WATER (COMMONWEALTH POWERS) BILL 2008
WATER MANAGEMENT AMENDMENT BILL 2008

Bills introduced on motion by Mr Phillip Costa.

Agreement in Principle

Mr PHILLIP COSTA (Wollondilly—Minister for Water, Minister for Rural Affairs, and Minister for Regional Development) [4.45 p.m.]: I move:

That these bills be now agreed to in principle.

The Water Management Act 2000 is the primary legislation for the management of the State's water resources. The Act was introduced in 2000 by the Carr Government. The Act provides for an integrated approach to water management by recognising that water is both a valuable resource for industry as well as being vital for the health of our river systems and the environment. The Act fundamentally overhauled water rights in the State of New South Wales and it created a new system of property rights in water that greatly increased the security and value of water rights in this State. The Act remains the pivotal legislative mechanism for the protection and sustainable management of our State's water resources, and the key instruments empowered by the legislation—water-sharing plans—remain the key water management tool in New South Wales.

Under the Act, 40 water-sharing plans have been commenced now. These plans detail the rules for water use, allocation and trading for roughly 90 per cent of water used in New South Wales. These are great achievements and these reforms have led Australia and the world in water management. New South Wales was the first State to separate land and water rights to allow water to be traded to higher value uses. New South Wales was the first State to corporatise our irrigation districts and it was the first State to allocate a share of water to the environment. As Minister for Water I intend to continue this proud tradition of water reform. Today I am taking the first step on that journey by introducing to the House, as cognate bills, the Water (Commonwealth Powers) Bill 2008, known as the referral bill, and the Water Management Act Amendment Bill 2008.

The referral bill establishes the arrangements needed to implement the historic 3 July 2008 Intergovernmental Agreement on Murray-Darling Basin Reform, known as the July IGA. The Water Management Amendment Bill introduces tougher penalties, stronger offences and better investigation and evidence provisions. The aim of the bill is to improve compliance with the Water Management Act 2000. In plain language that means we want to catch water thieves. I am introducing these bills cognately because they both go to the same issue: safeguarding the future of our rivers and our river communities.

Firstly, I turn to the referral bill, the Water (Commonwealth Powers) Bill 2008. The July IGA was historic: all basin jurisdictions came together and agreed on a way forward for the Murray-Darling Basin. The Murray-Darling Basin extends over four States—Queensland, New South Wales, Victoria and South Australia—and the Australian Capital Territory. As a result, intergovernmental arrangements for the management of the resource have been in place since 1915. The basin is critical to New South Wales as 57 per cent of the basin is within New South Wales; irrigated agriculture across the basin is valued at $9 billion a year; and nearly all of inland New South Wales is within the Murray-Darling Basin.

For these reasons the New South Wales Government has not only led the other States in innovative reform of our own water resource management systems but we have also led in cooperation on the Murray-Darling Basin. Unfortunately, the former Federal Government was unable to produce a proposal that satisfied all States in the initial process and instead enacted the Water Act 2007 based solely on its own powers. This was unfortunate as it increased the complexity of the regulatory arrangements applying to water by laying a new administrative structure over the top of existing structures. This was unsatisfactory, it lacked clarity about State and Commonwealth roles, and it duplicated responsibilities.

Thankfully, on 26 March 2008 Council of Australian Governments agreed in principle to develop an intergovernmental agreement on Murray-Darling Basin reform to resolve these issues, and that historic agreement was signed at the 3 July Council of Australian Governments meeting. New South Wales was cooperative but tough throughout these negotiations. It was critical to ensure New South Wales was not disadvantaged. We achieved this by articulating preconditions for New South Wales signing the intergovernmental agreement. Most importantly, New South Wales demanded that: river operations and maintenance functions should continue to be undertaken in New South Wales by State Water unless New South

Wales agrees otherwise; the States will not be exposed to any net increase in costs as a result of the intergovernmental agreement; and the intergovernmental agreement should expressly provide that the Commonwealth is responsible for any compensation payments resulting from cuts to water imposed by the Commonwealth. The new Rudd Government met our conditions and New South Wales therefore agreed to sign the intergovernmental agreement.

As part of that agreement New South Wales agreed: to transfer the current powers and functions of existing Murray-Darling Basin institutions such as the commission and the ministerial council to the new institutions set out in the new Murray-Darling Basin Agreement, such as the authority, the new ministerial council, the Basin Officials Committee and the Basin Community Committee; to refer powers to cover issues associated with critical human needs, while retaining our responsibility for managing our share of available water; and to expand the application of water market and charge rules to cover all entities within the basin. This means there will be only one price regulator within the basin.

To meet these obligations, and fully comply with our part of the bargain embodied in the July intergovernmental agreement, two things are required: a new Murray-Darling Basin Agreement and legislation to refer powers to the Commonwealth. Today I am putting the second step in place by introducing into the House the Water (Commonwealth Powers) Bill 2008. This referral bill fulfils New South Wales' obligations under the July intergovernmental agreement by referring powers to the Commonwealth in relation to: the transfer of powers from institutions created by the 1992 Murray-Darling Basin Agreement to those created by the new agreement; water market rules and water charge rules; and critical human water needs. The bill is necessary under section 51(xxxvii) of the Constitution to enable the Commonwealth to legislate on these three matters because they are not mentioned in section 51 of the Constitution.

I refer first to the transfer of powers to the new Murray-Darling Basin institutions. The bill implements the arrangements set out in the new Murray-Darling Basin Agreement by enabling the Commonwealth to confer the powers and functions set out in the agreement on the institutions set out in the agreement. To ensure that there is only one version of the agreement and the referral bill the package is being formally tabled only in one State Parliament. The package was tabled in the South Australian Parliament earlier today. I have had that confirmed.

I now refer to water charge and water market rules. The existing Commonwealth Water Act gives the Commonwealth power to either make rules or determinations in relation to water charges and to regulate water trading by making "market rules". However, as a result of Commonwealth constitutional limits, Commonwealth rules under existing arrangements cannot be applied uniformly throughout the basin. For example, in the case of water charge rules this has created the potential for overlap and duplication between the role of the Independent Pricing and Regulatory Tribunal in New South Wales and the role of the Australian Competition and Consumer Commission across the basin as a whole.

It was therefore agreed in paragraph 6.8 of the July intergovernmental agreement to extend the application of the water market rules and water charge rules to cover, respectively, all irrigation infrastructure operators and all bodies within the basin that charge regulated water charges. The referral bill now makes this possible. This means the Australian Competition and Consumer Commission will be responsible for all water charge rules within the basin. In order to avoid the potential inefficiencies and inequities arising from two charging systems applying in the State the intergovernmental agreement allows New South Wales to opt in and to extend the powers of the Australian Competition and Consumer Commission to areas outside the basin if we are happy with the Commonwealth framework. These new arrangements will avoid the risk of increased administrative costs that would have occurred if the Department of Water and Energy and State Water had been required to make pricing applications to both the Independent Pricing and Regulatory Tribunal and the Australian Competition and Consumer Commission.

As with the water charge rules, the intergovernmental agreement proposes that market rules be set by the Australian Competition and Consumer Commission within the basin and possibly extended across the State, excluding urban supply. As with water charge rules, the referral bill now makes this possible. This is a significant reform because the irrigation corporations account for approximately 60 per cent of the high security entitlements in the regulated Murrumbidgee River and the sections of the Murray River in New South Wales, and 70 per cent of the general security entitlement. While increased trade has benefits, I also recognise that uncontrolled trade out of irrigation corporations has the potential to undermine the viability of the infrastructure on which the irrigation communities depend. My department will work closely with the Australian Competition and Consumer Commission and the irrigation corporations to ensure that the rules are fair to all parties.

I now turn to critical water needs. Under part 7 of the July intergovernmental agreement the States agreed to refer powers to enable planning for critical human water needs within the Murray River system to occur through the Commonwealth Water Act. In summary, the proposal in the July intergovernmental agreement was to enable the basin plan to: specify circumstances when departure from the normal water sharing arrangements between the States will be necessary; specify the amount of conveyance water required to deliver these requirements along the Murray River; provide for South Australia to store water in New South Wales and Victoria's upstream storages; and set trigger points for ministerial council intervention.

The States will continue to be responsible for jointly meeting the conveyance requirements necessary to deliver critical human needs along the Murray River, but each State will be responsible for managing their share of available water to meet their respective critical human needs. The referral bill provides for this and defines critical human needs as core human consumption requirements in rural and urban areas, and those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs.

I now turn to the Water Management Act Amendment Bill 2008. The bill will contribute to the further evolution of the water management system in New South Wales by significantly improving arrangements for enforcement and compliance under the Act. These improvements are being made to prevent water theft. They will ensure that our farmers and our precious riverine environments and communities get the water they are legally entitled to get. These improvements are particularly timely as the record drought continues across much of the State. I understand that 70 per cent of the State is drought declared at the moment. At this time the Government and the community are focused as never before on doing everything possible to sustain our inland rivers and the communities they support. Combating water theft is one of the keys to getting our rivers and our river communities through this difficult time, and the bill will be welcomed for that reason.

The bill also introduces further improvements for water sharing and planning during drought. The key changes contained in the bill include: improved enforcement arrangements, including improved powers for investigators, and improved arrangements for presenting evidence; increased fines for offences under the Act; strengthening of offences under the Act and new alternatives for sentencing; improved options for water sharing planning during drought; and amendments to ensure that irrigation corporation licences are consistent with the National Water Initiative, basic landholder rights to stock and domestic water are exercised reasonably, and the announcement of water restrictions can be made more easily.

I will now outline some of these provisions in detail. The first is investigator powers. The bill contains provisions providing departmental authorised officers with the ability to properly, comprehensively and efficiently investigate potential breaches of the provisions of the Act, such as water theft. The ability to properly investigate potential breaches of the Act is critical to providing the community with certainty that breaches will be detected and successfully prosecuted. The bill standardises and consolidates the powers of authorised officers in checking compliance with the provisions of the Act and investigating suspected non-compliance. These powers are analogous to other New South Wales legislation, such as the Protection of the Environment Operations Act 1997, that aim to protect important natural resources such as water.

Next are arrangements for presenting evidence. This bill introduces a number of changes that will assist the department to successfully take action against people suspected of breaking the rules. For example, the bill allows for the use of evidentiary certificates in legal proceedings to prove matters of an administrative nature. Evidentiary certificates will remove the need for a licensing officer to appear in court to state that a person does hold a licence. The use of evidentiary certificates is a tool that is common to other environmental legislation. They are used to streamline cases where the matters seeking to be proved are simple and technical matters. Another example relates to matters that are reasonably believed to be solely within the defendant's knowledge and control. For these matters, the commonsense evidentiary provisions contained in the current Act have been retained and some minor loopholes have been closed.

For example, it is reasonable to presume that the construction and use of a water pump located on a person's land has been constructed and is being used by the landholder to pump water. This presumption already exists and is being retained. Similar presumptions already exist in relation to drainage works and use of water on land. However, prior to this bill there was a gap in relation to controlled activities, such as excavating a riverbed, and aquifer interference activities. Unlike the other activities regulated by the Act, for these activities the prosecution had to prove the specific identity of the person who did the work. This was a major barrier to effective enforcement because it was not always possible, due to the vast geographical area of the State, to catch someone carrying out an activity.

The bill adopts a more commonsense approach. This is consistent with accepted legal practice, and it is fair as it enables those presumptions to be rebutted if evidence exists to the contrary. For example, if a pump was not constructed by a defendant on his or her property, the defendant could provide evidence to rebut the presumption that he or she constructed the pump. It is clear why this is a common legal approach—because it is a commonsense approach. These presumptions make no change to the existing requirement that the prosecution must prove beyond reasonable doubt that an offence has occurred. The Water Management Act 2000 already contains provisions concerning evidentiary presumptions; the bill refines these to bring them into line with other similar New South Wales legislation.

The next item is increased fines or penalties. With New South Wales suffering from the worst drought on record, it is critical that water is used by those lawfully entitled, and extracted according to licence conditions. Water theft directly reduces the water available to users and the environment. To put it simply: water theft is not a victimless crime. That is why I propose to introduce new maximum penalties for offences under the Act. This will send a strong message that stealing water is now regarded as a serious crime against property and a serious crime against the environment. Stock theft has traditionally been regarded in the bush as a low act, and these new

penalties send the message that taking water illegally should be regarded in the same way.

Maximum penalties in the bill for individuals found guilty of offences under the Act, including for water theft, are up to $1.1 million for individuals, with up to two years in prison. A further maximum penalty of $132,000 will apply for each additional day the offence continues. Corporations will also be subject to new maximum penalties. The maximum penalty in the bill that may be imposed on a corporation is $2.2 million and $264,000 for each day the offence continues. The new maximum penalties are a genuine attempt by the Government to crack down on water thieves and ensure that those members of the community who are using water lawfully are not unfairly disadvantaged. In short, the new maximum penalties send a strong message to offenders and the courts that illegal behaviour under the Act, including water theft, will not be tolerated in these difficult times.

The Act currently contains various offence provisions that began in the Water Act 1912. The bill seeks to update these provisions to improve the ability of the State's water watchdog, the Department of Water and Energy, to police the use of water in New South Wales. The bill contains provisions dealing with intentional and negligent behaviour. The bill also contains provisions addressing behaviour such as water meter tampering and harming aquifers. This demonstrates the commitment of the Government to address the concerns of individuals, farmers, environmentalists and industry that water must be shared fairly and equitably.

The bill also contains new sentencing provisions setting out the matters courts are required to take into account when imposing penalties for breaches of the Act. This is intended to assist the courts to determine an appropriate penalty. Water is now a high-value, tradeable asset for individuals, farmers and industry. Penalties for theft of valuable property should reflect the value of that property. The bill creates flexibility by giving the courts a wider range of sentencing options than is currently the case. Courts will now be able to require a guilty party to carry out or contribute to specified environmental projects to restore water sources or publicise the facts of their offence in the media.

The bill also contains notice provisions. This will ensure there is adequate power within the Act to direct a person to do, or not do, certain things, including to cease actions that are in contravention of the Act or that have an adverse impact on water sources; and to remediate waterfront land where actions have been carried out unlawfully. The bill also makes improvements to matters other than compliance issues, including changes relating to water planning, irrigation corporations, water access licences and publicising orders under the Act.

Water sharing plans set the rules for the sharing and distribution of water between users and the environment. The severe drought conditions in the State have resulted in the need to suspend a number of these plans to properly manage the impacts of the drought on critical industry and town water supplies as well as the environment. At the moment, the effect of suspending a plan is to suspend all the rules in the plan, which can adversely affect some water users. The bill will allow parts of a plan to be suspended during a severe water shortage, but avoid the need to suspend the whole plan. This will allow improved water management during drought. Importantly, the bill also ensures that the suspension of a plan is for a limited time and that the plan cannot remain suspended indefinitely. The other water planning matter addressed in the bill is provisions relating to local areas where groundwater extraction has had adverse impacts, for example, subsidence. The bill gives these provisions statutory force and will enable water restrictions to be imposed when it is necessary to protect groundwater sources in certain cases.

With regard to irrigation corporations, the State is now subject to a clear obligation to implement key aspects of the National Water Initiative. One of the most urgent is the need to ensure compliance with national metering obligations and standards. Irrigation Corporations operate in large parts of New South Wales. In some valleys their entitlements to water can represent the majority of the water in the valley. This bill will allow an irrigation corporation's operating licence to be amended to bring it into line with any requirements necessary to give effect to the National Water Initiative. To ensure that irrigation corporations are properly engaged in this process the bill provides that an amendment to the operating licence can only occur following consultation with the irrigation corporation.

The bill addresses two issues concerning water access licences. Firstly, the bill makes it clear that a person's basic rights under the Act must be exercised in accordance with any guidelines released on the reasonable use of water. This step will not affect a person's existing rights to water. However, it will promote equity amongst users and ensure that water is used responsibly—something that is particularly important in times of increasing water scarcity. The bill also introduces special provisions relating to co-holdings in water licences. These changes will allow a holder of a licence to nominate a person to act on their behalf in relation to their holding in the licence. This will create efficiencies in the system and further facilitate trading by reducing red tape.

The bill simplifies the publication requirements for temporary water restriction orders by providing a mechanism to communicate restrictions quickly through radio or television. If the restrictions are not urgent, the bill allows for the restrictions to be communicated in print. These changes will help to reduce red tape associated with publication requirements and will allow the department to communicate water restrictions to members of the public in the most effective manner. In addition, the bill will streamline the publication requirements in relation to newspapers for other orders and notices under the Act to ensure that they can be effectively communicated to all people affected. This is a very important bill. It is critical both for the ongoing reform of water management in

New South Wales and for safeguarding the future of our rivers and river communities to support our irrigation industries and our riverine environments. I commend the bill to the House.