



Submission to the Victorian Water Law review

Submission provided by the Victorian Farmers Federation

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## Foreword

The Victorian Farmers Federation is Australia's largest state farmer organisation, and the only recognised, consistent voice on issues affecting rural Victoria.

The VFF consists of an elected Board of Directors, a member representative Policy Council to set policy and eight commodity groups representing dairy, grains, livestock, horticulture, chicken meat, pigs, flowers and egg industries.

Farmers are elected by their peers to direct each of the commodity groups and are supported by Melbourne-based staff.

Each VFF member is represented locally by one of the 230 VFF branches across the state and through their commodity representatives at local, district, state and national levels. The VFF also represents farmers' views at many industry and government forums.



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## List of Recommendations

**Recommendation 1:** Other areas of the State Government look at the definitions and approach used in this Bill for determined 'informed consent' for other purposes to enter land, such as mining and CSG exploration.

**Recommendation 2:** There is guidance provided through the regulations on what 'serious or irreversible environmental damage' may be and make it clear that the precautionary principle is not to be used as a preventative measure for actions that will not deliver 'serious or irreversible environmental damage'.

**Recommendation 3:** There should be a low cost option for individuals to challenge the use of the precautionary principle to test if it is consistent with the guidance developed from the previous recommendation.

**Recommendation 4:** Stormwater should be a right of the water authorities, not local Government.

**Recommendation 5:** The VFF requests that Victoria ends the uncertainty associated with risk by adopting the risk allocation model outlined in the 2004 National Water Initiative.

**Recommendation 6:** Section 142 (2b) is amended to require 12 months' notice for a variation.

**Recommendation 7:** The re-draft of the Act should take this opportunity to expand the possible uses of rainfall to drive economic development in regional areas.

**Recommendation 8:** The Minister uses the power provided in section 414 to ensure farmers are not worse off under a reconfiguration plan.

**Recommendation 9:** Provide clarity on what 'reasonable use' for stock and domestic purposes will be and how it is determined.

**Recommendation 10:** The State Government clearly articulate the process for development and consultation of WRMOs.

**Recommendation 11:** The WRMO advisory committees should be required (within Water Law) to have a majority of irrigators.

**Recommendation 12:** Enshrine the ability for advance allocations from unregulated systems in Sections 230 and 231.

## Introduction

The Victorian Farmers Federation (VFF) welcomes the opportunity to provide feedback into the Victorian Water Law Review.

The VFF, representing food and fibre producers in Victoria, are extremely interested in water Law and how any changes may impact the ability to produce and the cost of production. The rights and restrictions to water use are an integral factor to the production ability of agricultural production. It is through this lens that many of our comments will originate.

Also, other areas of water Law the VFF are interested in are liability associated with water flow damage, the conditions in which works can be conducted on private land and .....

The VFF will provide comments on changes in the water law that we are supportive and areas of the draft bill that we have concerns.

## Areas of support within the Draft Bill

### A needed Re-draft

The VFF is supportive of the redraft of water law. This is an overdue initiative as the current Act has swelled to over 900 pages and has been the subject of numerous amendments resulting in an Act that is not clear and lacks natural flow. The proposed Bill has taken large steps to improve the clarity of Water Law in Victoria

### Liability provisions

The VFF welcomes the clarity of the liability provisions within the proposed Bill. The Bill makes it clear that damage caused by the interferences of flow, unreasonable flow, contents of flow, polluted flow will be subject to liability provisions.

The Bill continues to say that the damage must be a result of 'intentional or negligent conduct'; this is appropriate. The outline of the liability section is below:

- (1) This section is a simplified outline of this Chapter.*
- (2) This Chapter imposes liability for injury, damage or economic loss arising out of—
  - (a) a flow of water; or*
  - (b) the taking, using or polluting of water; or*
  - (c) the construction, maintenance or operation of any unauthorised works.**
- (3) Exclusive jurisdiction is conferred on the Victorian Civil and Administrative Tribunal in relation to causes of action arising under this Chapter.*
- (4) Authorities are liable to compensate persons for certain losses and expenses incurred as a consequence of the carrying out of work.*

While the VFF is supportive of the clarity on liability from water damage, we are concerned with the implications for water holders, particularly GM-W in acting as an agent for the Commonwealth Environmental Water Holder (CWEH). There may be the case the CWEH will issue a directive to release a certain amount of water for a defined environmental outcome. If that release is a contributor to downstream damage GM-W will be liable for the damage.

To manage this risk there will need to be an understanding developed between CWEH and GM-W about the apportionment and analysis of risk associated with environmental flows. ***The VFF does not want to see irrigators placed in a position of liability as a result of CWEH directives to GM-W.***

The liability issues with regard to environmental flows should mean that there are greater precautions taken when deciding on environmental flow decisions. This is a positive step, particularly for landholders along river systems that have a risk of flooding or inundation from environmental flows. The creation of the liability provisions should ensure greater protection for these landholders

## Forestry License requirements

The Bill requires new forestry plantations (larger than the 'allowable plantation area'<sup>1</sup>) in declared areas to obtain a take and use license. Considering the potential impact of groundwater use for some plantations and their well understood water requirements over their life cycle, ***this is a positive addition to water law and welcomed by the VFF.***

Below are the relevant sections of the proposed water law relating to forestry plantations.

### ***Definitions:***

***forest plantation*** means an area of land on which perennial woody plants are planted—  
(a) primarily for commercial purposes (other than the production of food); or  
(b) for another purpose that is prescribed and at a density or with species of plant or a combination of both that is prescribed;

***declared forest plantation area*** means an area specified under a water resource management order as a declared forest plantation area;

### ***41 What a take and use licence authorises***

(1) A take and use licence authorises—

...

(d) the interception of an amount of surface water or groundwater by a specified forest plantation of which the licence holder is the forest plantation manager.

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<sup>1</sup> Allowable Plantation area is define in 61 (4) essentially as: 'the occupier of the land on which the forest plantation is planted, the greater of 20 hectares of land or 10% of the total area of land occupied by that manager that is within the declared forest plantation area'

## Powers of Entry

The Water Bill 2014 makes an important move to clarify who and when people can enter land and defines what is required to have achieved 'informed consent' to enter property. A positive move to ensure that there is better transparency for entering property. This could be a template for use in other areas, such as mineral and CSG exploration.

The relevant sections are below:

### **690 Entry to perform function or duty or exercise power—residential land**

*(1) In the circumstances described in subsection (2), but subject to subsection (3), an officer may enter residential land to perform a function or duty or exercise a power on the land (including to carry out work) on behalf of an Authority or the Minister, other than the construction or installation of works (including a State observation bore) on the land.*

*(2) The circumstances are—*

- (a) the occupier gives informed consent to the entry; or*
- (b) the Authority serves 7 days' written notice of the entry and of its purpose on the occupier; or*
- (c) the entry is for the purpose of passing through or over the land in order to perform a function referred to in section 427(a) on non-residential land; or*
- (d) the officer reasonably believes that there is an emergency that makes it necessary to enter without delay.*

*(3) An officer must not enter or remain on residential land between the hours of 6.00 p.m. and 7.00 a.m. unless—*

- (a) the occupier consents to the officer entering or remaining on the land between those hours; or*
- (b) the officer reasonably believes that there is an emergency that makes it necessary to enter or remain on the land between those hours.*

### **Water Bill 2014 also defines Informed Consent as:**

#### **683 Informed consent**

*(1) An occupier is only to be taken to have given informed consent for the purposes of section 690(2)(a), 691(2)(a) or 694(2)(b)(i) if—*

- (a) before the consent is given, the officer has followed the procedure set out in subsection (2); and*
- (b) the occupier and the officer have signed an acknowledgment that complies with subsection (3).*

*(2) The officer must—*

- (a) produce his or her identification card for inspection; and*
- (b) inform the occupier—
  - (i) of the purpose of the entry; and*
  - (ii) of the things proposed to be done on the land or in the building during the entry; and**

- (iii) that the occupier may refuse to give consent to the entry and to the things proposed to be done on the land or in the building during the entry; and*
  - (iv) that the occupier may at any time withdraw a consent of a kind referred to in subparagraph (iii) that has been previously given, including while the officer is on the land or in the building; and*
  - (v) that any sample taken and kept during the entry may be used in evidence in any proceeding; and*
  - (c) if the occupier indicates that he or she intends to consent, ask the occupier to sign an acknowledgment that complies with subsection (3).*
- (3) The acknowledgment must state—*
- (a) that the occupier has been informed of the matters referred to in subsection (2)(b); and*
  - (b) that the occupier has consented to the entry and to the proposed things being done on the land or in the building during the entry; and*
  - (c) the date and time that the occupier consented.*

**Recommendation 1:** Other Areas of the State Government look at the definitions and approach used in this Bill for determined 'informed consent' for other purposes to enter land, such as mining and CSG exploration.

## A Clearer Purpose for the Act

The purpose of the Act has been rewritten. The shorter purpose is more succinct and better reflects the Bill. ***The VFF supports the changes.*** The new purpose of the Bill is below.

### **The purpose of the Act**

#### **1 Purposes**

*The main purposes of this Act are—*

- (a) to restate, with amendments, the law relating to water in Victoria; and*
- (b) to reform the regulatory framework for water management and use across Victoria; and*
- (c) to further improve how water corporations are governed; and*
- (d) to provide enhanced compliance and enforcement provisions.*

## Areas of Concern within the Draft Bill

### The Precautionary principle

Section 6 of the proposed Bill stipulates that the precautionary principle must be used, particularly in regard to the decision to 'postpone measures to prevent environmental degradation'. The VFF has concerns with the potential of inappropriate use of the precautionary principle.

The employment of the precautionary principle can potentially be used as a scapegoat for authorities to reject water infrastructure work or trade. The precautionary principle outlined in the Bill (below) will impose substantial costs on any water users that wish to change the amount of water or the way water is used on their farm.

The VFF have received a number of examples where the water authorities have referred to the precautionary principle to avoid additional work or responsibility for a decision. In one instance a farmer wished to trade water temporarily in a closed aquifer to increase his water use and production. This was rejected until a hydro-geo study was conducted at a \$20,000 expense. There is an additional example of a hydro-geo study required for a bore 450m away from a waterway to ensure the water is not surface water. The imposition of additional, expensive studies on producers is an implicit preventative measure to expansion or better use of water resources.

**Recommendation 2:** There is guidance provided through the regulations on what 'serious or irreversible environmental damage' may be and make it clear that the precautionary principle is not to be used as a preventative measure for actions that will not deliver 'serious or irreversible environmental damage'.

**Recommendation 3:** There should be a low cost recourse for individuals to challenge the use of the precautionary principle to test if it is consistent with the guidance developed from the previous recommendation

### **6 The precautionary principle**

*(1) The Minister or an Authority in making a decision under this Act must have regard to the principle set out in this section.*

*(2) If there are threats of serious or irreversible environmental damage, lack of full scientific certainty is not to be used as a reason for postponing measures to prevent environmental degradation.*

*(3) Decision making must be guided by—*

*(a) a careful evaluation to avoid serious or irreversible environmental damage, wherever practicable; and*

*(b) an assessment of the risk-weighted consequences of various options.*

## **Rights to Stormwater for Local Government**

The previous Act was silent regarding rights to Stormwater, where the new Act states the following:

### **35 Water Corporation and Council rights to stormwater**

*(1) A water corporation has the right to take and use water that is in its stormwater works.*

*(2) A Council has the right to take and use water that is in its stormwater works.*

- (3) A right conferred by this section is subject to—
- (a) any applicable water resource management order; or
  - (b) any licence issued by the Minister to any person to take and use water from the stormwater works of a water corporation or a Council.
- (4) Nothing in this section confers a right with respect to water in a waterway, including works to deviate (temporarily or permanently) a waterway.

Conferring the right to stormwater to Local Government is new to Water Law and will create substantial uncertainty and confusion with how the water can be used, sold, or otherwise provided to a third party. Some councils may be prepared for the responsibility of the right of the stormwater, but many may not be and will add another player in the water market. This may also add more costs to the Local government through expense consultancies and staff management that is an additional burden on ratepayers.

Recognising that local council does not have the experience in the water market, they should not have the rights to the rainfall that ends up in their drainage system. The local Water Authorities are better placed as they have the expertise in this area.

**Recommendation 4:** Stormwater should be a right of the water authorities, not local Government

## Risk Allocation for Environmental Water

There is still an unresolved issue with regard to future risk associated with delivering environmental water that originated during the Basin Plan discussions. Many other States have rectified this, but this has not happened in Victoria.

There is risk associated with delivering water outcomes into the future. The National Water Initiative was signed off in 2004 outlined and apportioned these risks (below). The VFF requests that Victoria ends the uncertainty associated with risk by adopting the risk allocation model outlined in the 2004 National Water Initiative.

### National Water Initiative

48. *Water access entitlement holders are to bear the risks of any reduction or less reliable water allocation, under their water access entitlements, arising from reductions to the consumptive pool as a result of: (i) seasonal or long-term changes in climate; and (ii) periodic natural events such as bushfires and drought.*
49. *The risks of any reduction or less reliable water allocation under a water access entitlement, arising as a result of bona fide improvements in the knowledge of water systems' capacity to sustain particular extraction levels are to be borne by users up to 2014. Risks arising under comprehensive water plans commencing or renewed after 2014 are to be shared over each ten year period in the following way:*
- i) water access entitlement holders to bear the first 3% reduction in water allocation under a water access entitlement;*

*ii) State/Territory governments and the Commonwealth Government to share one-third and two-thirds respectively reductions in water allocation under water access entitlements of between 3% and 6%; and*

*iii) State/Territory and Commonwealth governments to equally share reductions in water allocation under water access entitlements greater than 6%.*

*50. Governments are to bear the risks of any reduction or less reliable water allocation that is not previously provided for, arising from changes in government policy (for example, new environmental objectives). In such cases, governments may recover this water in accordance with the principles for assessing the most efficient and cost effective measures for water recovery (paragraph 79 (ii) (a) refers).*

*51. Alternatively, the Parties agree that where affected parties, including water access entitlement holders, environmental stakeholders and the relevant government agree, on a voluntary basis, to a different risk sharing formula to that proposed in paragraphs 48 - 50 above, that this will be an acceptable approach.*

**Recommendation 5:** The VFF requests that Victoria ends the uncertainty associated with risk by adopting the risk allocation model outlined in the 2004 National Water Initiative.

## Variations to Take and Use Licenses

Section 142 of the Bill gives the Minister the power to vary Take and Use licenses according to a Water Resource Management order with 3 months' notice to the license holder (Section below).

### ***Subdivision 3 – Variation on Minister's initiative***

#### *142 Variation on Minister's initiative*

*(1) The Minister on his or her initiative, may vary a take and use license to the extent necessary to give effect to a matter specified in an applicable water resource Management order.*

*(2) The Minister must –*

*(a) give written notice of the variation to the license holder at least 3 months before the variation take effect; and*

*(b) specify in the notice the reason for the variation.*

The VFF has concerns with the level of power that is given to the Minister to vary a Take and Use license. This cause allows the Minister to alter or revoke a Take and Use license with 3 months' notice based on a Water Resource Management Order.

This is a concern from the perspective of take and use license holders as it will create uncertainty for the license holder. Often, to take full advantage of take and use licenses, substantial investment is required on-farm. The ability of the Minister to alter or revoke a take and use license on 3 months' notice will create additional uncertainty in reliability of water. This will have a direct impact of investment decisions and may put future production increase at risk. The sensible way to manage regulatory risk for the farmer will be to curb investment therefore reducing potential losses.

While we can recognise that there may be a need in the future, through the review processes to alter take and use licenses there should be more certainty provided to license holders. We suggest the variation timeframe to be extended to 12 months.

**Recommendation 6:** Section 142 (2b) is amended to require 12 months' notice for a variation.

## Minister's Powers to Terminate Irrigators Access

At the VFF Annual Conference the membership supported the following resolution:

*“That the VFF call on the State Government to amend the Victorian Water Legislation to remove the Minister’s powers to terminate an irrigator’s access to the irrigation system, directly or via approved reconfiguration plans (section 7a of the Water Act), ensuring farmers are not made worse off as a result of the Connections Program.*

This reflects the concern many irrigators are feeling that the result of the Connections program will be the remove of irrigation services to farmers that wish to continue to irrigated agriculture. While the section of the Act does not state that explicitly that the Minister has the Power to disconnect farmers from irrigation, it does state that the Minister has the ability to 'issue a direction that applies to reconfiguration plans'.<sup>2</sup>

**Recommendation 7:** The Minister uses the power provided in section 414 to ensure farmers are not worse off under a reconfiguration plan.

## Private Dams on Farmland

The VFF recently adopted a policy calling for all farmers to be allowed to collect up to 10% of rainfall on their property. The policy entails that this right to water would not be transferable, allow for storage on farm dams and have similar winter fill provisions as other take and use licenses.

The benefit of being able to collect rainfall is associated with the efficiency of using water at its source

The proposed Bill does not amend the rights of farmers to hold rainfall for uses other than Stock and Domestic. The benefit of being able to collect rainfall is associated with the efficiency of using water at its source. There are some areas of the State that have a large amount of rainfall throughout the year and could deliver considerable economic activity if allowed to use through on-farm storage.

**Recommendation 8:** The re-draft of the Act should take this opportunity to expand the possible uses of rainfall to drive economic development in regional areas.

## The definition of 'Reasonable use' under domestic and Stock use

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<sup>2</sup> Section 414 (1)

The Water Bill has introduced the term 'reasonable use' with regard to stock and domestic use. While this in itself is not negative, the certainty around 'reasonable use' may be. It is unclear what reasonable use will be considered under the new law and this is a source of concern.

**domestic and stock use**, in relation to water—

(a) means reasonable use for—

- (i) household purposes; or
- (ii) watering of animals kept as pets; or
- (iii) watering of livestock; or
- (iv) watering an area, not exceeding 1.2 hectares, around a house;

(b) does not include use for—

- (i) dairies, piggeries, feed lots, poultry, aquaculture or any other intensive or commercial use; or
- (ii) watering commercial plantings; or
- (iii) a purpose covered by paragraph (a)(iii) and (iv) of an amount of water above that prescribed for a use for that purpose;

Section (b)(iii) of the definition refers to 'an amount of water above that prescribed for a use for that purpose'. This will mean that there are regulations developed to define the 'water amount'. While the VFF is supportive of ensuring that D&S water is not abused, it will be vital that the development of regulations associated with D&S water amounts include the Victorian Farmers Federation.

**Recommendation 9:** Provide clarity on what 'reasonable use' for stock and domestic purposes will be and how it is determined.

## The Uncertainty with Water Resource management Orders

The Exposure Draft proposes that water resource management orders (WRMOs) will replace a variety of instruments. The current mix of instruments that may affect entitlement holders or prospective entitlement holders has been described as complex, inconsistent and containing unnecessary processes.

The WRMO is meant to consolidate existing water management arrangements for a given area, which may be a river basin or large water supply system. WRMOs will:

- contain water system management rules currently included in bulk entitlements, such as regulated system operating rules
- include licence restrictions in particular areas, and other arrangements currently in management plans
- include trading rules, carryover rules and rules for making seasonal determinations, currently set out in bulk entitlements, management plans, Ministerial rules and Ministerial policies
- include the capping arrangements which determine the maximum volume of water that can be taken under all entitlements within a particular area or water system
- clarify the water that is available to the environment, and formally recognise water that contributes to the preservation of environmental health and water ecosystems
- set out water resource management roles and responsibilities.

The expected outcomes of this approach are:

- water management arrangements will be easier to communicate and it will be easier to foster a better understanding of them
- easier to integrate management of surface water and groundwater, and to implement the new groundwater management framework
- a more transparent approach that, where possible, reduces the regulatory burden
- better alignment with requirements of the Commonwealth Water Act 2007 and Murray-Darling Basin Plan.

Also, the Bill also states that the Minister must have regard to a number of factors when making a water resource management order, including the significant environmental, economic, social and cultural impacts. The VFF is supportive of the explicit need to assess the economic factors as that was an area that was missed during a large portion of the Murray Darling Basin Plan. It is imperative that this remains.

Although the explanatory notes state the process of making the WRMOs will not affect the volume or tenure of entitlements it does create uncertainty for water users. There is a 2 year process for the development of the WRMOs and many aspects of the proposed water law defer to the WRMOs.

It is clear that the WRMOs will be where the 'rubber will hit the road' for water users. The proposed water law has been described as enabling legislation with many references to the WRMOs. The use of WRMOs may facilitate effective regulation of water use it creates uncertainty until the WRMOs are complete.

There is no clarity on the consultation process for the development of the WRMOs. It will be sensible to provide that clarity to water users to ensure that proper consultation is provided and clarity for the development of the WRMOs is reached.

**Recommendation 10:** The State Government clearly articulate the process for development and consultation of WRMOs

## Committee Representation

Section 224 stipulates the requirements for an advisory Committee for any Water resource Management Order (WRMO). Section 224 (3) states the following regarding the committee:

*The Minister must make sure that, so far as possible, an advisory committee is comprised of members who have knowledge of, or experience in, the matters being dealt with by the draft and that all relevant interests are fairly represented on it.*

The VFF seek an amendment to ensure the majority on the committee are irrigators/water users.

**Recommendation 11:** The WRMO advisory committees should be required (within Water Law) to have a majority of irrigators.

## Providing Advanced Allocations

The re-drafting of water law is an opportunity to provide clarity on advanced allocations on unregulated systems. For example, the Broken and the Ovens River Systems must often wait until well into November now final allocations are decided. This often precludes early sowing of opportunity crops like Maize, Millet and other fodder crops, reducing the viability of farms that would otherwise see an increase in their productivity.

Water used under through advanced allocations would be debited from the customer's Allocation Bank Account and would be in excess of the minimal environmental flows required. It is often a source of frustration for irrigators that they can't use water flowing past their properties early in the season, long before final allocations are decided.

Sections 230 & 231 of the Exposure Draft go part off the way to allowing this to occur. This opportunity could be used to enshrine in legislation that ability to issue Advanced Allocations from unregulated flows, at the determining Authority's discretion, for systems that have small storages that make early allocations problematic.

**Recommendation 12:** Enshrine the ability for advance allocations from unregulated systems in Sections 230 and 231

## **The Challenges with 'Enabling Legislation'**

A final thought will be with the difficulty for water users to fully understand the impact of the new water law when the legislative approach has been to create 'enabling' legislation. While we can understand the reason to not be too prescriptive with the legislation it can create uncertainty before the development of the WRMOs and will increase uncertainty between changes in Ministers and political parties.

By referring many of the items to the regulations rather than in legislation, there is inherently less certainty over the medium term. While this is not necessarily negative, in the cases where flexibility would be an asset it does create additional questions and leaves much to be open for interpretational bias.

The final result of this approach is that water law commentators may have an initial impression (either negative or positive) which may turn out to be false due to incorrect or changing interpretations. It is for this reason there needs to be a thorough consultation process on the development of the associated regulations.

## **Conclusion**

The redraft of Victorian water Law has been required considering the length of the current Act, the number of amendments that have occurred since 1989 and the significance of the Basin plan. This submission has pointed out a number of areas that the Victorian Farmers federation are supportive of and also indicates areas that have either not done enough to ensure the farming community has appropriate rights to water, or where it has not been clear enough on rights and responsibilities.

We ask the Victoria State Government consider our suggestions for amendments as they will deliver a better Water Law for Victoria.

Over the coming 18 months it will be very important that the VFF is engaged in the on-going development of the WRMOs as that is where most water users will really feel the changes in Water law.