



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: RuralIssuesREel:879804

11 July 2014

Mr Eamonn Moran QC PSM
Chair, Independent Expert Panel
Review of the Water Act 2007
GPO Box 787
CANBERRA ACT 2601

By email: wateractreview@environment.gov.au

Dear Chair,

Review of the Water Act 2007 (Cth)

I am writing on behalf of the Rural Issues Committee of the Law Society of NSW ("Committee"). The Rural Issues Committee represents the Law Society on rural issues, as they relate to the legal needs of people in rural and remote NSW. The Committee includes experts drawn from the ranks of the Law Society's membership.

Thank you for the opportunity to provide a submission to the Independent Expert Panel conducting this review, and thank you for the extension of the submission deadline.

The Committee writes in relation to (1)(a)(iv) of the terms of reference of the review, submitting that for water trading to be effective and efficient, minimum regulatory standards should be in place for intermediaries, particularly in relation to the holding of deposits. The Committee has observed that in the past water trading was principally conducted by real estate agents and solicitors in connection with the sale of land. In recent years brokers have entered the market and, using their own form of contract, act as both agent and conveyancer in the sale of water.

The sale of water can be complex and may cover a number of State jurisdictions. In relation to river water, parties to a transaction may be located in New South Wales, Victoria and South Australia.

The Committee is concerned about the role of water market brokers and water exchanges in the trading of water rights. In particular, the Committee is concerned about the lack of industry-specific legislation to regulate the conduct of water market brokers. The Committee submits that the trading of permanent water rights is "legal work" that should be based on a legally drafted contract between two parties and subject to the legal requirements for the establishment and transfer of the title of a particular interest in water. The role of water brokers should be limited to the "broker" of the trade between the potential vendor and purchaser.

The Committee submits also that the government should introduce and administer a licensing scheme for water brokers, as well as a set of minimum standards of professional conduct.

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The Committee's comments are set out in more detail below.

1. Nature of services: conflict of interest and “legal work”

Services offered by water brokers include the facilitation of water trading and the investigation of potential water rights trades. Water brokers will also prepare documents on behalf of a vendor or purchaser to facilitate water trading. Water brokers are described as “intermediaries” in the water trade transaction. The Committee is concerned about the potential risks to vendors and purchasers where a water broker is not acting for either party but only facilitating the trade on behalf of both parties.

The Committee members have observed that the practice of water brokers is to locate a vendor and contract with that vendor for the sale of a parcel of water. The broker will then locate a purchaser and contract separately with the purchaser to purchase the water. Once this has happened, the broker will, as an “intermediary,” facilitate the conveyance of the water pursuant to its separate contracts with the vendor and purchaser. The broker charges each party a commission and a fee for the conveyance. In this transaction the broker is not acting for either party and is facilitating the trade on behalf of both parties. The Committee is concerned about privity of contract between the vendor and purchaser if problems arise with the transaction.

The Committee is of the view that the use of brokers in this way in the trading of permanent water rights and leases is inappropriate. The Committee's concerns are based on the complexity of the trading of water rights, noting that there are presently many different types of interests in water. Different trading rules and policies apply to each of these entities. Examples of the complexity and diversity of interests in water include:

- Irrigation Corporations (for example Murrumbidgee Irrigation, Murray Irrigation and Coleambaly Irrigation);
- Surface water and aquifer water in Water Access License (“WAL”) Titles administered by the NSW Office of Water, State Water and Land and Property Information;
- Large and small WAL holding syndicates;
- Trusts administered under the *Water Management Act 2000* (NSW);
- Victorian Water Act Corporations (such as Goulburn Murray Water and Lower Murray Water)

The Committee is of the view that the trading of permanent water rights and leases, affecting the annual allocation of water under these entitlements, involves complex transactions that constitute “legal work”. As the nature of the transaction is similar to the conveyance of land, properly documented specific contractual arrangements between vendor and purchaser should be required. The Committee is also of the view that the principle of conflict of interest also apply in relation to brokers in the same way as they apply to legal practitioners who practice in the trading of water rights.

2. Handling clients’ monies: trust accounts and transfer concerns

During a water trade, a broker will collect and place into a “trust account” the purchase money for a parcel of water. A water rights trade can take several months

to complete and during this period, water brokers will continue to hold the funds. Water brokers often hold large amounts of money and the interest earned on accounts may be paid to the broker.

The Committee is concerned about the risks to clients' funds held by water brokers. Water brokers are not subject to the same administrative standards in relation to trust accounts required of legal professionals and real estate agents under the *Legal Profession Act 2004* (NSW) and the *Property, Stock and Business Agents Act 2002* (NSW) respectively. The Committee is concerned about the likelihood of theft, fraud or misuse of clients' funds which are held in an account that is not subject to any auditing, reporting or transparent accounting standards. The Committee is also concerned about the potential loss of a purchaser's funds if a broker became insolvent or bankrupt.

Where a water broker facilitates a transaction, the vendor will receive the money after the relevant Water Authority has registered the change of ownership. This is consistent with the broker's role as an "intermediary". Where a legal practitioner is involved in a transaction, the purchase monies are paid to the vendor at the point the documents transferring title in the water to the vendor are exchanged, in the same manner as a conveyance of real property. There are obvious disadvantages to the practice of water brokers in this regard.

3. Committee's submissions

It is the Committee's view that the trading of permanent water rights is "legal work" that should be based on a legally drafted contract between two parties and subject to the legal requirements for the establishment and transfer of the title of a particular interest in water. To avoid conflicts of interest, the role of water brokers should be limited to the "broker" of the trade between the potential vendor and purchaser.

The Committee also supports the introduction of a government administered licensing scheme for water brokers and the introduction of minimum standards of professional conduct.

If you have any questions in relation to this letter, please contact Emma Liddle, Policy Lawyer for the Rural Issues Committee on (02) 9926 0212 or by email to emma.liddle@lawsociety.com.au.

Yours sincerely,



Ros Everett
President