilitator reviews and analyses factual information provided by the parties, listens to the parties' submissions and provides a non-binding opinion.

Generally, a case appraisal process will be as follows:

A case appraiser:

1. *meets with both parties to decide how the appraisal will progress*
2. *may ask parties to deliver witness statements and submissions before conducting a hearing*
3. *reads the documents sent by the parties and listens to the case presented by the parties (or their lawyers)*
4. *assesses the merits of each case and makes a decision about the dispute*
5. *puts the decision in writing*
6 *files a certificate with the registrar with a copy of the decision.*

If the parties are not happy with the case appraiser's decision, then they can elect to go to arbitration (by agreement) or take the matter to the Land Court.[65]

Committee comment

The committee is satisfied that the department has clarified the case appraisal process and provided advice to address concerns that the Bill would extend the duration of case appraisals.

2.2.2 Distinct arbitration process for CCAs and MGAs

The Bill proposes changes to the MERCP Act and Water Act that establish arbitration as a distinct option for dispute resolution. The Bill proposes that arbitration will be an alternative to applying to the Land Court for a determination, and that both parties will have to agree to attend the arbitration.[66] The department explained:

To implement recommendation 8 of Professor Scott's review, following unsuccessful negotiation and ADR of a CCA and a make-good agreement by the parties, by mutual agreement they will have the option of going to binding arbitration as an alternative to the Land Court.[67]

Generally, stakeholders supported arbitration as a distinct option for dispute resolution.[68] As APPEA stated:

APPEA is supportive of empowering parties to resolve disputes without seeking a determination by the Land Court by establishing a range of options in the statutory negotiation process to encourage the parties to reach an agreement (such as the establishment of arbitration as a distinct pathway and the proposed establishment case appraisal under the Land Court).[69]

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65 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 3. Department of Natural Resources, Mines and Energy, correspondence dated 28 February 2018, p 3.

66 Explanatory notes, p 4.

67 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 2.

68 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce, submission 4, p 5; APPEA, submission 13, p 1; QRC, submission 15, p 2.

69 APPEA, submission 17, p 1.

However, several stakeholders raised issues relating to the arbitration process as proposed under the Bill.

2.2.2.1 ADR prerequisite to arbitration

While AgForce supported the voluntary nature of arbitration as a dispute resolution option for CCAs and MGAs, it did not support the ability to access arbitration without first completing ADR as a prerequisite:

> *By including ADR as a prerequisite, we believe this will encourage both parties to exhaust other options before undertaking arbitration, as well as provide landholders with an opportunity to seek additional information from the company, to inform any subsequent arbitration.*
>
> *…*
>
> *Currently, parties can only access the Land Court if they complete minimum negotiation and ADR/mediation timeframes. AgForce are seeking the same requirements be applied to arbitration, to ensure landholders are not pressured into arbitration, particularly in the absence of appeal rights, or disputes prematurely escalated.*[70]

Specifically, AgForce was concerned that landholders might agree to arbitration 'without being completely aware of the restrictions or implications and how landholder rights will be protected'.[71]

A landholder legal representative expressed concerns that landholders may be rushed into arbitration and this process, which is binding, does not have the same evidentiary basis as the Land Court.

> *My difficulty with these new arbitration processes is that it opens the door to a watered down mediation and arbitration process. Also if you tie it in with some of the uncertainty as to the reimbursement of professional costs, you might see landowners will be picking arbitration other than going to the Land Court because they do not want to go there. As a practitioner who has lots of matters in the Land Court, I can say that just because it gets referred to the Land Court does not mean you end up in court the next day; it is actually quite a wideranging process. There are orders that can be directed and you actually set it down for court appointed mediation. You can actually go to the Land Court and it can be referred for arbitration, so you can go through that process anyway. Having it as a step forward in front of it, I think it will be pressed by companies who will prefer to go to arbitration because they will not have to deal with some of the evidentiary basis that we have to deal with when we go to the Land Court. My position on that is that it should be dealt with very carefully.*[72]

AgForce stated further:

> *Our strong preference is for an adequate ADR step prior to arbitration to encourage a full attempt at negotiating differences and to promote transparency, disclosure and release of information, which is of significant concern to landholders.*[73]

The department advised that the option to access arbitration without first completing ADR as a prerequisite came from the review report:

> *In the Independent Review of the Gasfields Commission Queensland, Professor Robert Scott recommended that if the negotiations between the parties had been conducted in such a manner*

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70 AgForce, submission 4, p 6.

71 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce, submission, p 2.

72 Public hearing transcript, 9 March 2018, p 7.

73 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public hearing transcript, Brisbane, 11 October 2017, p 22.

> *that they were of the view that mediation would add little value, those parties should be able to agree to proceed directly to arbitration.*

In relation to concerns that the landholder might not be 'completely aware' of the situation, DEHP advised:

> *The Bill has been drafted with this concern in mind. For example, an arbitration election notice must state the consequences of accepting a request for arbitration, including that if the request for arbitration is accepted, an application to the Land Court for a decision about the dispute cannot be made. If DEHP becomes aware that there are any deficiencies in this regard, it has a power to prescribe further information to be included in this notice by regulation. Further, there are protections contained within the* Commercial Arbitration Act 2013*, such as the requirement for the equal treatment of parties.*[74]

The department advised that '[c]communication materials will be developed to explain the arbitration process to parties.'[75]

In light of the binding nature of arbitration and the possibility that some landholders may not be fully aware of the implications of this type of process, the committee recommends that this material is comprehensive, targeted, well-advertised and readily available to peak bodies, key stakeholder and effected communities.

Recommendation 3

The committee recommends that:

- the Department of Natural Resources, Mines and Energy develops an extensive suite of educational material regarding the arbitration process and that this material be readily available and easy to find on the Department of Natural Resources, Mines and Energy website
- the Department of Natural Resources, Mines and Energy conducts information sessions with peak bodies, key stakeholder and affected communities to provide, and advertise, the availability of this material
- the Department of Natural Resources, Mines and Energy reports to the committee in November 2018 on the development and distribution of this material.

2.2.3 Legal representation in arbitration

Several stakeholders expressed concern regarding s 91C of the MERCP Act which outlines the circumstances in which a party may be represented by a lawyer in the arbitration. The explanatory notes state:

> *Section 91C outlines the circumstances in which a party may be represented by a lawyer in the arbitration. A party can be represented by a lawyer if both parties agree to the party being represented, or the arbitrator permits the party to be represented.*[76]

Some of these stakeholders sought amendments to the Bill to ensure legal representation is an explicit right for landholders.[77] As AgForce stated:

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74 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 10.

75 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 6.

76 Explanatory notes, 2018, p 26.

77 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Shay Dougall, submission 3, AgForce, submission 4; John Jenkyns, submission 14, Queensland Law Society, submission 17; Property Rights Australia, submission 18.

> *AgForce does not support the current wording in the Bill restricting landholder legal representation to situations where the resource company and/or arbitrator agrees. We strongly encourage the Committee to consider changing this to allow landholders access to legal representation, without the need for other party consent. AgForce does not view this as creating an equal platform for negotiations, as most landholders without legal representation will be at a significant disadvantage to trained company representatives, often in-house or contracted lawyers. This common situation should be acknowledged and the legislation must provide landholders with this expressed protection.*[78]

QLS also stated its opposition to the section:

> *The Society does not agree with the proposition in s 91C that a party will not be permitted to have legal representation in an arbitration unless both parties agree to the party being represented. The matters in dispute and the resulting decision of the arbitrator will likely be of enormous significance to both parties and involve the determination of legal issues. It is inappropriate that a party (or both parties) might be disallowed legal representation, particularly given the limited opportunity to seek review of or appeal against the arbitrator's decision.*[79]

Property Rights Australia expressed the view that the provision was 'unacceptable and a clear violation of landowner rights.'[80] Shay Dougall submitted that:

> *It is unacceptable to limit the amount of help an individual can have in a meeting required by others to gain access to your land that will cause impacts.*[81]

Contrary to the view that the section be amended to make legal representation an explicit right for landholders, the committee noted QRC's support for the inclusion of s 91C:

> *QRC is consistently made aware of examples where legal fees are far greater than the compensation amounts received by the landholder which is usually brought on by dragging out negotiations unnecessarily. QRC is supportive of a process that encourages legal representation in the best interests of the landholder and reaching an agreement. As such, QRC is supportive of lawyer involvement in arbitration to be at the discretion of the arbitrator. Arbitration is intended to be less formal than Court proceedings, and it may be appropriate that legal representation should be atypical to foster this informal environment.*[82]

APPEA considered that legal representation should only be available in certain circumstances and parameters should be developed around when an arbitrator can decide that the parties may be legally represented.[83]

The department advised that s 91C will implement recommendation 8 of the review report which recommended that parties should be able to be legally represented in the arbitration if agreed by both parties or with the consent of the arbitrator.[84] The department further advised:

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78 AgForce, submission 7, p 6.

79 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Law Society, submission 17, p 2.

80 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Property Rights Australia, submission 18, p 1.

81 Shay Dougall, submission 1, p 1.

82 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Resources Council, submission 15, p 4.

83 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, APPEA, submission 13, p 14.

84 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 7.

There will always be a place for the esteemed legal profession where there are disputes, and nothing in this framework takes away the ability for people to have appropriate legal representation.[85]

However, this position was not supported by QLS who argued that:

Arbitration in and of itself is fine as an alternative means by which to determine these activities, but the QLS does not agree with the current proposal to limit the parties' rights to legal representation in arbitration without the agreement of both parties. We feel that it is important to note that arbitration can be as complicated and consuming as a full trial. In this instance, the issues that are likely to be the subject of an arbitration will likely be of enormous significance to both parties to any particular negotiation and will involve the determination of complex legal issues.

We feel it is inappropriate that the parties to an arbitration be disallowed legal representation in any circumstances. It is a well-understood fact that legal processes such as binding arbitration which proceed in the absence of appropriately skilled and experienced legal professionals ultimately cost the proponents more time and money than would otherwise be the case. From our perspective, there does not seem to be any good reason to exclude legal professionals from the arbitration process.[86]

Committee comment

The committee acknowledges concerns from landholders and other stakeholders regarding s 91C and its potential to disadvantage landholders in their negotiations with the resource industry. The committee notes the Bill provides that, if one party wishes to have legal representation during arbitration, they can make their case to the other party or the arbitrator and gain consent.

Although the department has confirmed that s 91C would implement recommendation 8 from the review report, the committee notes that the findings of arbitration are binding and is not satisfied that the concerns of landholders in regard to this matter have been sufficiently addressed. For this reason, the committee recommends that proposed s 91C be removed and that the Bill be amended so that parties have the right to legal representation during arbitration.

Recommendation 4

The committee recommends that proposed s 91C be removed and that the Bill be amended so that parties have the right to legal representation during arbitration.

2.2.4 Responsibility for payment of professional fees incurred as part of CCA

The Bill proposes amendments to implement recommendation 9 of the review report which would ensure that the resource authority holder will be responsible for the professional fees necessarily and reasonably incurred in the negotiation and preparation of a CCA, including the costs of an agronomist. The costs are payable even if the negotiations of a CCA are abandoned.[87] The department provided further details about these amendments:

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85 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, public hearing transcript, Brisbane, 11 October 2017, p 33.

86 Public hearing, 9 March 2018, p 26.

87 Explanatory notes, p 4. Clause 91 of the Bill: Recovery of negotiation and preparation costs:

(1) This section applies if an eligible claimant necessarily and reasonably incurs negotiation and preparation costs in entering or seeking to enter into a conduct and compensation agreement or deferral agreement with a resource authority holder.

(2) The resource authority holder is liable to pay to the eligible claimant the negotiation and preparation costs necessarily and reasonably incurred.

> *The bill also ensures that a resource authority holder remains liable to pay a landholder for necessary and reasonable accounting, valuation and legal costs incurred in the negotiation and preparation of a conduct and compensation agreement. This liability will now apply under the provisions of the bill where negotiations do not result in an agreement and has also been extended to include the negotiation and preparation costs of a deferral agreement between the parties. Furthermore, in line with recommendation 9 of the independent review, the bill expands the liability to pay a landholder's negotiation and preparation costs by including a liability to pay a landholder for necessary and reasonably incurred costs of an agronomist. As recommended by Professor Scott, the inclusion of agronomist costs within this liability will assist landholders to evaluate the impact of the proposed activities on the landholder's land. The Land Court will also be conferred a new head of power to determine whether accounting, valuation, legal and now agronomist costs were necessary and reasonably incurred in the negotiation and preparation of the conduct and compensation agreement. Again, that will also apply regardless of whether a final agreement has been made.*[88]

The committee notes that there was general support for the provisions;[89] however, stakeholders raised several issues relating to the recovery of negotiation and preparation costs.

2.2.4.1 Recovery of all negotiation and preparation costs

Mr Houen submitted that the Bill be amended to ensure that *all* professional costs necessarily and reasonably incurred be payable by a resource authority holder.[90] Mr Houen stated:

> *And while* [the] *Bill extends the types of professional cost payable by the resource authority holder to agronomist (along with legal, valuation and accounting costs) this selective approach is an unfair distortion. Section 91 should be extended to embrace all necessarily and reasonably incurred professional costs.*
>
> *That is because the range of professionals whose advice landholders typically require includes hydrogeologist (groundwater); noise monitoring; building design for noise alleviation; hydrologist (surface water); air quality (fugitive gases, dust) agricultural economist (economic impacts of disturbed production); livestock management/animal behaviour expert (disturbance impacts).*[91]

The department advised it did not intend to expand the definition of professional costs:

> *The requirement for resource authority holders to compensate a landholder's necessarily and reasonably incurred legal, accounting and valuation fees has existed since the land access framework was introduced in 2010. The Bill proposes to expand this liability to include a liability to compensate for the necessarily and reasonably incurred costs of an agronomist.*
>
> *The parties can negotiate whether the resource authority holder will pay the reasonable costs of additional experts*.[92]

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88 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 2.

89 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, See, for example, EDO Qld, submission 8, p 2; George Houen, Landholder Services, submission 16, p 2.

90 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, George Houen, Landholder Services, submission 16, p 2.

91 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, George Houen, Landholder Services, submission 16, p 2.

92 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 6.

Committee comment

The committee notes the department's response and the Bill's provisions which implement the review report recommendation to extend the costs payable by a resource authority holder to include an agronomist's fees. The committee also notes that with the exception of an agronomist's fees, the costs payable to landholders will not change under the Bill but that the option to negotiate this will continue to exist.

2.2.4.2 Landholder's time should be recoverable

AgForce and QFF submitted that a landholder's recoverable costs should also include their time taken to negotiate and prepare a CCA. AgForce stated:

> *AgForce are seeking that recoverable costs incurred throughout this process be expanded to include landholder time.*
>
> *Landholders continue to express concern and frustration regarding the time spent preparing and negotiating agreements and that this cost is not recoverable or clearly defined. As such, AgForce would encourage the Committee to consider expanding these heads of costs to include necessary and reasonable landholder time and the costs incurred to prepare and/or negotiate an agreement, Consistent with Section 91 amendments, these costs would be recoverable if a company abandon negotiations. AgForce is available to discuss with the Committee and other stakeholders an agreed methodology to determine reasonable producer time-related costs.*[93]

The committee heard that the GasFields Commission advises landholders that 'their responsibility is to negotiate the best deal possible for themselves' in regard to a CCA. However, this makes an assumption about landholder time, experience and knowledge in negotiating a CCA. Additionally, as Mr Marland told the committee:

> *That puts a fair bit of pressure on a landholder. I suppose it has never been more poignantly driven home to me about what this means in terms of our responsibility than when dealing with a make-good situation last week. In the course of it the wife burst into tears and said, 'My husband should be harvesting sorghum. I should be at home with the kids. Instead, we are up until 12 o'clock every night reading documents we don't understand.*[94]

When the IPNRC sought additional detail about how the value of a landholder's time might be determined, AgForce advised:

> *We certainly appreciate that it is a difficult area to quantify. Again, the data we have collected from landholders and through our conversations indicates that there is a huge amount of time that landholders are spending negotiating agreements, attending meetings and conferences and dispute resolution meetings or attending activities on property informing the negotiations. That is a direct cost to their business, and that is something that landholders have often indicated should be a cost recoverable process. In a negotiation process, everybody is being paid to attend that process other than the landholder. It is putting a great degree of time and cost restraints on the landholder.*[95]

The department advised that the issue of recovering the costs of landholder's time was 'outside the scope of the Bill' and stated:

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93 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce, submission 4, p 3.

94 Public hearing transcript, 9 March 2018, p 3.

95 Public hearing transcript, Brisbane, 11 October 2017, p 27.

There is nothing to prevent the parties from negotiating compensation for a landholder's time.

According to an SKM report produced in 2013, which examined the heads of compensation for land access, most resource firms indicated they are already voluntarily paying compensation for landholder negotiation however; this is often not made clear to landholders.[96]

Committee comment

The committee notes the concerns raised by some stakeholders regarding the inability of landholders to recover the costs of their time to prepare and negotiate CCAs. While this has not been part of the compensation payable by resource authority holders to date, the committee notes AgForce's concern that all participants of a negotiation process are being paid with the exception of landholders who are also being taken away from their core business.

Given the significant time and effort landholders are required to invest in negotiating CCAs and MGAs, the committee recommends consideration be given to compensate landholders in this regard.

Recommendation 5

The committee recommends that the Department of Natural Resources, Mines and Energy collaborates with stakeholders to investigate developing a methodology to determine reasonable landholder time-related costs and how this could be included in legislation.

2.2.4.3 'Broad' definition of necessarily and reasonably incurred costs

Several stakeholders raised for consideration the 'broad' definition of *necessarily and reasonably* incurred costs.[97] APPEA stated:

We agree that Holders should pay the reasonable and necessary costs incurred by the Landholder in using reasonable endeavours to negotiate a CCA with the Holder under the statutory negotiation process (even where an agreement is not reached). It is extremely difficult to resolve differences in opinion on the reasonableness and necessity of fees because the test is subjective and the parties have no guidance on how this test is to be applied/interpreted.[98]

However, Mr Marland told the committee:

As a solicitor, we are heavily regulated by the Legal Professional Act in relation to our professional obligations and billing practices to our clients. There is an extensive process where a client considers an invoice to be unreasonable or excessive and very serious consequences if a practitioner is found to be in breach of the ethical obligations. I understand a resource companies concern about the process of paying "the other sides" professional costs especially when those professional costs are being used against their own commercial interests, i.e. a solicitor negotiating for better terms of access to land and for more appropriate compensation to be paid for the disturbance.[99]

In response to concerns about defining what costs are 'necessary and reasonable', the department advised:

Clause 62, which inserts new definitions into the Schedule 2 Dictionary, outlines how negotiation and preparation costs are defined. Negotiation and preparation costs means accounting costs, legal costs, valuation costs or the costs of an agronomist. Negotiation and preparation costs

96 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 4.

97 APPEA, submission 13; Queensland Resources Council, submission 15.

98 APPEA, submission 13, p 6.

99 Mr Marland, submission 16, p 4.

expressly does not include the costs of an ADR facilitator or the costs of obtaining, under section 88(6), a decision from a prescribed ADR institute or the Land Court.

The Land Court's jurisdiction will extend to determining the reasonableness and necessity of the negotiation and preparation costs. Parties are not prevented from seeking alternative advice with regards to costs, including applying to an independent costs assessor.

The requirement for landholders to only incur reasonable and necessary professional fees (including legal fees) has existed since 2010.[100]

However, the committee was informed by the President of the Land Court that the current drafting of the Bill contains certain anomalies which would impact on the Land Court's jurisdiction.

Clause 46 of the Bill inserts a new s 88 into the Mineral and Energy Resources (Common Provisions) Act 2014 (MERCP Act). We draw your attention to subsection (6) of the new s 88 which provides that if the party given an ADR election notice does not accept the type of ADR or ADR facilitator proposed in the notice, the party giving the notice may make another proposal, or obtain a decision from the Land Court, or a prescribed ADR institute, about the matter not accepted.

There is an inconsistency in clause 67 of the Bill, which inserts a new definition into Schedule 2 of the MERCP Act for "negotiation and preparation costs". That definition appears to suggest that the registrar of the Land Court makes the decision under s 88(6) of the MERCP Act. The President takes the view that the decision under s 88(6) should be a judicial decision by a Member of the Land Court. It is not appropriate for the registrar to be making decisions about the type of ADR, for example.

The President's view is supported by the amendments made to the Water Act 2000 by the Bill. See clause 263 of the Bill, which inserts a new s 426 into the Water Act 2000. Subsection (7) of new s 426 is in identical terms to s 88(6) of the MERCP Act. There is no reference to the registrar making the decision under s 426(7) or in any other provision of the Water Act amendments. There is no equivalent definition of "negotiation and preparation costs" in the Water Act amendments because it is not an applicable concept under that Act. This indicates that the reference to the registrar in the MERCP Act definition for "negotiation and preparation costs" is an anomaly which should be corrected. The decision-maker should be the same under both pieces of legislation.

It is therefore submitted that the MERCP Act definition of "negotiation and preparation costs" in clause 67 of the Bill should be amended to read as follows:

negotiation and preparation costs –

(a) means—

(i) accounting costs; or

(ii) legal costs; or

(iii) valuation costs; or

(iv) the costs of an agronomist; and

(b) does not include—

(i) the costs of an ADR facilitator; or

[100] IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 6.

(ii) the costs of obtaining, under section 88(6), a decision from the Land Court or a prescribed ADR institute.[101]

New section 91E(3) outlines that parties are responsible for their own costs of an arbitration.

The department further advised:

Questions have also been raised … about the term 'necessary and reasonable costs' and how they are calculated, particularly with the addition of the agronomist's cost to the existing framework. Ultimately the Land Court is responsible for determining what is necessary and reasonable if there is a dispute between the parties, but if the parties do not seek to go to the Land Court—and in many cases they would not—then there is an opportunity for them to get an independent expert to help them bridge the difference, if you like. In most cases we experience there is agreement between the parties as to what is reasonable and necessary, but we have heard discussion about cost assessors or cost appraisal or case appraisal. There are practitioners out there who can provide a service, but that is obviously a commercial arrangement.[102]

With respect to APPEA's suggestion that the parties be able to refer the cost dispute to a special costs assessment/taxing service,[103] the department advised that parties 'are not prevented from seeking alternative advice with regards to costs, including applying to an independent costs assessor.'[104]

APPEA, QRC and QLS expressed the view that s 91 should be amended to clarify when the payment of the necessary and reasonable costs incurred once an agreement has been reached would be made.[105] The department advised that the Bill was drafted to establish 'the liability and provide flexibility for the parties to determine when payment should be made.' The department further clarified that the Land Court would have the power to make a declaration or order payment in the event of a dispute about the reasonable and necessary fees.[106]

2.2.4.4 Apportioning costs of arbitration

In relation to the costs of arbitration:

[Proposed new section] *91E provides that where parties have not participated in an ADR process about the dispute before the arbitrator was appointed, the resource authority holder will be liable to pay the fees and expenses of the arbitrator.*

If the parties have participated in an ADR process before the appointment of the arbitrator, the parties are liable to pay the fees and expenses of the arbitrator in equal shares (unless the parties agree, or the arbitrator decides, otherwise).

Regardless of where the obligation to pay the arbitrator's fees and expenses falls, the parties to an arbitration must bear their own costs for the arbitration unless the parties agree, or the arbitrator decides, otherwise. This includes their own costs of attendance, or representation, if any.[107]

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101 Mr Darren Campbell, correspondence dated 14 March 2018.

102 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, public hearing transcript, Brisbane, 11 October 2017, p 30.

103 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, APPEA, submission 13, Queensland Resources Council, submission 15.

104 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 8.

105 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, APPEA, submission 13, Queensland Resources Council, submission 15; Queensland Law Society, submission 17.

106 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 4.

107 Explanatory notes, p 26.

AgForce was not supportive of provisions 'requiring that both parties are equally liable to pay arbitration costs, unless the parties agree, or the arbitrator decides otherwise.'[108] AgForce explained:

> *We believe that consistent with existing ADR provisions (prior to amendments in this Bill), the party who elects for the matter to proceed to ADR (arbitration in this instance) should be liable to pay these costs. This will help provide certainty to both parties.*[109]

QRC and APPEA suggested several amendments to s 91 to provide greater clarity on costs. APPEA proposed a recommendation to s 91E that if a landholder does not attend ADR, the tenure holder should not have to pay.[110]

In response to these recommendations, the department advised:

> *The costs requirements outlined in section 91E implement the recommendation of the Independent Review of the Gasfields Commission Queensland. If the parties have participated in ADR about the dispute before the appointment of the arbitrator, the parties are liable to pay the fees and expenses of the arbitrator in equal shares (unless the parties agree or the arbitrator decides otherwise). Each party to an arbitration must bear their own costs, unless otherwise agreed.*
>
> *Where the parties have not participated in an ADR process prior to going to arbitration, the resource authority holder is liable to pay the fees and expenses of the arbitrator.*
>
> *Where a party fails to attend the arbitration, the arbitrator will make an award in their absence. This may include an order as to costs.*[111]

APPEA also recommended that section 91E be amended 'to provide guidelines on sensible arbitration rules and costs.' By way of example, APPEA suggested the appointment of one arbitrator only, and not a panel of five arbitrators would be 'sensible'.[112] The department provided the following clarification in relation to how arbitration will be governed:

> *The rules of the arbitration will be governed by the arbitrator or the prescribed arbitration institute. They will also be governed by the* Commercial Arbitration Act 2013*, which applies to an arbitration to the extent of any inconsistency with the proposed arbitration provisions.*[113]

Some legal sector submitters raised concerns regarding the removal of professional costs from s 81 to a new s 91, arguing that the amendment effectively make the reimbursement a 'recovery of costs' process which places landholders at unnecessary disadvantage. Mr Marland submitted:

> *The Bill proposes to remove a landholder's right to have their professional costs reimbursed from s81 which sets out a resources companies compensation liability. Effectively, this removes the obligation of a resource company to reimburse professional costs reasonably and necessarily incurred as a head of compensation. The new section 91 is proposed on the basis that*

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108 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce, submission 4, p 5.

109 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce, submission 4, p 5.

110 QRC, submission 8, p 5; IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, APPEA, submission 13, p 15.

111 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 7.

112 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, APPEA, submission 13, p 15.

113 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 7.

professional costs will be paid even if an agreement cannot be reached and also be extended to agronomy services.

The existing Section 81(4)(b) of MERCP provides the ability of a landholder to seek ***reimbursement of professional costs with*** *"includes accounting, legal or valuation costs the claimant necessarily and reasonably incurs to negotiate or prepare a conduct and compensation agreement" (emphasis added).*

The existing section does not provide that professional costs can only be reimbursed after an agreement has been reached but for fees "reasonability and necessarily incurred to negotiate and prepare" an agreement. There is no mention of "execution". Accordingly, a resource holder is already obligated to reimburse a landholder's professional fees whether agreement is reached or not. Any other interpretation would effectively hold a landholder to gun point to reach an agreement or face the prospects of being left with their professional costs for a negotiation they did not instigate and activities on their land they did not want in the first place.[114]

Similarly, Shine Lawyers argued:

Moving it out of the head of compensation means it stands independently of that process, and a Landholder may well have to pay his own costs of arguing whether their professional assistance was "reasonable" with absolutely no bargaining power because the CCA will have been forced upon them or entered into without this issue being addressed.

Companies will try to argue that the CCA process now stands independently of the issues surrounding costs so a landholder will necessarily find out later how much of the compensation they actually receive.[115]

Similarly, the QLS raised concerns regarding the amendments in relation to the new s 91.

The way the new legislation is structured is such that the reasonable and necessary costs of negotiating a conduct and compensation agreement are no longer considered to be part of the compensatable effects. It is the concern of the [QLS] committee that the separation in this way will have potentially unintended consequences. I do not think anyone is suggesting that those costs that are reasonably and necessarily incurred should not be for the account of the resource authority holder …

I do not know that it is necessarily the department's or the government's intention to have those costs. A landholder in that situation should be entitled to seek legal representation to understand and to make an approach, but I do not believe it is the policy intent to have changed what was initially there. I think the response that the department gave was that the only policy change was about agronomist costs being expressly captured, and that is fine. We are just wary that changing and taking out the reasonable and necessary costs from the compensatable effects regime will open up discussions as to when the resource authorities are liable for costs that have been incurred.[116]

Committee comment

The committee notes that the costs requirements outlined in s 91 implement the recommendation of the Independent Review of the Gasfields Commission Queensland. However, the committee has found that the proposed s 91 in the current drafting of the Bill goes further than the intention described in the explanatory notes.

Given that landholder and legal sector stakeholders raised significant concerns that these amendments may unintentionally undermine the ability of landholders to negotiate CCAs the committee considers

[114] Marland Law, submission 16, pp 4-5.

[115] Shine Lawyers, submission 11, p 5.

[116] Public hearing, 9 March 2018, p 26.

that the existing s 81(4)(b) should be retained and extended to capture agronomist costs. The committee sought drafting advice from QLS. QLS provided:

> *To ensure that the Bill appropriately reflects the stated intention, we suggest the following amendments be included* in *the Bill:*
>
> *1. removal of proposed section 91 from clause 46 of the Bill; and*
>
> *2. retention of the current provisions with respect to profession costs as set out in section 81(4)(b) of the MERCP Act (under clause 38 of the Bill), with a minor amendment to include the costs of an agronomist as follows:*
>
> > *81(4)(b) accounting, legal or valuation or agronomist costs the claimant necessarily and reasonably incurs to negotiate or prepare a conduct and compensation agreement, other than the costs of a person facilitating an ADR;*[117]

The committee recommends that the Bill be amended to reflect the advice of the QLS.

Recommendation 6

The committee recommends that the Bill be amended to:

- remove proposed s 91 from cl 46 of the Bill
- retain the current provisions with respect to professional costs as set out in s 81(4)(b) of the *Mineral and Energy Resources (Common Provisions) Act 2014* (under cl 38 of the Bill), with a minor amendment to include the costs of an agronomist as follows:

  81(4)(b) accounting, legal or valuation or agronomist costs the claimant necessarily and reasonably incurs to negotiate or prepare a conduct and compensation agreement, other than the costs of a person facilitating an ADR.

2.3 Climate change considerations in water planning

The Bill proposes to strengthen the climate change considerations in the water planning framework by making it an explicit requirement for the Minister to consider the water-related effects of climate change on:

- water availability when preparing a water plan
- Water use practices and the risk to land or water resources arising from the use of water on land when preparing a water use plan.

The intended outcomes include:

- helping to ensure water plan strategies are adaptive to the prevailing water conditions
- additional transparency when considering climate change impacts through water planning
- Promoting community awareness of the implications of climate change on water resources.

The department advised:

> *The proposed changes require that when preparing water plans the effect of climate change is considered. Climate change has the potential to influence the availability of water and the reliability of water resources. It is essential that these matters are considered to ensure that we protect the significant investment Queensland businesses have made in buying and securing water resources and that we also protect natural water flows and the environments of our river systems and waterways.*

[117] QLS, correspondence dated 14 March 2018, pp 1-2.

> *It is critical that Queenslanders have confidence that climate change and its effect on water resources are considered in water planning. It is important to recognise that when we do this work we are not talking about gazing well off into the future. Water plans have 10-year horizons and a ministerial report on the effectiveness of plans is prepared every five years. Should this amendment be accepted by the parliament, water modelling and the preparation of the plan will consider climate change risks only over the lifetime of the plan. The introduction of climate change requirements into water planning will help to align water planning to the Queensland government's commitment in 2017 via the Queensland Climate Adaptation Strategy.*[118]

Stakeholders broadly supported the amendments to provide for climate change considerations in water planning.[119]

> *WWF-Australia fully supports the greater recognition and consideration of the effects that climate change will have on the availability of Queensland's water resources.*[120]

WWF highlighted its concerns in regard to the data used by DMNRE for modelling for climate change:

> *Under the current methodology, the modelling that informs the development of water planning instruments is based on historic rainfall and stream flow data that has been collected over the last 100 plus years.*
>
> *As climate change is predicted to significantly alter future rainfall patterns, there is a substantial risk that the availability of water over the life of a water plan will be considerably less than how much water has been available for consumptive purposes in the past. Given the current modelling does not consider the potential effects of climate change on the future availability of water, requiring the effects of climate change on the state's water resources to be explicitly consider will ensure that water planning instruments will take into account and are able to address the emerging risks to water users and the environment from climate change.*[121]

However, some stakeholders sought further clarification and/or amendment in regard to the provisions.

AgForce stated that the water planning framework should facilitate adaptive on-farm efforts, while supporting the sustainable management of water resources to preserve the reliability of entitlements and minimise impacts on the environment. Agforce submitted that plans should focus on impacts likely to be experienced over the life of a water plan. Additionally, that the Water Act should not duplicate other legislative frameworks that manage land use and vegetation.[122]

The department agreed that 'only climate change risks and potential effects likely to be experienced over the life of a water plan would be considered.' The department provided an example for this and responded further to AgForce's comments:

> *For example, it would not be appropriate to plan for the effects of climate change on water availability expected by 2050 when preparing a water plan that will expire in 2027.*
>
> *DNRM also recognises that continued support for improvements to on farm water use efficiency, such as through the rural water use efficiency - irrigation futures (RWUE-IF) initiative, is an important part of ensuring that rural communities are resilient to climate change. DNRM notes that the incentive of being able to trade any unutilised entitlement also supports improvements on farm water use efficiency.*

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118 Public briefing transcript, 5 March 2018, p 4.

119 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, See, for example, Great Barrier Reef Marine Park Authority, submission 19; Wide Bay Burnett Environment Council, submission 6; WWF, submission 11; Stanthorpe Community Reference Panel, submission 2.

120 WWF, Submission 3, p 1.

121 WWF, Submission 3, p 2.

122 AgForce, submission 7, p 9.

Having access to water markets and flexible water products is also a key strategy for ensuring that water users are able to readily adapt their businesses to changing climatic conditions and market opportunities.[123]

Environment groups recommended that the Minister be required to consider the effect that climate change will have on water quality when developing water planning instruments. In this regard, the WWF, Wide Bay Burnett Environment Council and EDO Qld recommended amending the Bill (s 45(2) of the Water Act).[124] WWF argued:

While the adverse impacts that can occur to water quality from releasing industrial, agricultural and other types of contaminants to waterways and marine receiving waters is managed under the Environmental Protection Act 1994, the effects of climate change on water quality is not currently managed under any state or commonwealth legislation.

As the most effective way to reduce the effects of climate change on water quality is to ensure that adequate flows are maintained in waterways during critical periods, the Water Act 2000 is the only existing piece of legislation with the ability to ensure that enough water is maintained in watercourses during periods of prolonged low flows to enable the effects of climate change on water quality to be mitigated.

Recommendations

Under Clause 243 of the Bill, amend draft s42(2)(g) of the Act to read "the effects of climate change on the quality and availability of water resources".

Under Clause 244 of the Bill, include under draft s 60(2)(c) of the Act:

- *(iii) water quality*[125]

EDO Qld clarified its reasoning for including *quality* in the clause as follows:

Climate change may have impacts on the quality of water resources, therefore we recommend that water planning also consider these impacts, in addition to water availability, to ensure robust water management.[126]

The department did not support EDO Qld's proposed amendment for the following reasons:

Water plans are best placed to deal with water quality issues that are able to be influenced through the management of flow, for example, through responsible operation of infrastructure; through provision of sufficient water to maintain the health of aquatic environments and riparian vegetation, or through limitations on the total volume and times at which water may be taken under water entitlements. This provision appropriately reflects this focus on flow management by requiring consideration of impacts only on the availability of water.

However, the department noted that water quality was an important issue and advised that this was managed under separate legislation:

However it is well understood that often the most significant risks to water quality result from poor land management practices. These risks are dealt with separately under other Queensland legislation including the Land Act, Vegetation Management Act and Environmental Protection Act. In particular note the role of Healthy Waters Management Plans under the Environment Protection Act, which systematically identify primary causes of risk to water quality as well as

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123 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 14.

124 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Wide Bay Burnett Environment Council, submission 6, p 2; WWF, submission 11, p 2; EDO Qld, submission 8, p 4.

125 WWF, submission 3, p 2.

126 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, EDO, submission 8, p 4.

measures to address those risks. DEHP work closely during the development of water plans and healthy waters management plans to ensure that significant risks to water quality from all sources are identified and addressed as appropriate under each instrument.[127]

QFF made several recommendations regarding the proposed provisions in the 2017 Bill that would enable climate change considerations in the water planning framework:

- engage with stakeholders prior to any formal planning in regards to applying climate change forecasting to water plans and water use plans
- assess fully and transparently the impacts of any changes to water plans and water use plans as a result of climate change forecasting
- ensure the plans are able to adjust to significant impacts on reliability of water access, including for example revised announced allocation procedures and improved information on water availability to allow farmers to plan into the future.[128]

In regard to engaging with stakeholders and ensuring transparency on applying climate change forecasting to water planning policy, the department advised:

Transparent consideration of risks to water resources from climate change and clearly communicating risks will help prepare community and industry for expected changes in water availability. It will also inform the development of water plan strategies that support climate change adaptation and mitigation activities, including by ensuring that water markets are efficient and flexible in response to changing industries and market opportunities. This proposal helps to implement the Whole of Government Queensland Climate Adaptation Strategy.

…

DNRM will continue to engage fully with water users and other stakeholders about proposed water plan strategies for addressing identified risks. Water user input will be particularly important where technical assessments indicate that changes to water sharing rules or water entitlements are required to ensure plan outcomes and objectives can continue to be achieved.

Periodic Minister's reporting on water plans, as prescribed in the Water Regulation, will also provide an ongoing framework for reviewing and reporting risks to plan outcomes that emerge during the life of a water plan, including climate change risks. This reporting framework ensures transparency, evidence-based policy and adaptive management as part of an adaptive management cycle. The Minister's reporting framework can reveal changes in water use patterns as well as market dynamics resulting from or associated with changes to water plan provisions and measures.[129]

The Great Barrier Reef Marine Park Authority (GBRMPA) stated that it would 'like to see the Reef recognised as a downstream value and any activity in the catchment should maintain and improve the capacity of coastal ecosystems to support the health of the Reef and the social and economic benefits derived from a healthy Reef.'[130]

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127 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, pp 14-15.

128 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Farmers' Federation, submission 7, p 2.

129 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, pp 14-15.

130 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Great Barrier Reef Marine Park Authority, submission 19, p 1.

Committee comment

The committee is satisfied with the amendments proposed in the Bill in relation to water planning and allocation and the consideration of the Great Barrier Reef within water plans.

2.4 Cultural outcomes for Aboriginal peoples and Torres Strait Islanders in water planning

The Bill proposes to enhance the water planning provisions of the *Water Act 2000* to better recognise the importance of water resources to Aboriginal peoples and Torres Strait Islanders and to ensure that cultural values of water resources are clearly protected under water plans.[131] The Bill proposes to achieve this by amending the Water Act to include cultural outcomes (specified separately from economic, social and environmental outcomes) for Aboriginal peoples and Torres Strait Islanders as something that must be stated in a water plan. DNRME explained to the committee how cultural outcomes are delivered in the Bill:

> *What we are doing by introducing cultural water into that equation is, firstly, sitting with Indigenous communities and looking at what their culturally significant activities might be. As we go through those risk assessments and that hydrological modelling, we try to take those things into account in all of those assessments. In looking at those matters, quite often we find the environmental requirements and the cultural requirements might be quite closely linked. It might be about protection of a waterhole that is important for cultural reasons, but equally can be quite significant for environmental reasons, the breeding of fish or the like. That is how this activity might be considered at that plan\development stage.*
>
> *When we get into the implementation of water planning stages, there is a whole range of tools that the department uses to ensure that we operate the water plan in an effective way that also protects these things. We use water management strategies. We might have release rules from structures. We might have resource operations licences. We might have operations manuals. We can use all of those tools to try to build in protection of environmental values or, in this case, protection of cultural values. As I say, that is the next stage in the process. As we get through our plans, what we do on a five yearly basis is prepare a bit of a scorecard as to how we are going and report back to the minister.*[132]

Cultural outcomes will be achieved mainly through the plan's environmental flow objectives, amongst other measures. The Bill expands the definition of environmental flow objectives to make it clear that these objectives protect environmental, cultural and social outcomes within the plan area. This aligns with the approach under the *Environmental Protection Act 1994*, which defines 'environment' to include ecosystem constituents, natural and physical resources, and social, economic, aesthetic and cultural conditions.[133]

Further, the amendments proposed by the Bill to specify cultural outcomes in water plans will not remove the ability for the plan to also consider economic opportunities for Aboriginal peoples and Torres Strait Islanders through the use of or access to water, such as through setting unallocated water reserves. Water plan provisions will continue to be tailored, on a catchment by catchment basis, to provide flexibility in providing water to support economic development opportunities for Aboriginal peoples and Torres Strait Islanders, informed by consultation.[134]

131 Explanatory notes, p 3.

132 Public briefing transcript, 5 March 2018, p 7.

133 Explanatory notes, p 6.

134 Explanatory notes, p 6.

There was broad support for the inclusion of cultural outcomes for Aboriginal peoples and Torres Strait Islanders in water planning.[135] Southern Downs Regional Council confirmed its support:

> *In regard to the second item within the terms of reference, namely that there should be the inclusion of cultural outcomes in water plans to support the protection of the cultural values of water resources for Aboriginal peoples and Torres Strait Islanders, Council supports the identification of allocations that maintain these important assets through adequate and appropriate environmental flows. Council believes that these flows are important to maintain the environment that surrounds cultural assets and places that are sustained and managed by Aboriginal peoples and Torres Strait Islanders.*[136]

However, several stakeholders raised issues for the committee's consideration. The most common issue was the concern that situations may arise where access to the water might be for economic purposes rather than cultural purposes.[137] Also that cultural, economic, social and environmental outcomes should be managed separately.[138] In response to the 2017 Bill QRC explained further and recommended that the definition of *cultural outcome* be redrafted:

> *QRC's only query of the drafting is that while the explanatory note says that cultural outcomes will be specified separately from economic, social and environmental outcomes (page 3 and 90) and this is how clause 238 amends section 43 (page 136), the definition of cultural outcome in clause 276 (page 166) only refers to a "beneficial consequence" rather than a specifically cultural outcome. QRC's concern is that this definition would appear to encompass existing economic, social and environmental outcomes as well as the new cultural outcomes. This aggregation risks the transparency of the water planning process for other water users who may question whether an allocation was made on the grounds of economic or cultural benefits. QRC understands that often a single water allocation will deliver multiple benefits (for example social and cultural), but that there is value in maintaining these distinctions. QRC recommends the drafting of this definition is revisited.*[139]

The department explained the underlying statutory right for the taking of water for cultural purposes and also responded to concerns that water could be taken for economic purposes:

> *The proposed amendment builds on and does not replace the unlimited statutory right under the Water Act to take water for cultural purposes and traditional activities, without the need for a water entitlement. This right cannot be used for commercial water resource development, such as irrigated agriculture.*
>
> *This is not to say that economic opportunities through water use cannot be otherwise dealt with; it is just that those opportunities would be set through a different mechanism established under the respective water plan for the area.*[140]

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135 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Wide Bay Burnett Environment Council, submission 6, p 2; EDO Qld, submission 8; Cotton Australia, submission 12, p 3; Southern Downs Regional Council, submission 5, p 2; Queensland Resources Council, submission 15, p 10.

136 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Southern Downs Regional Council, submission 5, p 2.

137 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce, submission 4, Queensland Farmers' Federation, submission 7; Cotton Australia, submission 12, Queensland Resources Council, submission 15.

138 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce submission 4, Queensland Resources Council, submission 15.

139 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Resources Council, submission 15, p 10.

140 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 13.

In response to QRC's recommendation to redraft the definition of 'cultural outcomes', the department advised:

> *Cultural outcomes are deliberately broad in scope to encompass all beneficial consequences to Aboriginal Peoples and Torres Strait Islanders with water values and uses in the relevant plan area. However the specific cultural outcomes for a water plan area will be identified in consultation with Aboriginal Peoples and Torres Strait Islanders in the plan area.*
>
> *Again, consultation with relevant Aboriginal Peoples and Torres Strait Islanders parties will occur on a catchment-by-catchment basis to determine the appropriate scope of cultural outcomes and supporting strategies.*[141]

Wide Bay Burnett Environment Council and EDO Qld recommended the insertion of meaningful consultation requirements throughout the Water Act whenever Aboriginal and Torres Strait Islander interests might be affected by water related decisions.[142] QFF supported the view that the department undertakes consultation with local communities so all stakeholders could understand how the amendments would impact water resources:

> *… it will be important that there is a state-wide process to outline how these reforms will be implemented in subsequent plan reviews. For example, local communities will need to understand how these reforms would be introduced through the reviews of water plans where cultural outcomes include ensuring that water is available for indigenous businesses that rely on taking water from a river or bore even though this statutory right is already in the Act. There will also be concerns how water for cultural needs will be provided, particularly in catchments/sub-catchments where water resources are fully committed for environmental and consumptive needs.*[143]

The department confirmed it would undertake consultation with Aboriginal and Torres Strait Islander stakeholders, as well as other local communities:

> *The inclusion of separate cultural outcomes in water plans will support more targeted consultation with Aboriginal and Torres Strait Islander stakeholders and ensure that their values and uses in water are better identified and provided for through the water planning process.*
>
> *The flexibility in the framework in terms of how cultural outcomes are identified and provided for in water plans will be determined in consultation with local communities.*[144]

Committee comment

The committee notes the department's responses to stakeholder issues raised and that the Bill as drafted will support its objective to better recognise the importance of water resources to Aboriginal peoples and Torres Strait Islanders.

2.5 Temporary access to strategic water infrastructure reserves

Clause 241 inserts a new subdivision 3 'Temporary release of water from strategic water infrastructure reserve' in chapter 2, part 2, division 2 of the Water Act to allow the chief executive to temporarily release water from a strategic water infrastructure reserve.

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141 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 13.

142 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Wide Bay Burnett Environment Council, submission 6; EDO Qld, submission 8.

143 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Farmers' Federation, submission 7, p 2.

144 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 13.

To achieve this objective, the Bill proposes to introduce a new mechanism in the Water Act to allow water held in strategic water infrastructure reserves to be temporarily released as unallocated water, and granted temporarily through a water licence of up to three years, until the reserve is required for its intended purpose.[145] The Bill specifies that the chief executive must consider a number of matters in deciding whether to temporarily release water from the reserve (see s 40B).

The department stated the objective is to better utilise water in instances where water plans have set aside a strategic water infrastructure reserve and the water is not currently being used:

> *Strategic infrastructure reserves are water allocations that have been set aside. Typically, it is us looking over the horizon at the need for new dams and new infrastructure. We keep these reserves in place for future needs. Quite often these reserves exist for extended periods before the projects to which they are linked go ahead. Currently in Queensland we have about 990,000 megalitres of strategic reserves set aside. This proposal provides for the temporary release of these reserves for a three-year period. The proposal opens up the opportunity that this water can be used for new job-creating and economic development opportunities. At the end of the licence term, the water will return to the strategic infrastructure reserves. The process proposed for the releasing of this water is the same process that is used for releasing unallocated water. The aim is rather than waiting for infrastructure that may be some years off we can make use of this water on a temporary basis while still protecting the future infrastructure needs of Queensland.*[146]

Stakeholders to the IPNRC inquiry broadly supported the proposed amendment in the Bill to provide a mechanism to allow temporary access to strategic water infrastructure reserves;[147] for example, Cotton Australia stated that the release of unallocated water could provide the State with economic growth and jobs in the short to medium term, as well as resources for longer-term infrastructure projects:

> *… the state currently holds around 60,000 megalitres in Strategic Reserves for the construction of Nathan Dam on the Dawson River. Nathan Dam was first proposed in 1926, and while Sunwater now has an approved EIS it has indicated that it has no immediate plans for construction.*
>
> *All or part of this water could be temporarily released, to existing irrigators along the Dawson River, who could boost their production until the water is actually required, when/if the dam is constructed.*[148]

Some stakeholders recommended a minimum 5-year term or removal of restriction on licence renewal. For example QFF and Cotton Australia both noted the intent of the 3-year restriction was to limit reliance or investment pertaining to any release of temporary water; however, they expressed concern that the time period would not be conducive to an environment in which farmers can effectively maximise yield and productivity.[149] Similarly, the Basin Sustainability Association argued that it would be not be viable for landholder businesses to invest in infrastructure on a three-year cycle:

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145 Strategic water infrastructure reserves are defined to include strategic water infrastructure reserves identified under a water plan or strategic reserves identified under a water plan that are not set aside for Indigenous purposes. Explanatory notes, p 7.

146 Public briefing hearing, 5 March 2018, p 4.

147 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, see, for example, Cotton Australia, submission 7; Southern Downs Regional Council, submission 5.

148 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Cotton Australia, submission 12, pp 1-2.

149 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Farmers' Federation, submission no 7, p 3; Cotton Australia, submission 12, p 2.

To the BSA, encouraging somebody to install infrastructure for three-year use of an insecure resource does not seem like good public policy. We think that once people get access to it and put in a million dollars of resource they will be arguing that they should continue to have it.[150]

The committee asked DNRME if consideration had been given to the limits a temporary allocation may place on investment. The department informed the committee:

I guess on the flip side of that is that at the moment that water is sitting there with no ability to access it. I think what we are trying to do in this space is enter into a conversation with industry about the possible use of it. As the state, we have to protect the future potential infrastructure needs of Queensland. That is the reason why the water would be only temporarily released. Yes, it will be a business judgement that somebody might need to make about whether it is an appropriate business situation for them to access that water.

I am not an expert in rural industries. I suspect you have far more experience in it than I do. However, I can envisage some crops that might require some establishment work. Ones that I am familiar with might be a citrus grove or something of that nature, the establishment of which requires more water, but then later in time it might require less water. You are right: it is going to be an individual business decision for a landowner to decide whether temporary access to that water would be a valuable business decision.[151]

Cotton Australia recommended that licence renewal decisions should be made at the chief executive's discretion.[152] The department advised that such licences would only be granted for genuine short-term proposals without affecting longer-term certainty for strategic water infrastructure projects and, on this basis, it would not be appropriate to consider dealings such as amalgamation, renewal or reinstatement:

Upon expiry of the licence, consideration of a new temporary release from the strategic reserve can be made by the chief executive. It would be a new temporary release process, whereby a new temporary access licence may be granted for no more than 3 years.

The proposal includes a number of safeguards to ensure that water is only made available in compliance with water plan requirements to protect security of existing entitlements and important environmental flows. It also ensures that the water will be available for its intended purpose when required. [153]

The department confirmed that the provisions in proposed s 40B would provide guidance to the chief executive in decision-making:

The provisions in proposed new section 40B are really around some checks and balances to ensure that those other options are being considered adequately and that we are not going to be left in a position where that strategic water will not come back after the three-year process. Obviously that is important to the integrity of our water planning. Those key projects need to be protected.[154]

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150 Public hearing transcript, 9 March 2018, p 16.

151 Public briefing transcript, 5 March 2018, p 9.

152 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Cotton Australia, submission 12, p 2.

153 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 16.

154 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 12.

Some stakeholders recommended s 40B should include consideration of the following matters:

- environmental values and water quality objectives established under the Environmental Protection (Water) Policy 2009
- government commitments under the Reef 2050 Long Term Sustainability Plan and Murray-Darling Basin Plan
- cultural values of Aboriginal and Torres Strait Islander peoples[155]
- potential impacts to identified water related ecological assets and MSES/MNES/MLES.[156]

Committee comment

The committee acknowledges stakeholder comments regarding the proposed amendments to the Water Act that allow the chief executive to temporarily release water from a strategic water infrastructure reserve.

In regard to the recommendation to extend the licence for access to this water from 3 years to 5 years to better respond to the needs of farmers, the committee is satisfied with the approach in the Bill that would allow the chief executive to issue a new licence upon the expiry of a licence, rather than automatically renewing the licence, after considering water requirements at that time. This supports the objective of the Bill and ensures allocation of water is compliant with current water plan requirements. The committee is also satisfied the department has addressed comments regarding consultation and water planning and allocation.

2.6 Urgent actions for dealing with water quality issues

Clause 259 inserts new chapter 2, part 3, division 5A 'Minister or chief executive may give direction to take action about water quality issue' into the Water Act to establish new powers for the Minister or chief executive (the official) to deal with urgent water quality issues.[157]

The department clarified the need for the proposed amendment and the process that will be involved:

> *This power allows in emergency situations for a directive to be given to a relevant entity about actions to prevent or remedy a water quality issue. This change is a result of some of the cyclone events that we have had and would only be used in an absolute emergency and when other provisions under legislation could not achieve the objectives.*
>
> *The amendment provides the flexibility to manage water quality issues when urgent action is necessary and not sufficiently provided for in a planning instrument. Consideration of the suitability of other mechanisms to deal with water supply emergencies and water quality incidents will be ascertained in close consultation with relevant agencies. To maintain application of this directive power, the minister or chief executive will be required to prepare and publish a report about the water quality incident including the circumstances under which this urgent direction was given.*[158]

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155 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Wide Bay Burnett Environment Council, submission 6, p1; EDO Qld, submission 8, Appendix, p 2; and WWF Australia, submission 11, p 1.

156 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, A matter of national environmental significance (MNES), a matter of State environmental significance (MSES), and a matter of local environmental significance (MLES); Wide Bay Burnett Environment Council, submission 6, p 1.

157 Explanatory notes, pp 95-97.

158 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 3.

In his explanatory speech to the 2017 Bill, the Minister stated that the powers would only be used in exceptional circumstances and he would consider any potential impacts on critical water supplies and the water security of water entitlement holders; for example:

> *… in a situation where a cyclone or intense rainfall event has led to raised concentrations of a contaminant in a dam or weir, the power could be used to allow water to be released from storage in order to facilitate dilution.*[159]

Stakeholder comments

Stakeholders broadly supported the proposed amendment to the Water Act in relation to urgent actions for dealing with water quality issues; for example, EDO Qld acknowledged that an urgent action may be needed to release water from a dam to flush out a waterway. EDO Qld noted that while this would represent a significant power to affect water rights, it understood that 'it is a necessary power and may be essential in preventing or mitigating serious water related incidents'.[160]

There were, however, some issues raised by stakeholders, including AgForce who submitted the following matters for consideration:

- the proposed definition of 'water quality issue' (cl 255 in 2017 Bill) should be clarified to indicate these are instances of a serious or material threat to water use, infrastructure, the environment or human health given the removal of liability for loss or damage caused by the action or inaction of the relevant entity
- when deciding whether to give direction, the 'official' (Minister or chief executive) should also have regard to subsequent impacts on other water users, such as for stock and domestic purposes, or landholders, to ensure responses are proportionate
- to ensure an effective response, coordination of actions by DNRM with relevant government agencies should be established prior to the application of these powers, including effective warning of downstream landholders who may be affected by the action.[161]

The department provided the following response to these matters:

> *The chief executive or Minister would need to have regard for other Acts that may be able to address the water quality issue prior to issuing a direction to take action and in consultation with the relevant agency.*
>
> *The Bill has been drafted to ensure it is clear that consideration of other mechanisms must occur before use of the power as it is intended this power would only be exercised in exceptional circumstances. An operational policy would support decision making under this power including consultation requirements.*[162]

The department provided further information on how the provisions would 'trigger' an urgent action for dealing with water quality, for example a particular event such as a cyclone or a flood. The department advised that the power to direct such an action may be triggered by the Minister only under specific circumstances and only after considering a range of matters as outlined in new ss 203A

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159 Hon Anthony Lynham MP, Minister for State Development and Minister for Natural Resources and Mines, Queensland Parliament, Record of Proceedings, 22 August 2017, p 2290.

160 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce, submission 8, p 4.

161 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, AgForce, submission 4, p 10.

162 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 16.

and 203B of the Bill, and that this provision is deliberately broad as it is not possible to identify all potential future emergency scenarios.[163]

> *Submitters were seeking clarity about the definition of a water quality issue and the environmental matters that must be considered before a decision is made to use the directive power. In the amendments, the definition of a water quality issue is deliberately broad because it is not possible to identify all possible future emergency scenarios where this directive power may be needed to be exercised. However, the definition covers the issues raised by submitters in relation to the impact the water quality issue may have on water use, infrastructure, the environment and public health and safety.*
>
> *The provisions in the bill also set out the matters that must be considered before making a direction as a safeguard to minimise the possible impacts from any action taken under this power. Again, I stress that this will be a power that will be used very infrequently, if at all. The intent would be that hopefully it is never used … other mechanisms that exist certainly would be preferred to this one.*[164]

Several stakeholders supported an amendment to new s 203C(a) to clarify that impacts to the 'environment' should include consideration of the following matters prior to giving direction:

- the environmental values and water quality objectives established under the Environmental Protection (Water) Policy 2009
- governments' commitments under the Reef 2050 Long Term Sustainability Plan and the Murray Darling Basin Plan
- all terrestrial and marine receiving waters
- all other matters captured by the definition of 'environment' integrated by the Bill
- impacts to the interests of Aboriginal and Torres Strait Islander peoples.[165]

The department provided the following response:

> *The Great Barrier Reef and terrestrial and marine waters are components of the 'environment'. The Bill provides for consideration of the environment without being restricted to particular components of the environment.*
>
> *The new definition of 'environment' also includes cultural interests. The provision already ensures consideration of impacts on the environment.*
>
> *Water planning and allocation decisions under Chapter 2 of the Water Act must advance the purposes of the Act, which include sustainable management and the principles of ecologically sustainable development.*[166]

The department further clarified that the broad definition of environment aligned with the definition in the *Environmental Protection Act 1994:*

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163 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Answer to Question taken on notice No. 2, public briefing transcript, Brisbane, 6 September 2017, pp 3-4.

164 Public hearing transcript, 9 March 2018, pp 32-33.

165 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Wide Bay Burnett Environment Council, submission 6, p 2; EDO Qld, submission 8, p 4; WWF Australia, submission 11, p 3.

166 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 17.

This definition makes clear that the environment, for the purpose of the Water Act, has a broad meaning extending to ecosystem constituents, natural and physical resources, and social, economic, aesthetic and cultural conditions.[167]

QRC recommended new s 203G be amended to include a statutory reporting timeframe to ensure the use of the new powers is reported on promptly and tabled in Parliament, as this 'could provide an appropriate opportunity to review how these emergency powers have been deployed'. [168]

The department agreed to consider a non-statutory timeframe to 'ensure reporting on the utilisation of these powers is carried out promptly and in an appropriate manner'.[169]

Committee comment

The committee noted the recommendation by QRC to amend s 203G of the Water Act to include a statutory timeframe for an official to report on a direction given to a relevant entity for water quality issues for the purposes of timeliness and to provide an opportunity for review, and that the report be tabled in Parliament.

The committee also noted the department's advice that it would consider a non-statutory reporting timeframe to ensure that any use of these new powers is reported on promptly and in an appropriate manner.

The committee noted that the official must have regard to any impacts on water supplies, the environment, public interest and other matters considered appropriate, as well as water security for water entitlement holders, prior to giving a direction to take action on a water quality issue. Given this, the committee considers it is reasonable for the community and stakeholders to have an understanding of the expected reporting timeframe after the issuing of the direction. For this reason, the committee seeks clarification from the Minister regarding the timeframe for an official to report on a direction given to a relevant entity to take action on a water quality issue.

Recommendation 7

The committee recommends the Minister for Natural Resources and Mines clarifies, during his second reading speech, the timeframe proposed for an official to report on a direction given to a relevant entity to take action on a water quality issue.

2.7 Further amendments relating to water

The Bill proposes several further amendments relating to water, including:

- the process to release unallocated water held as general reserve under a water planning instrument to be prescribed in a regulation: '[t]his amendment means that the detailed and complex process for release of unallocated water stated in older water plans may be replaced with a more streamlined process'[170]

167 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Answer to Question taken on notice No. 2, public briefing transcript, Brisbane, 6 September 2017, p 5.

168 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Resources Council, submission 15, p 11.

169 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 17.

170 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 3.

- providing for seasonal assignment of water allocations for part of a year and a requirement for resource operations licence holders to collect and publish seasonal water assignment sale price information [171]
- providing for a person other than a licensed water bore driller, such as the landowner, to carry out water bore repairs up to 1.2 metres
- clarifying that compensation payment for a reduction in an allocation's value applies for the life of the plan
- a referral panel to now consider environmental management rules contained in a resource operations licence
- providing for all owners of land to which a water licence attaches to be notified when a draft water entitlement notice is released which proposes to convert the licence to a water allocation
- clarifying how water licence dealings are processed if land changes ownership either partly or wholly
- prescribing that an application for a dealing to relocate a water licence can only be made if provided for in a water plan, a regulation or a water management protocol. It also clarifies that these applications are made, assessed and decided by the process prescribed in the regulation.[172]

Stakeholder comments

Clause 274 inserts new s 1006A which provides that a regulation or water plan may declare particular underground water to be overland flow water. The explanatory notes state:

> *Clause 274 inserts new section 1006A of the Water Act 2000. New section 1006A provides that a regulation or water plan may declare particular underground water to be overland flow water. Where such a declaration is in place, the underground water the subject of the declaration is no longer considered underground water for the purpose of the Act and is regulated as overland flow water. This is similar to existing section 1006 of the Water Act 2000 which allows for underground water to be declared as water in a watercourse. These provisions ensure that where different sources of water are highly connected they are able to be managed as the same water resource through the same water management rules.*[173]

QRC stated it was difficult to declare underground water as overland flow water as it is difficult to conceptualise except at a highly localised level and suggested:

> *… an example or illustration in the explanatory notes would help stakeholders understand how this definitional re-categorisation would be used in a water plan or regulation.*[174]

The department confirmed it would make an illustrative representation available in communications materials.[175]

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171 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, p 3.

172 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Public briefing transcript, Brisbane, 6 September 2017, pp 3, 4.

173 Explanatory notes, p 103.

174 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Queensland Resources Council, submission 15, p 11.

175 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 17.

Property Rights Australia also raised a concern about new s 1006A:

> *… it is a very general declaration of what underground water or aquifers may be declared overland flow, without the requirement for the water so declared to be under, or adjacent to a watercourse and is a severe abrogation of landowner rights.*
>
> *It is unfair and unreasonable and strips some of the rights and protections that are enjoyed by underground water users away from them and is so general as to allow the declaration of any bore.*[176]

The department explained that this provision is only intended to be used in very specific circumstances where it is not practical to manage overland flow water and shallow groundwater as separate resources such as in the Stanthorpe/Granite Belt area:

> *DNRM will undertake consultation with the local community prior to applying it in a particular area.*
>
> *DNRM will also take steps to develop an operational policy or procedure that supports the process of deciding when to declare underground water to be overland flow water.*[177]

Clause 250 replaces s 126 of the Water Act to clarify what is meant by the relocation of a water licence, making it clear that relocation only relates to where a water plan, water management protocol or regulation provide rules for relocation for the purpose of this section of the Water Act.

Some stakeholders were concerned that the process may not be subject to sufficient consideration of the impacts on other water users and the environment and called for stricter guidance on what must be considered when deciding where and how much water must be taken:

> *For example, the 'process' for allowing relocation or granting of a water licence should always require consideration of the impacts of the water licence on other water users, including ATSI interests, and environmental impacts of the water take or interference from a certain water resource, as well as community submission and appeal rights around these decisions. Input by the community ensures that decisions are robust, accountable and well-informed.*[178]

Further:

> *Community submission and appeal rights should always be available around these decisions. Input by the community ensures that decisions are robust, accountable and well-informed.*[179]

The department advised that the amendments will clarify that applications to relocate a water licence can only be made where a water planning instrument provides rules for the relocation of water licences:

> *Rules for relocation are decided during consultation for water plans and a dealing that is a relocation must be consistent with those rules. Public notification and submission processes remain in place for decisions in relation to the issuing of new water licences.*[180]

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176 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Property Rights Australia, submission 18, p 3.

177 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 17.

178 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Wide Bay Burnett Environment Council, submission 6, p 2; EDO Qld, submission 14, Appendix, p 3.

179 EDO Qld, submission 14, Appendix, p 3.

180 IPNRC, Inquiry into the Mineral, Water and Other Legislation Amendment Bill 2017, Department of Natural Resources and Mines, correspondence dated 29 September 2017, p 17.

Committee comment

The committee is satisfied with the department's responses on the issues raised. In particular, the committee notes that the department will undertake consultation with local communities and also take steps to develop operational policy or procedure that supports decisions in regard to underground water and overland water flow.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the House.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

The committee considered that cls 46, 259 and 263 contain issues of fundamental legislative principle. These clauses are discussed in Table 1 below.

The Bill also includes five offence provisions which are set out in Table 2 below.

TABLE 1 - RIGHTS AND LIBERTIES OF INDIVIDUALS

Clauses	**46 and 263**
FLP issue	**Administrative power** - s 4(3)(a) of the LSA Are rights, obligations and liberties of individuals dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?
Comment	Summary of provisions **Clause 46** proposes a replacement s 91A of the *Mineral and Energy Resources (Common Provisions) Act* 2014, dealing with arbitrations. Under the proposed provision, where parties have not been able to successfully negotiate certain agreements under the Act, the parties may agree to an arbitration to decide the dispute. Under new s 91F, the arbitrator's decision is final and the parties may not appeal or seek review of the decision, other than to apply to the Supreme Court on the ground of jurisdictional error. **Clause 263** proposes an identical provision to be inserted in the *Water Act 2000* in new s 433F. This enables parties to certain disputes to enter into arbitration to reach a make good agreement (rather than seeking a determination by the Land Court). New s 433F deems the arbitrator's decision in those arbitrations to be final and not subject to review or appeal (other than to the Supreme Court on the ground of jurisdictional error). Potential FLP issues An arbitrator's decision under each of these new provisions is final and not subject to a review or appeal on any ground (other than jurisdictional error). Legislation should make rights and liberties, or obligations, dependent on administrative power only if subject to appropriate review. The OQPC Notebook states:

	Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.[181] Committee comment Parties are made aware prior to entering into arbitration that their review options will be limited (to a Supreme Court claim on the ground of jurisdictional error) because an 'arbitration election notice' (which begins the arbitration process) is required to state that if a party accepts the request for arbitration, neither party can then make an application to the Land Court for a determination of the dispute. The explanatory notes advise in respect of new s 433F: *It is intended that the arbitrator's decision is binding on the parties. New section 433F provides that the arbitrator's decision is final, and that where arbitration is chosen by the parties, both parties are subsequently prevented from making an application to the Land Court for a decision about the dispute. However, the arbitrator's decision does not limit or otherwise affect a power of the Supreme Court to decide a decision of the arbitrator is affected by jurisdictional error.*[182] Parties entering into arbitration do so with the knowledge that the arbitrator's decision is final and no application can be made to the Land Court to determine the disputed matter. It can be argued that they have thereby consented to the limitation of 'usual' review or appeal options as a trade-off for this comparatively easier dispute resolution process. The committee has made a recommendation in regard to s 433F. In light of this recommendation the committee is satisfied that there is sufficient regard for the rights, obligations and liberties of individuals.
Clauses	**46 and 263; 259**
FLP issue	**Immunity from proceedings** – s 4(3)(h) of the LSA Does the Bill confer immunity from proceeding or prosecution without adequate justification?
Comment	Summary of immunity provisions **Clause 46** inserts s 91A(7) which provides: *a prescribed arbitration institute does not incur any civil monetary liability for an act or omission in the performance, or purported performance, of a function under subsection (6) unless the act or omission is done or made in bad faith or through negligence."* **Clause 263** inserts a replica provision (proposed s 433A(7)) into the *Water Act 2000.* Proposed s 203D under **cl 259** sets a maximum penalty of 1,665 penalty units (currently $210,039.75) for a relevant entity that fails to comply (absent reasonable excuse) with a direction given under s 203B(1) of the *Water Act 2000* (re water infrastructure and water quality and supply issues).

[181] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 18.

[182] Mineral, Water and Other Legislation Amendment Bill 2018, explanatory notes, p 10.

	Section 203B(1) provides that an official may, by a notice given to the relevant entity, direct the entity in either or both of the following ways – (a) to take stated reasonable action within or for a stated reasonable period; *Example- if the entity is the holder of a resource operations licence, direct the entity to operate stated water infrastructure, operated by the entity, in a stated way (for example, to release water from the infrastructure for the purpose of remedying the water quality issue) for a stated reasonable period.* (b) not to take stated action for a stated reasonable period. The s 203B notice must also state that complying with the direction would or may be inconsistent with a stated instrument of a type mentioned in s 203A(1)(c) and the direction prevails over the instrument to the extent of any inconsistency. Proposed s 203E (**cl 259)** provides that a relevant entity is not liable for loss or damage caused by taking action or not taking action (acts or omissions), that is inconsistent with the entity's current supply contractual arrangements and (provided it is) in compliance with a direction given under s 203B(1). This protection only applies to the extent the relevant entity acted honestly and without negligence and does not affect the relevant entity's liability for negligence. Proposed s 203F **(cl 259)** provides that civil liability does not attach to the State or the official [being the Minister or the Chief Executive – see s 203B(2)(b)(i) and (ii)] because of a failure to give a direction under s 203B(1). <u>Potential FLP issues</u> Legislation should not confer immunity from proceeding or prosecution without adequate justification.[183] The OQPC Notebook states:[184] *a person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence … if liability is removed it is usually shifted to the State.* <u>Comment</u> In respect of the protections conferred by ss 203E and 203F, the explanatory notes state: *However, the Bill provides protection from civil liability to an entity complying with a direction under the new power for dealing with urgent water quality issues. It is necessary to ensure that entities complying with a water quality direction are not made liable for actions they are required to take, or not take, under the direction [with] which they are required to comply. This protection from liability is required to ensure that recipients of directions, most likely the operators of water infrastructure, are protected from liability in terms of potential inability to meet contractual arrangements they have in place with water entitlement holders within their water supply scheme.* *…*

[183] *Legislative Standards Act 1992*, s 4(3)(h).

[184] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 64.

	New section 203E limits the protection to actions done, or omissions made, honestly and without negligence. It is not intended that this section affect the liability of the relevant entity for negligence. The protection from liability provided by new section 203E is consistent with that provided under section 25X of the Water Act 2000 for service providers complying with water supply emergency declarations. *Further, new section 203F provides protection to the State, Minister or chief executive from civil liability in the circumstance they fail to give a direction under the new powers for dealing with an urgent water quality issue. This protection from liability is justified by potential consequences of a water quality issue, which mean that urgent decisions and actions may need to be taken in order to manage the issue. Whether or not to give a direction involves the exercise of important administrative discretion, and different minds may legitimately come to different conclusions about what actions should be taken or not taken. Providing protection from liability associated with the decision about whether to issue, or not to issue, a direction ensures the discretion can be exercised without fear of being held liable for a failure to give a direction. This protection from liability is consistent with that provided under section 25W of the Water Act 2000 for failure to make a water supply emergency declaration.185* The committee notes the policy rationale given in the explanatory notes for providing the above immunities (eg. s 203E that the act or omission must have been in compliance with a s 203B(1) direction and the entity must have acted honestly and without negligence). The committee is satisfied with the protections conferred by ss 203E and 203F.

EXPLANATORY NOTES

Part 4 of the *Legislative Standards Act 1992* requires an explanatory note to be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins. However, it would be helpful if the explanatory notes identified the specific clause(s) being discussed, when identifying the fundamental legislative principles.

TABLE 2 – PROPOSED NEW OR AMENDED OFFENCE PROVISIONS

[Note: one penalty unit equals $126.15]

Clause	Offence	Proposed maximum penalty
129	**Amendment of *Mineral Resources Act 1989*** **Insertion of new s 315 Activity report for mining lease** (1) A regulation may— (a) require a holder or former holder of a mining lease to give the Minister a report (an ***activity report***) about the activities carried out under the mining lease; and	

185 Mineral, Water and Other Legislation Amendment Bill 2018 explanatory notes, p 10.

	(b) prescribe the following for the activity report— (i) when the report is to be given; (ii) the information to be contained in the report. (2) The holder or former holder must give an activity report in compliance with the regulation.	150 penalty units
129	**Insertion of new s 315A Relinquishment report for mining lease** (1) This section applies in relation to a holder of a mining lease who, under a relinquishment condition, relinquishes part of the area of the lease. (2) A regulation may— (a) require the holder to give the Minister a report (a ***relinquishment report***) about the relinquishment; and (b) prescribe the following for the relinquishment report— (i) when the report is to be given; (ii) the information to be contained in the report; (iii) the persons to whom a copy of the report is to be given. (3) The holder must give a relinquishment report in compliance with the regulation.	150 penalty units
129	**Insertion of new s 315B Surrender report for mining lease** (1) This section applies in relation to a holder of a mining lease who applies, under section 309, to surrender the lease or a stated part or percentage of the area of the lease. (2) A regulation may— (a) require the holder to give the Minister a report (a ***surrender report***) about the surrender; and (b) prescribe the following for the surrender report— (i) when the report is to be given; (ii) the information to be contained in the report. (3) The holder must give a surrender report in compliance with the regulation.	150 penalty units
142	**Insertion of new s 334ZZS Obligation to decommission** (1) This section applies to a person (the ***owner***) who holds a mineral development licence, mining lease or water monitoring authority under which a water monitoring bore was constructed, unless the water monitoring bore has, under division 1, been transferred. (2) The owner must decommission the bore from use under this Act before—	

	(a) the mineral development licence, mining lease or water monitoring authority ends; or (b) the land on which the bore is located is no longer in the area of the licence, lease or authority. (3) For subsection (1), the bore is decommissioned from use under this Act only if— (a) it has been plugged and abandoned in the way prescribed by regulation; and (b) the decommissioning complies with the Water Act, sections 816 and 817; and (c) the owner gives the chief executive a notice, in the approved form, of the decommissioning of the bore. (4) Subsection (3)(b) applies only to the extent it is not inconsistent with subsection (3)(a).	500 penalty units
259	**Amendment of *Water Act 2000*** **Insertion of new s 203D Direction must be complied with** A relevant entity given a direction under section 203B(1) must comply with the direction unless the entity has a reasonable excuse.	1,665 penalty units

Appendix A – 2018 inquiry list of submitters

Sub #	Submitter
001	Shay Dougall
002	Gecko
003	WWF Australia
004	Russell Bennie
005	Queensland Law Society
006	Lock the Gate Alliance
007	Agforce Queensland
008	Queensland Resource Council
009	Peter Dart
010	Lee McNicholl
011	Shine Lawyers
012	George Houen
013	Resolution Institute
014	Environmental Defenders Office
015	Protect the Bush Alliance
016	Marland Law
017	APPEA

Appendix B – List of witnesses at 2018 departmental briefing and public hearing

Departmental briefing

Department of Natural Resources, Mines and Energy

- Shaun Ferris, Executive Director, Mineral and Energy Resources Policy
- David Wiskar, Executive Director, Water Policy
- Marcus Rees, Director, Resources Policy and Projects
- Jason Douglas, Director, Strategic Water Policy

Public hearing

Shine Lawyers

- Peter Shannon, Special Counsel
- Geoffrey Kelk, Solicitor

Marland Law

- Tom Marland, Principal

Basis Sustainability Alliance

- Lee McNicholl, Chair

Landholder Services Pty Ltd

- George Houen

Wambo Cattle Company Pty Ltd

- Max Winders, Managing Director

Australian Petroleum Production & Exploration Association (APPEA)

- Matthew Paull, Policy Director

Queensland Resources Council

- Andrew Barger, Policy Director, Infrastructure and Economics
- Katie-Anne Mulder, Director Resource Policy
- Emma Hansen, Senior Advisor, Resource Policy
- Gavin Scott, Partner, Norton Rose Fullbright

Queensland Law Society

- James Plumb, Chair of QLS Mining and Resource Law Committee
- Matt Dunn, Government Relations Principal Advisor
- Vanessa Krulin, Senior Policy Solicitor

Department of Natural Resources, Mines and Energy

- Shaun Ferris, Executive Director, Mineral and Energy Resources Policy
- David Wiskar, Executive Director, Water Policy
- Marcus Rees, Director, Resources Policy and Projects
- Jason Douglas, Director, Strategic Water Policy

Department of Environment and Science

- Lawrie Wade, Director, Environmental Policy and Legislation
- John Ruffini, Director, Water Planning and Coastal Sciences, Science Division

Appendix C – 2017 inquiry list of submitters

Sub #	Submitter
001	Shine Lawyers
002	Stanthorpe Community Reference Panel Inc
003	Shay Dougall
004	AgForce
005	Southern Downs Regional Council
006	Wide Bay Environmental Council Inc (WBBEC)
007	Queensland Farmers Federation
008	Environmental Defenders Office (EDO) Qld
009	North Queensland Miners' Association Inc
010	Queensland Sapphire Miners Association
011	WWF
012	Cotton Australia
013	Australian Petroleum Production and Exploration Association (APPEA)
014	J Jenkyns
015	Queensland Resources Council (QRC)
016	George Houen
017	Queensland Law Society
018	Property Rights Australia
019	Great Barrier Reef Marine Park Authority (GBRMPA)

Appendix D – List of witnesses at 2017 departmental briefing and public hearing

Departmental briefing

Department of Natural Resources and Mines

- Mr Lyall Hinrichsen, Acting Executive Director, Mineral and Energy Resources Policy
- Mr David Wiskar, Executive Director, Water Policy
- Mr Marcus Rees, Director, Resources and Policy and Projects
- Mr Jason Douglas, Strategic Water Policy

Department of Environment and Heritage Protection

- Mr Laurie Hodgman, Director, Environmental Policy and Legislation

Public hearing

North Qld Miners Association

- Ms Fiona Abbey, President

Queensland Sapphire Miners Association

- Ms Carolyn Graham, Secretary

Landholder Services

- Mr George Houen

Australian Petroleum Production & Exploration Association (APPEA)

- Mr Matthew Paull, Policy Director - Queensland

Queensland Resources Council (QRC)

- Mr Andrew Barger, Director – Infrastructure & Economic Policy
- Ms Katie-Anne Mulder, Director – Resources Policy
- Ms Emma Hansen, Advisor – Resources Policy

AgForce

- Dr Dale Miller, General Manager - Policy
- Mr Daniel Phipps – CSG Project Leader, AgForce Projects

Department of Natural Resources and Mines

- Mr Lyall Hinrichsen, Acting Executive Director, Mineral and Energy Resources Policy
- Mr David Wiskar, Executive Director, Water Policy
- Mr Marcus Rees, Director, Mineral and Energy Resources Policy
- Ms Natasha Hinrichsen, Team Leader, Strategic Water Policy

Department of Environment and Heritage Protection

- Mr Laurie Hodgman, Director, Environmental Policy and Legislation