Legislative Assembly Hansard,

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WATER MANAGEMENT AMENDMENT (WATER PROPERTY RIGHTS COMPENSATION) BILL

Bill introduced and read a first time.

Second Reading

Mr PETER DRAPER (Tamworth) [10.00 a.m.]: I move:

That this bill be now read a second time.

The need for this bill arises from unfinished business contained in the 1994 Council of Australian Governments [COAG] agreement on the implementation of the strategic water reform signed in April 1995 by representatives of all Australian governments, and the national action plan for salinity COAG agreement signed in 2002. This agreement has driven the water component of $4.7 billion worth of national competition payments to New South Wales under national competition policy agreements. The agreement to separate land and water rights for the purposes of allowing entitlement water to transfer to its highest value included a commitment to establish a new form of water property right. Governments, both State and Federal, have failed to enact this commitment. Both seem unwilling to support and underpin the clear need to provide an outcome to resource over-allocation, and also the need to provide security for private investment. These outcomes will only be realized, should governments commit equally to just terms resumption of water entitlements and the need for continued study into the environmental requirements of our surface and ground water systems.

Currently, in a perverse way, governments will spend more per megalitre on gaining water through water savings than the actual market value of water, yet they are very reluctant to resume water at market values and compensate licence holders accordingly. This bill will underpin the hundreds of millions of dollars of regional investment based on water entitlements that are in place in New South Wales. I intend to quote from a submission from the Australian Property Institute to the Federal Senate, in which the New South Wales Divisional President Tom Webster issued a statement expressing concern that the collateral base for rural lending was poorly understood. He said:

> The API is very concerned that rural loans where a water access entitlement is present do not have an adequate underlying security for lenders or borrowers.

That statement defines the very purpose of this bill in that there is a clear need to underpin financial transactions made to holders of water entitlements who forego part or all of their allocation for environmental or public good reasons. Mr Webster went on to say:

> When mortgage valuations of rural properties are undertaken, the valuer is asked to advise on two distinct matters pertaining to a particular property, namely whether the total value is supported by the marketplace, and secondly whether the collateral being offered for the loan represents adequate security for the funds to be advanced. The Australian Property Institute considers that the New South Wales water legislation does not provide such security, and requires urgent amendment to protect both rural borrowers and lenders.

I will touch now on the national water initiative, which has been touted as containing a commitment to water property rights, yet an examination of the document confirms that the only interpretation that could be placed on the so-called property right clauses, is that there is a gentleman's agreement in place to delay discussion of the issue for another eight years. The national water initiative in fact represents a major step away from the commitment to deliver a property right over the portion of water allocated for irrigation use. There are many misconceptions relating to the concept and need for establishing water property rights, and I will attempt to allay some of these fears.

This bill does not allow greater access to water for those who have invested in this asset. The bill equally does not modify the standing of environmental water in the Water Management Act 2000. Environmental water continues to hold a hierarchy over irrigation entitlement in terms of allocation and the entitlement processes. This bill will protect the billions of dollars of investment made in land development, machinery and human resources that are repaid by water dependent production. I believe I have demonstrated a clear need for this bill, and the support from industry for the legislation is noted and welcomed.

Water entitlements are a major economic driver in north-western New South Wales, with both mining and irrigated agriculture investment dependent on water entitlement, among other factors. As I have foreshadowed, the national water initiative has not achieved the establishment of a water property right. It simply became too difficult for the Federal Government to present a strong, unified viewpoint to States such as New South Wales

where there are complex issues arising from over-allocation of the resource. It should be noted that this over-allocation occurred under the overview of both sides of the House, so neither side can claim the moral high ground over this issue. The basis for a lack of Federal direction lies in the constitutional issues highlighted by the Franklin River political debate contained in part V, section 51 paragraph (xxxi) of the Australian Constitution under the heading "Part V - Powers of the Parliament." Section 51 states:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to …
>
> (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

The office of the member for New England has provided me with advice that the legislation in question restricted development on certain land in Tasmania without the consent of the Commonwealth Government. The State of Tasmania challenged this legislation on the ground, inter alia, that the restrictions amounted to an acquisition of its property on terms that were not just. On this point, the majority of the court decided against Tasmania. The only interest acquired by the Commonwealth in the land was the power to veto development.

It may be necessary yet to test the far more tangible impact of the removal of ground water assets for the purposes of meeting a Commonwealth agreement, the State being subject to Commonwealth penalty if it does not comply. The minority viewpoint offered in this decision by Justice Deane in the High Court is instructive on this point, and the Parliamentary Library provided advice on the decision. Justice Deane maintained that the imposition of an absolute prohibition on development should be treated as an acquisition of property, even though the Commonwealth had not acquired a "material benefit of a proprietary nature."

He said that section 51 (xxxi) should not be limited to those situations that would be characterised as acquisitions of property in private law. He said that a restriction on the exercise of property rights may amount to an acquisition of property under section 51 (xxxi) if its effect is "to confer upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth." In his view, both the purpose and the impact of a restriction are important: if the restriction is intended merely to adjust competing interests in resources, it is likely that section 51 (xxxi) is not involved. Similarly, if the impact is slight, section 51 (xxxi) does not apply.

The negative economic impacts of the removal of water are enormous. Quite simply, it seems the Commonwealth will not offer compensation for the removal of a water asset as they are avoiding their constitutional responsibility. The Commonwealth should have contemplated this more fully when it drew up the 1995 COAG agreement on the implementation of the strategic reform of the water industry. In this agreement they offered a water property right as an outcome of the separation of land and water and, along with New South Wales, the Commonwealth signed to this agreement. The decision to retreat from this position drove the development of the national water initiative that allowed the replacement of property rights through a cascading order of dealing with overallocation within the water-sharing plan period: Namely by seeking efficiency gains in the natural system, followed by efficiency gains being purchased from private landholders, and finally resumption. Clause 79 (ii) of the intergovernmental agreement on a national water initiative states:

(i) where it is necessary to recover water to achieve modified environmental and other public benefit outcomes, to adopt the following principles for determining the most effective and efficient mix of water recovery measures:

(a) consideration of all available options for water recovery, including: investment in more efficient water infrastructure; purchase of water on the market, by tender or other market based mechanisms; investment in more efficient water management practices, including measurement; or investment in behavioural change to reduce urban water consumption;
(b) assessment of the socio-economic costs and benefits of the most prospective options, including on downstream users, and the implications for wider natural resource management outcomes (eg. impacts on water quality or salinity); and

(c) selection of measures primarily on the basis of cost effectiveness, and with a view to managing socio-economic impacts.

At the 10-year water-sharing plan review period the theory is that there will be risk assignment, and I refer to Clause 49 of the intergovernmental agreement on a national water initiative. Up until 2014 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 the capacity of water systems to sustain particular extraction levels are to be borne by users. Risks arising under comprehensive water plans commencing or renewed after 2014 are to be shared over each 10-year period in the following way: Water access entitlement holders to bear the first 3 per cent reduction in water allocation under a water access entitlement; State and 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 per cent and 6 per cent; and State, Territory and Commonwealth governments equally to share reductions in water allocation under water access entitlements greater than 6 per cent. The hope is that the knowledge of the quantum of the loss will become a replacement for an actual

property right. This is a remarkable juggling act in an attempt to hide from entitlement holders the fact that they still bear the risk for adjustment to overallocation.

The Water Management Act 2000 and the national water initiative contain no secure guarantees of compensation that bears relationship to the cycles of rural investment, which are measured in decades. Unfortunately, in addition to the lack of a property right in these agreements there are many out clauses for both governments on these commitments to water security. Compensation within the planning cycle in New South Wales will be offered only at the Minister's discretion. New science that challenges the thinking behind resource estimates creates a possibility that the resource share may be challenged as incorrectly assessed, and yet again the potential arises for reductions to entitlement with no compensation. The jury is still out on the national water initiative. However the prognosis is poor. It has been described by the Business Council of Australia as a confused process that lacks urgency and clear direction. This can be attributed to a lack of commitment to measuring the water resource, to offering a real property right, and to dealing with overallocation through a fair and just compensation process. If these goals are addressed the market will have security and certainty, and the environment will see a significant improvement as well.

Almost $2 billion allocated to the national water initiative processes is at risk of not achieving the outcomes agreed under the 1995 Council of Australian Governments [COAG] along with the 2002 National Action Plan and COAG. A current example of the backwards approach to compensation is being played out in six ground water valleys across New South Wales. As many in the House would be aware, the Achieving Sustainable Groundwater Entitlement Program, which was a direct initiative of the 1995 COAG on water, currently is being rolled out. In the Namoi Valley this package has delivered very difficult news to farmers who are losing on average around 60 per cent of their entitlements. Irrigators who have participated willingly in the process and voluntarily structured their businesses around the agreed cuts to their current water entitlement of 73 per cent are rightfully in shock after being informed by the Namoi Catchment Management Authority that those who do not have a history of extraction for the period 1991 to 2000 will be cast aside in the process, with no consideration given to individual circumstances.

I have spoken to many of these people, and their stories need to be told. Robert and Anna Billingham from Kelvin in my electorate typify the people whose livelihoods apparently mean nothing to the New South Wales Government, both of whom have worked numerous jobs to achieve their dream of becoming farmers. In the late 1990s the Billinghams bought an unimproved property with a 480-megalitre ground water licence, and gradually they were able build a sustainable business growing lucerne. Despite being legally able to use all of their 480-megalitre entitlement, the Billinghams structured their business around not exceeding the 73 per cent cut and have never exceeded 120 megalitres since they commenced their business.

Recently they were told that, unless there is unanimous agreement on the process from all licence holders in their zone, their allocation would now be cut by 87 per cent, making their business worthless and forcing them off the land. Having attended many meetings through the years in good faith and having adhered to the 73 per cent agreed reduction to their entitlement, they are distressed—and rightfully so—at the situation they now face. What makes it more galling is the inequity that another irrigator in the same area has a history of extraction during the defined period, yet has not irrigated for the last five years. He has retained a massive allocation and he has been able to on sell that entitlement to another farmer. Another irrigator with the same allocation as the Billinghams, but with a history of use in the defined decade, will be cut to 320 megalitres, yet the Billinghams face decimation. This is a hardworking couple with a young family who have done everything right.

The Billinghams have written confirmation from various government departments that they could invest with confidence, provided they adhered to the 73 per cent cut. Yet the Government seems prepared to throw their lives on the scrapheap to favour irrigators who were active from 1991 to 2000. Why? Another anomaly involves a businessman purchasing a large property that held a substantial water entitlement with a view to irrigating portions of the property to fatten lambs. This deliberate business decision was made in light of the 73 per cent cut to entitlement, and the venture was structured on that understanding. Already having spent millions of dollars to acquire the property the spectre of an 87 per cent cut looms, which would render the business unviable. The purchase was made in good faith following departmental advice, yet apparently the property no longer will be able to sustain the very enterprise for which it was bought specifically. The farcical sideshow that accompanies this process is the delivery staff being instructed not to mention the term "compensation", and the honourable member for Gwydir blaming, firstly, the Australian Tax Office and then the New South Wales Government for taxation being applied to the compensation package, which now has been redefined as the structural adjustment package.

There is a significant difference in the financial compensation provided to farmers, should the Federal Government determine to continue their stated practice of treating any compensation as income and to tax the adjustment package, which I must point out has been provided to other industries free of income tax. I welcome the initiative from the honourable member for New England, Tony Windsor, to address this issue. A media search of the former Federal Minister and current member for Gwydir in relation to the Namoi Valley confirms it was he who first introduced the term "structural adjustment", clearly in the full knowledge that any direct funding to farmers would be taxed. His legacy is one that few farmers would appreciate. It is pleasing to see support for

this bill coming from a wide range of sources, and I refer in particular to the comments made by the shadow Minister for Natural Resources, Adrian Piccoli, who was quoted in the *Border Mail* on Monday 27 March 2006, saying that the New South Wales National Liberal Coalition was focused on providing as strong a property right for water as possible. He pointed out that the submission put to the Senate inquiry into water by the Australian Property Institute:

> … poses a serious risk to irrigation farmers if they cannot secure their business loans using their farms and using their water licenses.

He went on to say:

> The evidence given by the Australian Property Institute reinforces the need to have strong property rights for water, otherwise irrigation farming will be undermined.

He also said:

> We will be solving these and other issues to provide the sort of security that farmers want, and that their bankers need, because we know that water security means jobs in country New South Wales.

I am very appreciative of the shadow Minister's support. I also acknowledge comments from the honourable member for New England, the Hon. Tony Windsor, a former member of this place, who issued a media release with the header "Draper's Water Property Rights Bill Just What the Farmers Ordered." In his release Mr Windsor stated that he was pleased to see this bill building on the just terms legislation of 1991. At the time the National Party said they had been waiting 30 years for the legislation to go through the Parliament, but they could not achieve that until a hung Parliament occurred with Mr Windsor holding the balance of power. He pointed out that perhaps that is what may be required again. I must say I like his thinking on the issue. Mr Windsor said:

> The Water Management Amendment (Water Property Rights Compensation) Bill 2006 will create a crucial precedent in State legislation and reinforce a fair go for farmers who have their property rights removed for environmental and public good reasons.

I also acknowledge the contribution of the honourable member for Coffs Harbour on 20 August 1991 when contributing to the debate on the Land Acquisition (Just Terms Compensation) Bill when he said:

> It gives me a great deal of pleasure to speak to this bill, which is brought to the Parliament after attempts for more than 30 years to introduce a system of just terms when Government departments or authorities decide they need to acquire land for public use such as schools, hospitals and roads … The bill will ensure that land acquired by Government departments will now be acquired on just terms.

He went on to say:

> Under existing law a private citizen has no opportunity for input or just compensation when his or her land is acquired by a government department. This bill will alleviate any fears they may have.

I think these comments can be appropriately applied to the bill I have introduced as well because it delivers equity and security for irrigators affected by Government driven cuts to their entitlements. On 12 December last year in his second reading speech on the Water Management Amendment Bill, Minister Macdonald indicated he wanted to provide security to both the environment and the irrigators. Exactly the same principle should apply to providing security to borrowers and lenders. In that speech the Minister tried to justify the use of the historical data from 1991 to 2000 to determine allocations as trying to ensure that water "stayed in the hands of those who need it most."

He stated that "Those who rely on their water will retain it in a larger proportion whilst those who are not as dependent", that is, those who do not have the same level of history of use, "will face larger reductions." Try telling the small irrigators like the Billinghams that they do not rely on their water to the same extent that the long term irrigator who inherited a farm from his father. Why should the Billinghams be penalised for working hard and saving money to establish a business that did not start until this nonsensical decade of use was enshrined as the only determinate of allocation?

Representatives from the New South Wales Farmers Association have met with me this week in the Parliament after having time to consider the bill. They informed me that it echoed their policy on water, and they were happy to give it their endorsement and support. I look forward to hearing where the parties stand on this bill. This is an opportunity to stand up for irrigators, who are being affected by Government decisions that are not of their doing. Irrigators accept that water is a finite resource and it must be used sensibly and at sustainable levels. They do not accept that their financial negotiations with banks and other lenders should be jeopardised by a Government initiative to separate the value of land and water.

I am regularly in contact with farmers who are now facing the very real prospect of having to renegotiate their loans with financial institutions but not necessarily having the underpinning collateral to justify those loans. The situation arose because of government decisions to which they were not party and it is causing them enormous

concern and potentially great hardship in rural communities. This bill seeks to safeguard the future of farmers, to give them security and acknowledge the impost that government decisions place upon farmers.

This is one of the most important factors facing people in country communities and I hope that the concerns of farmers are taken into account in this significant reform process. The meeting I had with the New South Wales Farmers Association yesterday assured me that it was prepared to work towards the same end as that proposed by the bill. Investment in rural and regional areas is under significant threat unless something is done to address this issue and I am concerned about the devastating flow-on effects unless corrective action is taken.

Mrs Dawn Fardell: Dubbo and Narromine would be affected.

Mr PETER DRAPER: Dubbo and Narromine would certainly be affected, as the honourable member for Dubbo has so rightly pointed out, and I welcome the support of the bill. Indeed, all Independent members have indicated support for the bill. I call on all members of the House, particularly those from rural, regional and coastal areas, to support this extremely important bill. I would be pleased to discuss any aspect of the bill and its implications with the honourable members. I am sure meetings could be organised between representative groups backing the bill so that an informed decision can be made about what the bill can offer to farming communities in rural and regional New South Wales. I urge honourable members to consider the needs of farmers for security and equity and to give this bill the support that it deserves. I commend the bill to the House.