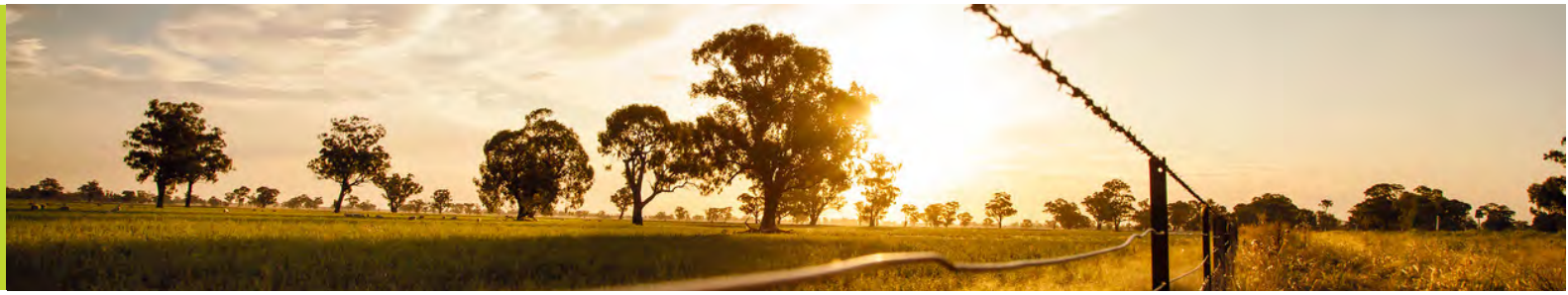
Thynne Macartney

Agribusiness Update

December 2019



The importance of being in the correct rates category

By Peter Kenny
Partner

In October last year, we challenged in the Queensland Land Court the rates category in which the Western Downs Regional Council (**Council**) had assessed our client's rural property. Judgment in our client's favour was handed down by Member WL Cochrane on 20 March this year.

Our client had purchased the property from a coal seam gas (**CSG**) company which, under the sale contract, retained the right to extract CSG from wells on the land under a Conduct and Compensation Agreement (**CCA**). At the time of sale, eight wells were operational. A further 14 wells on the land had been established but were not operational.

Since acquiring the land, our client has used the land solely for grazing and farming purposes. So, you can imagine our client's surprise when he received his first rates notice for the property only to find that the property was categorized as 'Petroleum Other', the effect of which was a rates levy of approximately $32,000 for the half year, some 20 times what it would have been had the property been categorized as 'Rural', which our client contended was the correct categorization.

This level of rates would make the property economically unviable for our client so he lodged an objection to the categorization of the property as 'Petroleum Other'. However, the Council disallowed the objection stating that it had adopted a policy for all properties previously categorized as 'Petroleum Other' (as our client's property had been when owned by the CSG company) to continue to issue rates for that category despite a transfer of the land to a party who uses the land for no purpose other than grazing and farming.

After the Council overruled our client's objection, we lodged an appeal to the Land Court on his behalf asserting that the land had been incorrectly categorized as 'Petroleum Other' and that it should instead by re-categorized as 'Rural'.

The Court found in favour of our client, determining that the proper categorization for this property was 'Rural'. Member Cochrane's judgment included the following points:

- In determining the correct categorization of land, the purpose of the enquiry is limited to a determination of the nature of the land use – categorization is to be undertaken in a common sense and practical way to find the categorization that best describes the activities performed on the land;
- The correct approach for the Land Court was not to start with the existing rates category. Instead, the Court would consider the local government's revenue statement and the characteristics of the land in question, then determine the category most reflective of the land's use;
- The rating structure is meant to impose reasonable burdens upon landowners according to the activities carried out on land owned by them;
- When the property was owned by the CSG company which used the land for CSG extraction, the appropriate categorization was 'Petroleum Other', but once ownership passed to our client then the principal activity ceased to be that of gas extraction and became almost exclusively rural except for the presence of the CSG infrastructure on the land;
- All Councils are under an obligation to consider a landowner's objection and not to immediately dismiss an objection because of what is contained in a policy.

While our client won this case, the Council has appealed the decision and the appeal will be heard by the Land Appeal Court in February next year. We will keep our rural clients informed of the outcome of the appeal.

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Agriculture should not forget to challenge the status quo on mining and gas

By Ari McCamley
Partner

Landholders in resource-rich areas of Queensland have become accustomed to a long-standing but sub-standard statutory regime that allows resource authority holders to access private land without the landholder's consent.

Mining and gas companies like to call it "co-existence". It sounds pleasant.

In the interests of allowing resource authority holders to extract resources, generating royalties for the Queensland Government, the statutory regime for land access creates a window of opportunity for landholders and resource tenement holders to negotiate a mutually acceptable arrangement.

However, it also includes mechanisms that slam that window shut with tough consequences for landholders who hold out for too much, for too long. As a result, the regime unfairly prejudices landholders' bargaining power in negotiations, right from the beginning.

As an industry, agriculture should be advocating for fairer laws.

Landholders' statutory position

In Queensland, resource authority holders are entitled to access private land subject to a statutory requirement to pay compensation for certain "compensatable effects" of their activities. The "compensatable effects" that a landholder can claim include "any cost, damage or loss arising from the carrying out of activities under the resource authority on the land".

Additionally, resource authority holders are obliged to pay a landholder's "negotiation and preparation costs" (defined to mean accounting costs, legal costs, valuation costs and the costs of an agronomist) necessarily and reasonably incurred in entering or seeking to enter into a Conduct and Compensation Agreement (**CCA**).

In summary, the statutory regime is designed to leave a landholder "no worse off" as a result of the resource authority holder's access, not any better off.

Further, the onus is on the landholder to prove that a "compensatable effect" is not merely a risk or contingent liability. That is, a landholder cannot claim an allowance for the possibility of adverse effects (such as groundwater contamination or drawdown, or biosecurity hazards) but instead must negotiate to preserve a right to further compensation if such risks materialise. Nothing in the legislation requires a resource authority holder to provide security (for example, a bank guarantee or bond) to a landholder for such contingent liabilities.

Statutory negotiation process

A resource authority holder is required to attempt to negotiate a CCA with the landholder prior to carrying out "advanced activities". These "advanced activities" are activities that have more than a minor impact on the land or the landholder's business activities.

The statutory process compels the landholder to negotiate. If agreement is not reached within 20 business days, the resource authority holder can instigate an alternative dispute resolution process. If agreement is still not reached within 30 business days after the alternative dispute resolution facilitator is appointed, the resource authority holder can apply to the Land Court for it to decide the amount of compensation and the other conditions of access. At that point, the resource authority holder becomes entitled to access the landholder's land and commence the proposed activities, potentially long before the Land Court makes its decision about compensation and conduct rules.

Further, when parties are at a point where they are no longer "seeking to enter into a CCA", such as when the matter is referred to the Land Court, the landholder ceases to have a right to recover legal, accounting, valuation and other professional costs.

To put this process in context, the resource authority's aim is usually to obtain access as quickly as possible at the lowest possible cost. A landholder will generally want to minimise the potential disturbance (to business operations, health, safety and amenity), maximise the compensation and preserve rights to further compensation if something goes unexpectedly wrong.

Therefore, there is usually only a brief window in which the parties' interests might align. It occurs at the beginning of the process, when a resource authority might be willing to pay a "premium" in exchange for access earlier than can be achieved through the statutory regime or without the relationship damage a heavy hand may cause.

It follows that there comes a point in negotiations when the landholder must choose between accepting what is on offer and pressing for more in the Land Court. However, much of it might vary from case to case or be stretched in any particular case.

It is not remarkable that the landholder must make such a choice. However, it is remarkable that the statutory regime encourages the landholder to settle by removing the commercial incentive for the resource authority holder to improve its offer (by granting it immediate access) and requiring the landholder to pay the landholder's own costs beyond that point.

Possible solutions

Ideally, from a landholder perspective, negotiations with resource companies would be voluntary: either the resource company entices the landholder with a mutually acceptable arrangement, or it stays away.

This might not solve the neighbouring landholders' potential problems, but it is beyond the scope of this article to address possible improvements to separate planning and environmental laws.

Besides, the argument against a landholder's "veto" power is that such a regime could deprive the other people of Queensland the right to benefit (via royalty or more directly) from the extraction of state-owned resources.

Another option might be to give the resource company, **if it cannot reach an agreement with the landholder**, the right to compulsorily acquire the landholder's entire property at market value plus a statutory premium. Potentially, that right could be subject to an appropriate authority deciding that the resource project was not likely to have a significant impact on the broader area's agricultural potential – for example, in an extension of principles contemplated by the *Regional Planning Interests Act*).

At the very least, the following two changes to the current statutory regime are necessary to bring more balance to the respective bargaining positions of landholders and resource companies:

1. If a land access matter is referred to the Land Court, the resource authority holder should only be entitled to access the property **after** the Land Court has made its decision (on compensation and conduct rules), not before as is currently the case; and
2. The resource authority holder should be obliged to pay the landholder's legal, accounting, valuation and other professional costs for the **entirety** of the process, unless and until the Land Court determines that such costs are not being incurred in good faith.

In the meantime, Thynne + Macartney will continue to assist farmers and graziers to secure the best possible outcome in their negotiations with resource companies.

Farmers a casualty of tax laws targeting land banking

By Hannah Barbour
Associate

With the introduction of the *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No.1) Act 2019* (**Act**), individuals, self-managed superannuation funds, discretionary trusts and private unit trusts may be denied from claiming deductions for expenses associated with holding certain vacant land.

Under the Act, expenses incurred on or after 1 July 2019 (such as interest, rates and land tax) associated with holding vacant land will not be deductible unless the vacant land is held for the purpose of carrying on a business by the taxpayer or certain related entities of the taxpayer including the taxpayer's spouse, children (under 18 years), affiliates or connected entities.

The amendments do not apply to land on which there is a substantial and permanent structure in use or available for use.

What does this mean for you?

The concern is that much farmland around Australia could be said to be without "a substantial and permanent structure", unless the Tax Office accepts that infrastructure such as fences and water improvements fall into that category.

If farmland is considered "vacant land" and someone other than the landowner is conducting a primary production business on the land, it appears that the drafting of the Act could have some unintended consequences.

For example, if adult children of the landowner have taken over the carrying on the primary production business on the land, their parents may be denied from claiming deductions for expenses associated with the land.

Further, on a strict interpretation of the Act, deductions may also be denied (in circumstances where they may have otherwise been allowed) due to the existence of a residence on the otherwise vacant farmland.

It is expected that the Tax Office will release some guidance on how the Act is to be interpreted to assist farmers and graziers and their advisers in applying this new legislation.

Thynne + Macartney can assist farmers and graziers to review arrangements between family members and entities to ensure they are not unintentionally affected by these changes.

Assistance for primary producers in North West

By Queensland Rural and Industry Development Authority

The Queensland Rural and Industry Development Authority (**QRIDA**) reports that nine months since flooding rain inundated North and Far North Queensland, debris has been cleaned up, fences replaced and infrastructure fixed, but the underlying effects of the Monsoon Trough are still rippling through many primary production enterprises.

QRIDA Disaster Recovery Manager Ross Henry said Government Disaster Recovery Funding Arrangements (**DRFA**) grants and loans are available to help primary producers recover after the disaster and long-term recovery.

"The Special Disaster Assistance Recovery Grants are there to help, up to $75,000 is available for primary producers while concessional Disaster Assistance Loans are available up to $250,000 and Exceptional Disaster Assistance Loans of up to $1 million," he said.

"Already, close to 2,000 applications for assistance have been approved for primary producers."

"DRFA loans and grants can be used for a range of purposes including repairing or replacing damaged equipment, repairing or replacing farm buildings, purchasing livestock to replace those lost in the disaster event and meeting carry-on requirements.

"Under the $400,000 co-contribution North Queensland Restocking, Replanting and On-farm Infrastructure Grant administered by QRIDA on behalf of the Australian Government, grants are available to help with long-term recovery including restocking lost livestock, replanting lost or damaged crops or permanent plantings and restoring or replacing lost or damaged on-farm infrastructure."

QRIDA administers financial assistance to disaster affected primary producers, businesses and non-profit organisations under the joint Commonwealth / Queensland Government funded Disaster Recovery Funding Arrangements 2018.

For more information visit www.qrida.qld.gov.au or Freecall **1800 623 946**.

Paper certificates of title phased out in Queensland

By Emma Kime
Lawyer

Paper certificates of title (also known as "title deeds") were once issued for all properties in Queensland.

However, in 1994, the Queensland Titles Registry adopted an electronic titles register and paper certificates of title were no longer issued automatically. They could still be obtained for a fee.

Since 1 October 2019, new laws have changed the way paper certificates of title are dealt with by the Queensland Titles Registry. Paper certificates of title no longer have legal effect and those already in existence are simply documents of historical and sentimental value. The Registry does not require them to be presented or lodged when dealing with land in Queensland. New paper certificates can no longer be obtained.

Is your handgun licence under threat?

By Mark Winn
Partner

Many farmers and graziers have long used pistols for a range of purposes, including for safety and to euthanise animals humanely. A long arm rifle is not always a suitable or safe alternative.

However, it has become more difficult in Queensland to acquire or renew a license for a pistol (category H).

Thynne + Macartney's lawyers have first-hand knowledge and experience making arguments about the safety reasons for continued use of handguns by graziers in certain circumstances, resulting in the renewal of several of our clients' licences.

Top tips for managing water take

By Alex Ramsey
Partner

The prosecution of a number of irrigators in New South Wales has highlighted the need for accurate metering and up-to-date information when taking water from rivers, bores or harvesting overland flow.

Based on these decisions of the Supreme Court and Planning & Environment Court of New South Wales in 2019, we offer the following "top tips" for managing the take and use of water in Queensland under the *Water Act 2000* (Qld) (**Act**).

#1
Know your limit

It is important to recognise the maximum volume of water which can be taken under a water entitlement.

Water licences issued for irrigation or lot feeding and most water allocations will feature "maximum volume limits" which dictate the total amount of water which can be taken during a water year.

Additionally, water allocations which access water from rivers or channels will usually include flow requirements which only permit the take of water if the water source is at a particular height or flow rate.

Before drawing water from any such watercourse, licence or allocation holders should check the official flow rates for the watercourse on the website of the Department of Natural Resources, Mines and Energy, SunWater or the Distribution Operations Licence holder to ensure that water can be taken from the pump site at that date and record the time at which the information was accessed.

In doing so, the water user will be able to defend itself against any allegation that it drew water at an unauthorised time or from an unauthorised location.

#2
Measure the meter

All water allocations and almost all water licences issued for irrigation or lot feeding will require water to be drawn through an approved and functioning meter. The allocation or licence holder bears responsibility for maintaining and ensuring that the meter is calibrated and working and if it does not meet these requirements, any water drawn under the allocation or licence will be classed as an "unauthorised activity" under the Act.

While the minimum requirements for newly installed meters are expected to change in 2020, it is likely that *Australian Standard 4747 (Meters for non-urban water supply)* will continue to form the basis for metering standards on rural land.

Meters and valves should be regularly checked for corrosion, leakage and accuracy before every pumping event and any concerns raised with a water engineer before pumping commences.

#3
Legalise your levies

The building or restoration of any levy embankment or structure that prevents, reduces or diverts overland flow may require approval or registration under the *Planning Act 2016* (Qld).

For the most part, levy banks which do not cause any effect to neighbours by way of flow path, flow height or flood area can be constructed lawfully under the published *Self Assessable Code for Construction and Modification of Levies* and only need to be registered with the local government within two weeks of completion.

However, levy banks which trigger off-property impacts or are constructed in areas which are deemed of risk to neighbours will require a development approval from the local government.

Prosecutions have taken place in New South Wales against landowners who have failed to comply with State or local government planning codes when rebuilding levy banks to heights in excess of their original approved limits.

Landholders should take care to check the heights and locations of any new or damaged levy banks before embarking on earthworks to ensure that they are authorised or approved.

Thynne + Macartney's Agribusiness group has experience assisting landholders who face charges for environmental or planning infringements.

In memory of **Bill Loughnan**

Bill Loughnan, a pre-eminent Queensland agribusiness lawyer for more than 40 years, was a champion of rural Queenslanders. Bill's passing on 7 October 2019 is a huge loss to his clients, colleagues and the many people he generously helped and mentored throughout his career.

After studying law at the University of Queensland, Bill joined Cannan & Petersen and quickly became a key member of their agricultural team. It was there he met Peter Kenny and began a successful business partnership and friendship based on the principles of the bush.

"When you've been in business with someone for 40 years and have remained friends for all that time, I think that says something," Peter said.

Bill became a partner in 1979 at the age of 27. In 2002, he and Peter moved to Thynne + Macartney with their entire team where they felt they could better serve their rural client base.

During his career, Bill advised on some of the largest cattle property deals in Australian history.

"Bill looked after the big corporates and the big families, as well as working with a great many mum and dad operations, which were very close to his heart," says Peter. *"He will be remembered as the mover and shaker on the big issues, just as he will for training many of the up-and-coming young rural lawyers."*

For most of his legal career, Bill, his wife Stephanie and their family ran sheep and cattle on their properties "Arlington" and "Wongamere".

Bill's legacy in the agricultural sector is immense. For more than 20 years he served as the principal lawyer of the United Graziers Association (UGA) and was the lead lawyer in the amalgamation of the Cattleman's Union, the Grain Growers Association and the UGA which formed AgForce, giving the Queensland agricultural sector the ability to speak with a united voice. He was instrumental in important policy and legislative developments in the history of Queensland agriculture.

Bill proposed and supported the firm's visited office program to meet with clients face to face in their home towns of Longreach, Charleville and Roma, and later expanded the program to include Emerald and Rockhampton. His client base stretched the breadth of Queensland and spanned three and four generations of some families and stands testament to Bill's dedication to the success of the practice.

"Bill was adamant that we make these scheduled visits, rain, hail or shine. To this day, we get to the airport peculiarly early as none of us wants to be the first to miss a flight on Bill's enduring watch," said Ari McCamley.

Bill helped numerous landholders navigate the negotiation of compensation agreements with mining and gas companies and the negotiation of Indigenous Land Use Agreements with native title claimants.

Bill was involved in the establishment of The Wetlands and Grasslands Foundation in 2000 and was one of its inaugural honorary directors. He was instrumental in publishing "A Legal Guide for Queensland Primary Producers" which is currently in its 4th edition. His generosity, both personally and as a key member of the leadership team at Thynne + Macartney, extended to many philanthropic ventures including the Royal Flying Doctor Service and the Gallipoli Medical Research Fund.

Bill also gave his time generously to those who sought his guidance or advice. His contribution to the legal sector included his role as Senior Counsellor for the Queensland Law Society and as a mentor to the many lawyers who worked with Bill during his career, including Ari and Alex who now lead the Agribusiness practice at Thynne + Macartney with Peter.

In a December 2016 interview, Bill reflected on his career, articulating his deep love for the bush and its people:

"It's the people that make it special. There are any number of families in the bush who were clients of our group before I became a lawyer and who, all going to plan, will continue to be clients when I am long since retired. People in the bush are the 'salt of the earth' – great clients to have. They become personal friends in many cases. Our group has numerous intergenerational clients. One family comes to mind where I've acted for four generations. The sense of personal satisfaction from such relationships surpasses any monetary rewards and makes this part of Australia, for me, the best place to live and work."

– Bill Loughnan

Bill is sadly missed. Our thoughts are with Stephanie, Olivia, Matthew, Andrew and their families, as well as Bill's friends in the bush.

As we head into next year and the next decade, we will do our best to continue the outstanding legacy of Bill Loughnan, our colleague and friend.

Thynne Macartney

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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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