

#### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the Water (Commonwealth Powers) Bill 2008.

#### Overview of Bill

The object of this Bill is to amend the Water Management Act 2000 (the Principal Act) so as:

- (a) to restate the offences under that Act, and to increase the penalties that may be imposed in respect of them, and
- (b) to restate, and broaden, the directions that the Minister may give under that Act with respect to the protection of the State's water resources, and
- (c) to restate the powers that may be exercised under that Act with respect to compelling the production of information and entering and searching premises, and
- (d) to enable a court that finds a person guilty of an offence against that Act to make certain orders (such as orders for the prevention or mitigation of harm to the environment) against that person, and
- (e) to establish the liabilities of the co-holders of an access licence or approval that is held by more than one person, and
- (f) to prescribe the matters that a court must take into consideration when imposing a penalty for an offence against that Act, and
- (g) to facilitate the use in legal proceedings under that Act of evidentiary certificates issued by the Minister and by authorised analysts, and
- (h) to prescribe certain states of affairs that, in legal proceedings under that Act, give rise to rebuttable presumptions of fact, and
- (i) to clarify the operation of certain provisions of that Act in relation to access licences, and
- (j) to standardise the provisions of that Act with respect to the publication of certain orders and notices, and
- (k) to make other amendments of a minor, consequential or ancillary nature.

The Bill also makes consequential amendments to the Dividing Fences Act 1991, the Law Enforcement (Powers and Responsibilities) Act 2002 and the Water Act 1912.

#### Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act. Except for Schedules 1–4 and 7.2 and 7.3, the proposed Act is to commence on the date of assent.

Schedules 1–4 and 7.2 and 7.3 are to commence on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the Water Management Act 2000 set out in Schedules 1–6.

Clause 4 is a formal provision that gives effect to the amendments to the Acts listed in Schedule 7.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent. Section 30 of the Interpretation Act 1987 provides that the repeal of an amending Act does not affect the amendments made by that Act.

#### Schedule 1 Amendments relating to offences and penalties

##### Offences in relation to access licences

Schedule 1 [1] inserts proposed Division 1A into Part 2 of Chapter 3. The new Division includes the following provisions:

- (a) an offence of taking water without an access licence (proposed section 60A),
- (b) an offence of contravening the terms and conditions of an access licence (proposed section 60B),
- (c) an offence of taking water under an access licence without having sufficient

- water credited to an access licence (proposed section 60C),
- (d) an offence of taking water otherwise than from a nominated water supply work (proposed section 60D),
- (e) a provision that deems the occupier of premises from which water is unlawfully taken as having committed the relevant offence in relation to the taking of that water (proposed section 60E),
- (f) a provision that establishes certain defences to a prosecution under the proposed Division (proposed section 60F),
- (g) a provision that empowers the Minister, if satisfied on the balance of probabilities that water has been unlawfully taken, to charge the offender with an amount of up to 5 times the value of the water taken and, if the offender holds an access licence, to debit the licence with up to 5 times the quantity of water taken (proposed section 60G),
- (h) a provision that extends the Division to interstate licences in the nature of an access licence (proposed section 60H).

Schedule 1 [2] omits section 85B, and Schedule 1 [12] amends section 368, as a consequence of section 85B's replacement by proposed section 60G (to be inserted by Schedule 1 [1]).

#### Offences in relation to approvals

Schedule 1 [4] inserts proposed Division 1A into Part 3 of Chapter 3. The new Division includes the following provisions:

- (a) an offence of using water without a water use approval (proposed section 91A),
- (b) an offence of constructing or using a water supply work without a water supply work approval (proposed section 91B),
- (c) an offence of constructing or using a drainage work without a drainage work approval (proposed section 91C),
- (d) an offence of constructing or using a flood work without a flood work approval (proposed section 91D),
- (e) an offence of carrying out a controlled activity without a controlled activity approval (proposed section 91E),
- (f) an offence of carrying out an aquifer interference activity without an aquifer interference approval (proposed section 91F),
- (g) an offence of contravening the terms and conditions of an approval (proposed section 91G),
- (h) an offence of failing to install or maintain metering equipment (proposed section 91H),
- (i) an offence of taking water by means of a metered work when its metering equipment is not working (proposed section 91I),
- (j) an offence of failing to keep proper metering records (proposed section 91J),
- (k) an offence of tampering with metering equipment (proposed section 91K),
- (l) a provision that deems the occupier of premises at which a water management work has been unlawfully constructed or used, or a controlled activity or aquifer interference activity has been carried out, as having committed the relevant offence in relation to that work or activity (proposed section 91L),
- (m) a provision that establishes certain defences to a prosecution under the proposed Division (proposed section 91M).

#### Other offences

Schedule 1 [3], [5] and [7] re-enact existing sections 347A, 350, 351 and 352 (with increased penalties) as proposed sections 87C, 120 (4), 318A and 318B.

Schedule 1 [8] substitutes Part 3 of Chapter 7. The new Part re-enacts existing sections 346, 347 and 353 (with increased penalties) as sections 342, 343 and 344 and adds new sections 345 (creating offences in relation to harming the environment), 346 (unlicensed bore drilling) and 347 (creating offences of causing, permitting or

encouraging the commission of offences against the Principal Act and of attempting or conspiring to commit offences against the Principal Act).

Schedule 1 [6] amends section 256 so as to increase the penalty for an offence against that section (which relates to the unlawful construction of certain works and structures).

Offences by joint holders of access licence or approval

Schedule 1 [9] inserts proposed section 363A. The new section provides that each co-holder of a jointly held access licence or approval is equally liable with the other co-holders in relation to any offence against the Principal Act that is committed in connection with the licence or approval unless he or she establishes that some other co-holder, with whom he or she has no association, committed the offence and that he or she took all reasonable steps to prevent the offence from being committed.

Penalties

Schedule 1 [9] inserts proposed section 363B. The new section fixes the amounts for a Tier 1, 2 or 3 penalty. Each offence against the Principal Act is to be punishable by a Tier 1, 2 or 3 penalty.

A Tier 1 penalty will correspond to a maximum penalty of:

(a) in the case of a corporation, 20,000 penalty units (\$2.2 million) and, in the case of a continuing offence, a further penalty of 2,400 penalty units (\$264,000) for each day the offence continues, or

(b) in any other case, imprisonment for 2 years or 10,000 penalty units (\$1.1 million), or both, and, in the case of a continuing offence, a further penalty of 1,200 penalty units (\$132,000) for each day the offence continues.

A Tier 2 penalty will correspond to a maximum penalty of:

(a) in the case of a corporation, 10,000 penalty units (\$1.1 million) and, in the case of a continuing offence, a further penalty of 1,200 penalty units (\$132,000) for each day the offence continues, or

(b) in any other case, 2,250 penalty units (\$247,500) and, in the case of a continuing offence, a further penalty of 600 penalty units (\$66,000) for each day the offence continues.

A Tier 3 penalty will correspond to a maximum penalty of 100 penalty units (\$11,000).

Schedule 1 [11] inserts proposed section 365A. The new section establishes the constituents of a continuing offence.

Schedule 1 [13] inserts definitions of Tier 1, 2 or 3 offence and Tier 1, 2 or 3 penalty into the Dictionary to the Principal Act.

Proceedings for offences

Schedule 1 [10] substitutes section 364 and inserts proposed section 364A.

New section 364 differs from the existing section in that it provides that proceedings for all offences against the Act may be commenced up to 3 years after their commission or up to 3 years after evidence of their commission came to the attention of an authorised officer.

New section 364A sets out the matters that a court should take into consideration when imposing a penalty for an offence against the Principal Act.

Schedule 2 Amendments relating to directions and other enforcement measures

Directions

Schedule 2 [2] substitutes Part 1 of Chapter 7. The new Part contains Divisions 1–7.

Division 1 includes a definitions section (proposed section 323).

Division 2 includes the following provisions:

(a) a provision that empowers the Minister to impose temporary restrictions on the taking of water under an access licence (proposed section 324),

(b) a provision that empowers the Minister to direct landholders to take measures to avoid wasting water (proposed section 325),

(c) a provision that empowers the Minister to direct that water supply works be equipped with metering equipment (proposed section 326).

Division 3 includes the following provisions:

(a) a provision that empowers the Minister to direct that construction or use of a water management work that is being unlawfully constructed or used be discontinued or continued only in a specified manner (proposed section 327),

(b) a provision that empowers the Minister to direct that the carrying out of a controlled activity or aquifer interference activity that is being carried out unlawfully be discontinued or carried out only in a specified manner (proposed section 328),

(c) a provision that empowers the Minister to direct that water management works that do not have approval be demolished or removed (proposed section 329).

Division 4 includes a provision that empowers the Minister to give a temporary “stop-work” order in relation to the use of a water management work or the carrying out of a controlled activity or aquifer interference activity (proposed section 330).

Division 5 includes the following provisions:

(a) a provision that empowers the Minister to direct a landholder to take specified measures to protect the environment, to preserve basic landholder rights or to overcome a threat to public health (proposed section 331),

(b) a provision that empowers the Minister to direct a landholder to stop stock from straying onto the State’s water management works or to repair any damage to such works caused by straying stock (proposed section 332),

(c) a provision that empowers the Minister to direct a person in charge of a water management work, or carrying out a controlled activity or aquifer interference activity, to prevent, minimise or mitigate any adverse effects that the use of the work, or the carrying out of the activity, may have on water sources or waterfront land (proposed section 333),

(d) a provision that authorises a direction under the proposed Division to require the person to whom it is given to furnish reports to the Minister as to the measures to be taken by the person to comply with the direction (proposed section 334).

Division 6 includes the following provisions:

(a) a provision that empowers the Land and Environment Court to grant injunctions directing a person to whom a direction has been given under the proposed Part to comply with the direction (proposed section 335),

(b) a provision that empowers the Land and Environment Court to make orders to remedy or restrain any breach (proposed section 336).

Division 7 includes the following provisions:

(a) a provision that enables the Minister to authorise persons to take measures that some other person has failed to take following a direction under the proposed Part, and to recover the cost of taking those measures from that other person (proposed section 336A),

(b) a provision that enables the Minister to issue mandatory guidelines as to the taking and use of water for domestic or stock purposes (proposed section 336B),

(c) a provision that makes it an offence for a person to fail to comply with a direction under the proposed Part (proposed section 336C),

(d) a provision that makes it clear that a direction under the proposed Part may be given without notice (proposed section 336D).

Schedule 2 [1] re-enacts existing section 336A (which enables the Minister’s power to give directions with respect to water management works to be exercised in relation to a water supply authority’s sewage works) as proposed section 301A.

Other enforcement powers

Schedule 2 [2] also substitutes Part 2 of Chapter 7. The proposed Part contains

Divisions 1–4. The Divisions contain provisions similar to equivalent provisions in the Protection of the Environment Operations Act 1997.

Division 1 includes the following provisions:

- (a) a provision that specifies the purposes for which the powers conferred by the proposed Part may be exercised (proposed section 337),
- (b) a provision that clarifies that the proposed Part does not affect functions conferred under any other provision of the Principal Act or under any other Act (proposed section 337A),
- (c) a provision that extends the meaning of occupier for the purposes of the proposed Part (proposed section 337B).

Division 2 includes the following provisions:

- (a) a provision that states that the Division applies whether or not a power of entry under proposed Division 3 is being exercised (proposed section 338),
- (b) a provision that enables a person to be required to furnish information or records for the purposes of the Principal Act (proposed section 338A),
- (c) a provision that enables a person to be required to answer questions as to matters connected with the administration of the Principal Act (proposed section 338B),
- (d) a provision that provides that questions and answers under the proposed Division may be recorded (proposed section 338C),
- (e) a provision that enables a person who is suspected of having committed an offence against the Principal Act to be required to supply his or her name and address, together with proof of any name or address so supplied (proposed section 338D).

Division 3 includes the following provisions:

- (a) a provision that enables an authorised officer to enter any premises (proposed section 339),
- (b) a provision that states that any such power of entry may only be exercised in relation to residential premises with the consent of the occupier or under a search warrant (proposed section 339A),
- (c) a provision that lists the various things an authorised officer may do while on premises that he or she has lawfully entered (proposed section 339B),
- (d) a provision that enables search warrants to be issued for the purposes of the proposed Part (proposed section 339C),
- (e) a provision that enables an authorised officer to make use of assistance (proposed section 339D),
- (f) a provision that enables the Minister to require the owner or occupier of premises to provide an authorised officer with such assistance and facilities as the officer may reasonably require (proposed section 339E),
- (g) a provision that requires an authorised officer to exercise his or her powers in such a manner as to minimise damage (proposed section 339F),
- (h) a provision that requires compensation to be paid for damage done by an authorised officer in the exercise of his or her powers (proposed section 339G).

Division 4 includes the following provisions:

- (a) a provision that requires an authorised officer to carry identification when exercising his or her functions under the Principal Act (proposed section 340),
- (b) a provision that creates certain offences in connection with the operation of the proposed Part (proposed section 340A),
- (c) a provision that ensures that a person does not commit an offence by failing to comply with a requirement to provide records or information, or to answer questions, unless the person has first been warned that such failure gives rise to an offence (proposed section 340B),
- (d) a provision that enables notices that have been given under the proposed Part

to be varied or revoked (proposed section 340C).

Schedule 3 Amendments relating to court orders  
and court proceedings

Court orders against persons contravening the Act

Schedule 3 [1] inserts proposed Part 3A into Chapter 7. The new Part includes the following provisions:

(a) a provision that applies its provisions to all persons that a court finds guilty of an offence against the Principal Act, and defines certain words and expressions for the purposes of the proposed Part (proposed section 353),

(b) a provision that ensures that one or more orders may be made against an offender in relation to an offence in addition to any other action that may be taken (proposed section 353A),

(c) a provision that empowers a court to make orders requiring an offender to mitigate any harm to the environment caused by the commission of an offence, to make good any environmental damage and to prevent any recurrence of the offence (proposed section 353B),

(d) a provision that empowers a court to order the offender to pay the costs incurred by a public authority in mitigating any environmental harm and making good any environmental damage (proposed section 353C),

(e) a provision that makes any such costs recoverable from the offender as a debt (proposed section 353D),

(f) a provision that empowers a court to order the offender to pay for the costs of any investigation of the offence (proposed section 353E),

(g) a provision that empowers the Land and Environment Court to order the offender to pay, in addition to any penalty, a further penalty of an amount equivalent to the monetary benefit that has accrued to the offender as a consequence of his or her commission of the offence (proposed section 353F),

(h) a provision that enables a court to make certain additional orders against the offender (proposed section 353G),

(i) a provision that makes it an offence for an offender to fail to comply with an order under the proposed Part (proposed section 353H).

Evidentiary certificates and rebuttable presumptions

Schedule 3 [2] substitutes section 367 and inserts proposed sections 367A and 367B.

New section 367 provides for an increased range of matters in respect of which an evidentiary certificate may be issued by the Minister. Such a certificate will be admissible in legal proceedings, and be evidence of the matters that it states.

New section 367A provides for the issue by an authorised analyst of an evidentiary certificate with respect to the results of any analysis or examination that he or she has carried out.

New section 367B provides that proof of certain matters gives rise to a rebuttable presumption as to specific issues of fact.

Schedule 3 [3] amends section 390 so as to provide for the appointment of authorised analysts. Schedule 3 [4] makes a consequential amendment to the Dictionary to the Principal Act.

Schedule 4 Amendments relating to access licences

Schedule 4 [1] substitutes section 52 (2). The new subsection differs from the old in that it provides that basic landholder rights must be exercised in accordance with mandatory guidelines to be established under proposed section 336B.

Schedule 4 [2] amends section 59 so as to clarify the intention of section 59 (4).

Schedule 4 [3] amends section 66 so as to clarify that the mandatory conditions of an access licence have effect only if they are included in the terms of the licence.

Schedule 4 [4] inserts proposed section 70. The new section empowers the Minister to make orders with respect to the taking of water pursuant to a supplementary water access licence. Under proposed section 60A (to be inserted by Schedule 1 [1]) it will

be an offence to take water under such a licence unless authorised to do so by an order under the proposed section.

Schedule 4 [5] substitutes section 71W so as to clarify the intention of that section with respect to interstate water tagging zones. Schedules 4 [6], [10] and [11] make consequential amendments to sections 71Z and 391A and the Dictionary.

Schedule 4 [7] substitutes section 72A so as to clarify the intention of that section with respect to the consent required by co-holders in an access licence for applications for the Minister's consent to certain dealings in the licence.

Schedule 4 [8] amends section 100 so as to clarify that the mandatory conditions of an approval have effect only if they are included in the terms of the approval.

Schedule 4 [9] amends section 123 so as to enable an irrigation corporation's operating licence to be amended by the Minister, after consultation with the irrigation corporation, so as to give effect to matters agreed to by or on behalf of the State pursuant to the National Water Initiative.

Schedule 5 Amendments relating to publication of proclamations, orders and notices

Schedule 5 amends various provisions so as to provide that proclamations, orders and notices under the Act are to be published in newspapers circulating throughout the area they affect.

Schedule 6 Amendments relating to other matters

Suspension of management plans during severe water shortages

Schedule 6 [3] inserts proposed section 49A. The new section, which replaces existing section 60 (2), enables the Minister to suspend the operation of a water management plan, either in whole or in part, if satisfied that there is a severe water shortage in relation to a particular water management area or water source. A suspension arising before 1 April in any year will end on 30 June of that year, while a suspension arising after 1 April will end on 30 June of the following year. Schedule 6 [7], [8] and [12] make consequential amendments to sections 60 and 71Y.

Suspension and cancellation of access licences

Schedule 6 [14] amends section 78 so as to provide that an access licence may be suspended or cancelled if its holder has failed to comply with a direction given to the holder under the Principal Act in connection with the licence or if the licence was granted as a result of false, misleading or materially inaccurate information.

Embargo on applications for approvals

Schedule 6 [18] substitutes section 112 so as to clarify the effect of an embargo under section 110 or 111 on an application for an approval.

Minor, consequential and ancillary amendments

Other provisions of Schedule 6 make minor, consequential or ancillary amendments to various provisions.

Schedule 7 Amendment of other Acts

Amendment of Dividing Fences Act 1991

Schedule 7.1 updates an obsolete reference to the Irrigation Corporations Act 1994 in section 25.

Amendment of Law Enforcement (Powers and Responsibilities) Act 2002

Schedule 7.2 makes a consequential update to a cross-reference.

Amendment of Water Act 1912

Schedule 7.3 [1] and [2] amend section 4G so as to extend the limitation period under that section from 6 months to 3 years, as is proposed for section 364 of the Water Management Act 2000 (to be inserted by Schedule 1 [10]).

Schedule 7.3 [3] omits section 180I, as a consequence of it having been superseded by proposed Division 2 of Part 2 of Chapter 7 of the Water Management Act 2000 (to be inserted by Schedule 2 [2]).

Schedule 7.3 [4] omits section 184A, as a consequence of it having been superseded

by the proposed amendment to section 4G (to be effected by Schedule 7.3 [1]).