SUBMISSION TO THE
SENATE RURAL AND REGIONAL AFFAIRS
AND TRANSPORT STANDING COMMITTEE
INQUIRY INTO THE WATER AMENDMENT BILL 2008

From:

Greg Cameron
gregorydcameron@bigpond.com
PO Box 498 Benalla VIC 3671
03 576 33339
30 October 2008

SUMMARY

Federal Government policy is that the primary right of access to water that falls on a person's roof is vested in state and territory Governments.

The purpose of this submission is to demonstrate that the Government's policy is not correct, with reference to the four states referring constitutional powers under the Water Amendment Bill 2008 (the Bill).

COMMON LAW RIGHT TO USE RAIN

4.6 million Australian houses do not have rainwater tanks (ABS, 2004). Should each household use 70 KL of rainwater each year, which is an achievable amount, the addition to the nation's drinking water supply would be 320 GL.

The federal Government's claim that state and territory Governments could establish entitlement regimes in order to regulate the use of rainwater (Minister representing the Minister for the Environment and Water Resources, Senate, QON 2971, 9 August 2007), is a risk to all property owners intending to invest in rainwater harvesting equipment. For example, an entitlement of 35 KL would double the cost of rainwater for a household.

The Bill has been informed by, and progresses the National Water Initiative Agreement 2004 (NWI) (Explanatory Memorandum, clause 7). Clause 2 of the NWI says: in Australia, water is vested in Governments.

The federal Government's interpretation of clause 2 is that it is: a reference to state and territory legislation which provides that the state or territory has primary rights of access to water which falls on land, including roof water (QON 2971).

The relevant state and territory legislation applies to water that occurs on, and below, the land surface. The legislation does not abolish the common law right to use rain, which is water that occurs above land.

Under the relevant legislation, the roof of a building is not land (see state-based discussion). Consequently, state and territory Governments cannot refer the primary right of access to water that falls on a person's roof to the federal Government.

The federal Government policy represents sovereign risk to all Australians on the grounds that it nationalises rain.

WATER OWNERSHIP

In Australia, water that is legally captured and taken under a person's control is owned by that person. Because rainfall is an act of nature, a person cannot be prevented from capturing and controlling it by means of that person's roof.

Since the common law right to use rain has not been abolished, rain that falls on a person's roof is owned by that person.

It is important to note that a rainwater tank is not a device for capturing rain. The roof of a building is the only permitted source of rainwater for a rainwater tank (Australian plumbing standard, AS3500.1:2003, section 14). Piping is the usual method of supplying rainwater to a rainwater tank from the roof of a building.

The relevant legislation in the four states involved with the Bill is discussed, below.

NEW SOUTH WALES

NSW Government policy in respect of rainwater ownership is that: generally, rainwater that falls into a gutter comes within the control of the person who has the right to control the relevant premises (owner or tenant as the case may be). Prima facie ownership of that water rests in that controller provided he/she asserts such a right over that water, for example, by trapping or collecting it in a rainwater tank (Minister for Water, 19 November 2007).

NSW Government policy in respect of legislation is that: the rights to water have been substantially and generally vested in governments in states and territories. The fact that roofwater has not been so vested in some states and territories seems irrelevant to the National Water Initiative or urban water management in NSW, and this is not an error of any consequence (Minister for Water, 11 July 2008).

VICTORIA

ALP policy, and therefore Victorian Government policy, is: water that falls on a person's roof in Victoria is the property of that person (Victorian ALP, 14 November 2006). This policy is consistent with the common law right not having been abolished to use water that falls on a person's roof.

Victorian Government policy in respect of water ownership is that: the common law recognises that water that has been lawfully appropriated by a person is the property of that person (Government of Victoria, Response to VCEC "Water Ways: Inquiry into Reform of the Metropolitan Retail Water Sector, Final Report", July 2008, p.9).

Under the Water Act 1989: the Crown has the right to the use, flow and control of all water in a waterway and all groundwater (section 7(1)). Government policy is: the terms "waterway" and "groundwater" are defined in the Water Act 1989. If water falls on a person's roof, it may, after it has left that roof, become water in a waterway or groundwater. For the period that the water remains on the roof, it is not water in a waterway or groundwater (Department of Sustainability and Environment, 3 February 2007).

The Victorian Government's position in respect of clause 2 of the NWI is that: clause 2 does not say all water in Australia is vested in governments (ibid).

The Government's policy means that clause 2 of the NWI does not apply to water that falls on a person's roof in Victoria.

A person's common law right to use rainwater that occurs on that person's land has been replaced with a statutory right, by section 8(4)(c) of the Water Act 1989. However, section 8(4)(c) applies to rainwater after it has fallen on land as a physical entity, and does not apply to rain that falls on the roof of a building.

It was held in Ashworth V The State of Victoria (VSC 194, 17 June 2003), that the common law right to use rainwater supplied to a farm dam from the roof of a building had not been abolished. The position where the common law right to use rainwater supplied to a rainwater tank from the roof of a building has not been abolished, is consistent with the finding in the Ashworth case.

In Victoria, the common law right to use stormwater has not been abolished (Government of Victoria, Response to VCEC "Water Ways: Inquiry into Reform of the Metropolitan Retail Water Sector, Final Report", July 2008, p.9). The Government is currently clarifying the rights to stormwater and responsibilities for the provision of stormwater harvesting services. Stormwater is generated from impervious surfaces, such as roofs, roads and footpaths in urban areas. This water is collected in the drainage system and discharged to rivers and creeks and eventually bays and oceans (Victorian Government, Draft Sustainable Water Strategy Central Region, April 2006, p.18).

Stormwater is: rainfall runoff from urban areas, where runoff is rainfall which flows from a catchment, and a catchment is an area of land (Victorian Government, Our Water Our future, Action to 2055, Glossary, October 2006).

Rainwater supplied to a rainwater tank from the roof of a building is neither runoff nor stormwater. Rainwater supplied from a person's roof does not become stormwater until it enters the stormwater drainage system, and it remains the property of that person while it is on that person's land.

SOUTH AUSTRALIA

Under the Natural Resources Management Act 2004 (NRM Act): rights at common law in relation to the taking of naturally occurring water are abolished (section 124(8)). The common law right to take rain has not been abolished (Minister for Environment and Conservation, Press Release, "No tax on domestic rainwater collection", 27 February 2007), which means that section 124(8) does not apply to rain.

Water that has been legally captured from its natural source and taken under a person's control is owned by that person (Department for Water Resources, Explanatory Documents, Supporting Papers for State Water Plan 2000, Explanatory Paper no.1 "Who owns water?", September 2000, p.2). Consistent with Government policy, water that falls on a person's roof is legally captured and controlled by that person, and is owned by that person.

In comparison, surface water is not owned by anyone (Minister for Environment and Conservation, 16 December 2005) because, by definition, it is not captured and controlled. Under the NRM Act, surface water is: water flowing over land after having fallen as rain; where: land means, according to the context (a) land as a physical entity, including land under water; or, (b) any legal estate or interest in, or right in respect of, land, and includes any building or structure fixed to land.

Surface water is water flowing over land in the context of alternative (a). A building, obviously, is not land as a physical entity.

For the roof of a building to be land in the context of alternative (b), it would mean that the common law right to own rain using a roof (to legally capture and control rainfall) has been abolished, which it has not.

Consequently, rainwater supplied from the roof of a building is not surface water.

SA Government policy is: rain that becomes runoff from roofs is surface water for the purposes of NRM Act (Minister for Environment and Conservation, 23 August 2008). Rainfall runoff is that part of precipitation which flows from a catchment area into streams, lakes, rivers or reservoirs; and catchment is an area of land draining rainfall into a river or reservoir (Government of South Australia, Water Proofing Adelaide, Glossary, 2005). Rainwater supplied to a rainwater tank from the roof of a building, obviously, is not runoff.

SA Government policy is consistent with rainwater supplied from the roof of a building not becoming surface water until it makes contact with land as a physical entity.

QUEENSLAND

All rights to the use, flow and control of all water in Queensland are vested in the State (Water Act 2000, section 19). Under the Act, overland flow water means: water flowing over land after having fallen as rain; and the meaning of overland flow water specifically: does not include water collected from roofs for rainwater tanks. Water collected from roofs for rainwater tanks, by definition, is non-Act water, and section 19 does not apply to non-Act water.

Consequently, the common law right to use water that falls on a person's roof has not been abolished.

On 14 November 2007, section 398(A) of the Water Act 2000 was passed. Its purpose was: to remove doubt that a service provider must not charge for non-Act water (Water and Other Legislation Amendment Bill 2007, Explanatory Notes, Page 46).

It is noted that a service provider has never had the right to charge for non-Act water, and section 398(A) did not change this situation.

RAINWATER TANK POLICY

In Australia, ownership of water that falls on a person's roof is a traditional right. The exercise of this right has implications for water trading. For example, when rainwater is used to replace mains drinking water costing $2/KL, the market value of 320 GL of rainwater is $640 million.

In a free market, households are more likely to use rainwater when it is lower in cost than mains water. The sovereign risk presented by federal Government policy, is that the cost of rainwater can be controlled by the Government establishing "entitlement regimes".

According to the National Water Commission: Governments have not yet considered the capture of water from roofs in rainwater tanks to be of sufficient magnitude to warrant the issuing of specific entitlements to use this class of

water. However, if rainwater tanks were to be adopted on a large scale such that their existence impacts significantly on the integrated water cycle, consideration could be given to setting an entitlement regime for this class of water (National Water Commission, 25 August 2006).

About 90% of rain soaks into the ground in the natural environment. It is self-evident that impervious surfaces such as roofs and roads in urban areas already impact significantly on the integrated water cycle. For example, the CSIRO estimated Melbourne's stormwater runoff to be 455 GL each year (CSIRO, Submission to Water Resource Strategy for the Melbourne Area Committee, 2002). This compares with the 70 GL of stormwater that would not be created should one million Melbourne houses each use 70 KL of rainwater collected from roofs.

However, federal Government policy on rainwater rights is inconsistent with its policy to encourage rainwater tanks.

Government policy is: federal Labor wants every Australian home and its roof to be a personal water catchment area, maximising re-use and collection of rain water (ALP, Election 07 Policy Document, Labor's national plan to tackle the water crisis, page 22); and: federal Labor will set an aspirational target that by 2020 all Australian homes where suitable, would be more energy and water efficient through technologies and appliances such as rainwater tanks and grey water re-use systems. We want every Australian home and its roof to be a personal water catchment area, maximising re-use and collection of rain water (Mr Kevin Rudd, Federal Labor Leader, media release, 25 June 2007).

A national program to install rainwater harvesting systems into 4.6 million houses would be a significant addition to the nation's water infrastructure. The objective would be to supply rainwater at an equal or lower cost compared with mains water, without subsidy. It is an achievable objective.

100% financing could be provided whereby principal and interest were repaid at point of sale of the property, or earlier, by choice. This treats rainwater supply as a housing cost.

Savings in mains water purchases could be applied against loan interest.

Mains water not consumed could be traded by the property owner for a higher price, in line with the proposal by the Australian Productivity Commission (March, 2008).

RECOMMENDATION

It is recommended that clause 2 of the NWI be amended to clearly show that in Australia, a person's common law right to use water that falls on that person's roof has not been abolished.