Thynne Macartney

Agribusiness Update

August 2019

Water licence trading –
new value and opportunities for landholders

By Alex Ramsey
Partner

As irrigators and feedlotters compete for access to secure water across dry parts of Queensland, tradable water has become a very valuable commodity.

While water allocations have been tradable independently of land since the *Water Act* was introduced in 2000, water licences remained connected to land and landholders' rights were limited when it came to dealing with water taken under these licences.

Recent changes to a number of water plans and management protocols now mean that landholders in the Barron, Condamine and Balonne, Cooper Creek, Great Artesian Basin, Gulf and Wet Tropics water plan areas can now:

- sell a "*relocatable water licence*" to another landholder in the same water area; or
- relocate a "*relocatable water licence*" to other land owned by it in the same water area.

These changes will grow a new market for tradable water in the same way as the conversion of some water licences to water allocations did over the past 19 years.

The Department of Natural Resources, Mines and Energy (**DNRME**) oversees the relocation process and it will apply the relocation rules under either the water plan or water management protocol to decide whether a sale or relocation should be permitted. Usually these rules will require an underground water impact assessment to look at how the relocated water use will affect the underground water source.

Unlike the sale of a water allocation which can be managed to ensure the seller is paid, the sale or relocation of a water licence is finalised as soon as an application is approved by the DNRME. This means that if a water licence is to be paid for, the buyer needs to provide security for the payment to the seller.

Thynne + Macartney have worked with a number of buyers and sellers of relocatable water licences to ensure that their rights are protected through this government managed process.

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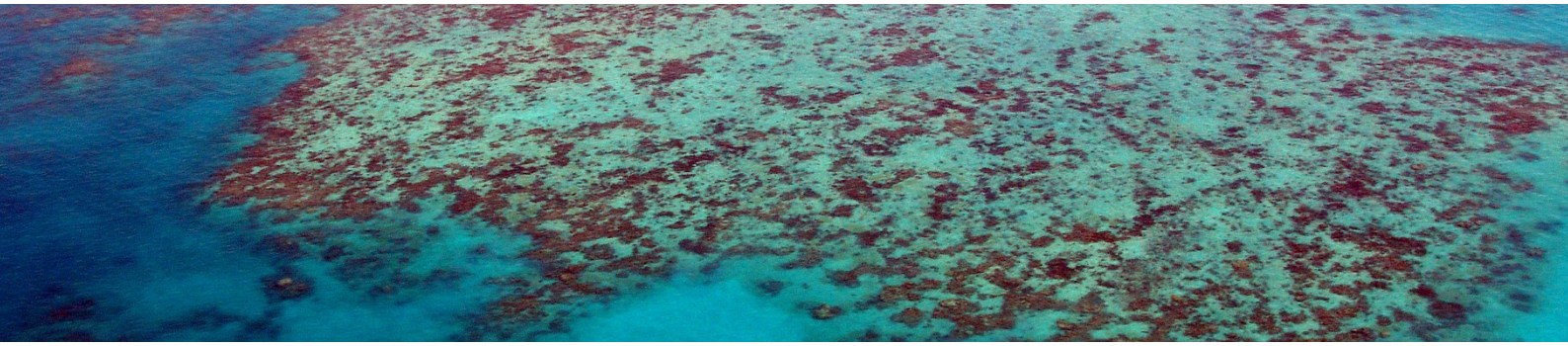

New reef laws still in the pipeline

By Emma Kime
Lawyer

Background

The *Environmental Protection (Great Barrier Reef Protection Measures) and Other Legislation Amendment Bill 2019* (**Bill**) was introduced into the Queensland Parliament on 27 February 2019 and then referred to the Innovation, Tourism Development and Environment Committee for consideration. The Committee tabled its report on 26 April 2019 and it is expected that the Bill will be further debated during the next Parliamentary sitting from 20 to 22 August 2019.

If passed, the new laws will create even more red tape for Queensland's farmers and graziers without a guarantee of tangible benefits for the reef.

Many graziers and grain, banana, cane and horticulture producers have taken proactive measures in the last decade and adopted best management practices to reduce sediment run-off. The proposed new laws reflect the Queensland Government's belief that these initiatives have not been sufficient and that Government intervention is necessary.

Changes to management practices

If passed, the new laws will classify commercial grazing, cropping and horticulture within a reef catchment area as an "Agricultural ERA" (Agricultural Environmentally Relevant Activity).

All commercial grazing, cropping and horticulture in the Cape York, Wet Tropics, Burdekin, Mackay-Whitsunday, Fitzroy and Burnett-Mary reef catchment areas will be affected.

The new laws will introduce minimum practice standards, which recognise existing best industry practice in some circumstances.

For example, graziers will be required to meet the "grazing minimum standards" that require:

1. depending on the current condition of the land, the adoption of measures to improve the condition of the land (such as wet season spelling and reduced stocking rates); and
2. the keeping of records about the use of fertiliser, chemical and soil conditioner.

Existing best management practice (BMP) programs may, subject to certain conditions being met, automatically be accredited as meeting the minimum practice standards.

If the Bill is passed, graziers will need to comply with the minimum practice standards within the following time frames:

1. Burdekin region – 12 months;
2. Fitzroy region – 2 years; and
3. Wet Tropics, Mackay Whitsunday, Cape York and Burnett Mary regions – 3 years.

The minimum practice standards that will apply to the sugar cane, banana, horticulture industries are yet to be developed by the Government.

Approval required for new cultivation

The new laws will also impose a requirement for an environmental authority to be obtained to undertake "new intensive cropping activities" on an area of more than two hectares of land that does not have a history of cropping. A history of cropping can be established if the land was used for cropping during the last 3 out of 10 years (with at least 1 year being in the last 5 years). To obtain an environmental authority, farm design and practice standards must be developed to address water quality risks which may arise from the cropping activities.

Future

Thynne + Macartney's agribusiness lawyers are concerned that the proposed laws represent yet another layer of regulation on agricultural production and development in Queensland. The State's vegetation management and nature conservation legislative regimes each take a conceptually different approach to some of the same environmental issues. Their combined smothering effect seems counter-intuitive to the environmental-custodianship mentality innate in Queensland's farmers and graziers. It is time for a wide-broom review of the many pieces of legislation.

Quad bikes, ag bikes and horses – an employer's nightmare?

By Peter Kenny
Partner

We are often asked by clients what precautions they need to take when employees, contractors or even backpackers are asked to muster livestock or carry out other routine station activities on quad bikes, ag bikes or on horseback.

This is not an easy question to answer as there is a myriad of legislation and decided case law which attempts to clarify what the employer's obligations are, but which in reality provide some complex layers of uncertainty in what is a very high risk area of the employer's business.

The best course of action

In the interest of simplifying the position for our clients, we have set out below what we believe is the bare minimum course of action to follow for the use of:

1. Quad bikes

- first and foremost, they should not be operated by anyone who doesn't have the necessary skill, knowledge and expertise of a practised farmworker used to riding this type of machine for the purpose of the activity he or she has been asked to carry out;
- quad bikes should be fitted with rollover protection and a safety belt;
- a safety approved helmet should always be worn by anyone riding a quad bike;
- any risk that the person using the quad bike is likely to encounter should be pointed out by the employer;
- all quad bikes should be equipped with 2 way communication capabilities;
- never allow a second person to be a passenger on a single seat quad bike.

2. Ag bikes

- anyone using an ag bike should always wear a safety approved helmet;
- a preliminary assessment should be made of the user's ability to operate and handle an ag bike;
- when using an ag bike to move livestock or carry out another routine station activity, the type of terrain that will be traversed should be clearly explained to the employee / contractor / backpacker;
- all ag bikes should be equipped with 2 way communication capabilities.

3. Horses

- riders should be evaluated before they are matched with a horse suited to their ability;
- horses should be evaluated to ensure that they are of good health and temperament, and suited to the rider;
- all bridles, belts, saddles, girths and straps must be kept in good condition;
- riders should wear suitable clothes and footwear as well as a safety approved riding helmet;
- a briefing should be given to all riders on the type of terrain that they are likely to encounter during the day and, in particular, a description of any inherent risks in that terrain;
- a strict protocol (including agreed hand signals) should be put in place and enforced if any roads are to be crossed or ridden on;
- avoid riding in failing light or darkness.

Have you been given a Conduct and Compensation Agreement (CCA) to sign?

The rules have changed... again

By Ari McCamley
Partner

Reforms to the land access laws that govern relationships between landholders and resource tenement holders took effect 19 April 2019 as part of the *Mineral, Water and Other Legislation Amendment Act 2018* (**Act**).

The Act has introduced new mechanisms to encourage resource companies and landholders to reach an agreement and will give landholders more certainty about the circumstances in which their costs will be paid by the resource company. Unfortunately, it also threatens landholders' bargaining power in negotiations.

Exhausting the possibility of reaching agreement

Either a landholder or resource company can now elect for an alternative dispute resolution (**ADR**) process if an agreement has not been reached at the end of the 20-business-day "minimum negotiation period" after a resource company commences negotiations with a landholder. The type of ADR process (for example, mediation) and the identity of the facilitator is to be decided by the Land Court or a recognised institute if the parties cannot agree. The resource company must pay the costs of the ADR facilitator. However, if a party does not attend without a reasonable excuse, it can be ordered to pay the other party's costs of attending.

There is also a new alternative to the Land Court if an agreement has not been reached at the end of the minimum negotiation period of an ADR process. If one party offers arbitration and the other accepts, an arbitrator will be appointed to make a binding determination on the issues in dispute, including the amount of compensation payable. The resource company must pay the costs of the arbitrator, unless the parties participated in an ADR process first, in which case the arbitrator's costs are shared unless the parties agree otherwise or the arbitrator decides otherwise. Also, subject to agreement or a decision by the arbitrator to the contract, each party must bear its own costs for the arbitration.

Landholder costs paid even if agreement is not reached

Previously, a resource company only became liable to pay the accounting, legal and valuation costs a landholder incurred in negotiations once a conduct and compensation agreement was signed. Landholders were therefore finding it necessary to reach preliminary agreements about the payment of their accounting, legal and valuation costs before commencing negotiations to ensure they were not left out of pocket if the resource company changed its plans.

The Act establishes a landholder's right to recover necessarily and reasonably incurred negotiation and preparation costs regardless of whether agreement is ultimately reached. Further, the costs of an agronomist have been added to the list of costs that can be recovered.

Threat to bargaining power

A landholder who owns or occupies land within the area of a resource authority is entitled to compensation from the resource authority holder for certain impacts called "compensatable effects".

Before the changes, impacts "caused by authorised activities" were compensatable effects if they related to the landholder's land, although arguably not necessarily the land within the authorised area of the resource authority or the specific parcel of land on which the activities are being carried out. That is, compensation could have been claimed for impacts on a parcel of land caused by the resource company's broader project, such as activities on neighbouring land owned by the same or another landholder.

The new definition of "compensatable effects" limits a landholder's rights to compensation to the impacts caused by the resource authority holder "carrying out authorised activities on the [landholder's] land".

Especially in the context of projects where significant disruptive infrastructure is installed on neighbouring properties (including those owned by the same landholder), this change could represent a significant erosion of landholders' rights.

The danger is that any legislative change that erodes landholders' rights threatens the delicate balance that has delivered compensation payments satisfactory to landholders in many negotiated outcomes to date. Proponents of "co-existence" point to such outcomes as proof of the concept. At what point will resource companies demand rather than incentivise co-existence?

Thynne + Macartney will continue to assist landholders secure the best possible outcomes in their dealings with resource authority holders.

Is fake meat fake news?

By Alex Ramsey
Partner

While Australia continues to produce clean, green and safe animal protein, the demand for "fake meat" and "vegan meat" has led to supermarkets and restaurants offering products labelled "meats" which don't come from a paddock or pen.

Since the 1920s, scientists have sought to develop foods which look, feel and taste like animal protein, though are comprised of plant-sourced molecules, yeasts, gums and seasoning. While these products have largely been sold within the domain of vegetables and health foods, they have made their way into the mainstream where fast-food outlets and grocery stores now count them as some of their highest growth sales items and place them alongside beef, lamb and poultry products.

Apart from the locations at which these products are offered in stores, objections have been raised by Australian agriculture industry bodies and consumer groups to the use of the word "meat" in labelling these goods.

In Queensland, there are no restrictions under the Food Standards Code regarding the use of the word "meat" to describe items which are not derived from animals. Under the Australia wide AUS-MEAT language, there are detailed guides as to how the language of meat products and cuts should be communicated, though there is no exclusivity claimed for the use of the word "meat" to describe only animal proteins.

Globally, the situation is changing as France has banned the use of "meat" and "dairy" related terms (including burger, bacon, sausage, milk and cheese) to non-animal derived products and Missouri in the USA has banned the use of the term "meat" to be applied to anything other than a product originating from livestock.

The Red Meat Advisory Council has indicated that it will engage with the Queensland and Federal Governments to clarify labelling laws and it remains to be seen whether there will be any regulatory action taken to preserve the use of the term for animal products or to allow it be used to describe products which are not derived from the natural growth of livestock.

Capital gains tax:
Selling the deceased's main residence

By Margaret McNamara
Partner
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By Penny Nicholls
Associate

As an executor or beneficiary of an estate, it is important to be aware of the capital gains tax (**CGT**) consequences of selling an estate property on which there is a dwelling.

A dwelling is anything that is used for residential accommodation.

Where an executor of an estate sells the deceased's main residence within two years of the deceased's date of death, any capital gain or loss will be disregarded, provided the property was not used to produce income.

Importantly, where the main residence is located on acreage, the CGT exemption applies to a maximum of two hectares of land around the dwelling.

Capital gains and losses are also disregarded when an executor sells a dwelling of the deceased that was acquired before 20 September 1985, within two years from the deceased's date of death.

The Commissioner of Taxation has always had the discretion to extend this two year period in certain circumstances upon application to Australian Taxation Office (ATO) by the executor.

On 27 June 2019, the Commissioner introduced Practical Compliance Guideline PCG 2019/5 which provides the executor with a safe harbour where the deceased's property cannot be sold and settled within 2 years of the deceased's death.

The safe harbour allows the executor an additional 18 months for settlement of the property to take place, where all of the following conditions are met:

1. during the first 2 years after the deceased's death, more than 12 months was spent addressing:
   (a) a challenge to ownership of the property or the Will;
   (b) a life interest in the Will;
   (c) complexity that delays the completion of the estate administration; or
   (d) a delay in settlement or termination of a contract for reasons outside the executor's control.
2. the property is listed for sale as soon as possible after the above issues are resolved;
3. the sale settles within 12 months of being listed for sale;
4. none of the following matters delayed the disposal of the property:
   (a) a wait for the property market to pick up;
   (b) a delay due to refurbishment of the house;
   (c) an inconvenience to the executor in organising the sale; or
   (d) an unexplained period of inactivity.

When executors rely on this safe harbour it is important they keep details notes and records in case they are chosen for an ATO compliance check.

It should be noted that the Commissioner still has discretion to extend the two year period in other circumstances upon application to the ATO.

Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth):

Increased protection for farmers

By Andrée Weller
Special Counsel

Landholders and agricultural businesses have become increasingly concerned in recent times as to their rights when faced with trespassers on their property, particularly protestors.

In the next few weeks, the Federal Government is expected to pass two key amendments to the *Criminal Code Act 1995* (Cth), which will introduce two new offences that aim to protect Australian farmers and agricultural businesses against those inciting trespass and damage to agricultural land.

The offences relate to the use of a carriage service to "transmit, make available, publish or otherwise distribute material" with an intention to incite another person to trespass on agricultural land, or unlawfully damage or destroy property, or commit theft, on agricultural land.

Agricultural land is broadly defined as land used for a primary production business. It includes land used for multiple purposes (including rotating pastures or where part of the land includes a family home or worker's cottage).

Presently, at common law, a person has a defence to trespass if he or she entered onto the land for the preservation or protection of life or property.

It is already an offence for a person to unlawfully:

- enter, or remain, on land used for agricultural or horticultural purposes, grazing and animal husbandry; and
- open and leave open any gate, fence or other barrier that encloses the land used for this purpose.

What do these changes mean?

The amendments are a positive step towards protecting the property rights of farmers, graziers and agricultural businesses.

How? The offence of inciting trespass will carry a maximum of 12 months' imprisonment, while the offence of inciting damage and destruction may lead to up to 5 years' imprisonment.

Exemptions will apply to journalists and for the lawful disclosure of information including by whistleblowers.

New regional visa rules

By Ruth Wang
Associate

Did you know?

The Federal Government abolished 457 visas for skilled foreign workers in 2018 and replaced them with more restrictive visa classes.

From 16 November 2019, the Government is introducing two new temporary visas and one new permanent visa to bring up to 23,000 extra skilled workers to regional Australia.

New types of visas:

1. **Skilled Employer Sponsored Regional (Provisional) Visa (Subclass 494)**

The Subclass 494 visa allows employers to sponsor a skilled worker in 673 eligible occupations in any regional area in Australia (which amounts to 450 more occupations than are available to non-regional employers). Applicants for the Subclass 494 visa will also be given priority with the Department of Home Affairs by processing applications faster. A Subclass 494 visa is valid for up to 5 years. Nominating employers are required to contribute towards the Skilling Australia Fund levy depending upon the size of the business.

2. **The Skilled Work Regional (Provisional) Visa (Subclass 491)**

A Subclass 491 visa is available to applicants sponsored by a State or Territory government agency or sponsored by a family member residing in a regional area.

3. **Permanent Residence (Skilled Regional) Visa (Subclass 191)**

Persons holding a Subclass 494 or 491 temporary visa for at least three years who live, work and study in a regional area can then apply for a Subclass 191 permanent visa from 16 November 2022. The conditions of the Subclass 191 visa have been designed to encourage applicants to stay in regional areas for longer periods.

At Thynne + Macartney, our migration lawyers can assist with all visa and migration issues.

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MEET THE AGRIBUSINESS TEAM

Thynne + Macartney has one of Australia's leading practices in agribusiness. Multiple generations of farmers and graziers have drawn on our experience to help them reach robust business agreements promptly – from sales and purchases of rural properties to plans for the future.

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UPCOMING REGIONAL VISITS FOR 2019

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NOVEMBER	15		7-8	

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