

WATER MANAGEMENT AMENDMENT BILL 2008

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Second Reading

The Hon. PENNY SHARPE (Parliamentary Secretary) [4.42 p.m.], on behalf of the Hon. Eric Roozendaal: I move:

That this bill be now read a second time.

The Water Management Act 2000 is the primary legislation for the management of the State's water resources. The Carr Government introduced the Act in 2000. It provided 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. It fundamentally overhauled water rights in the State of New South Wales. 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 now been commenced. 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 the 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. New South Wales was the first State to allocate a share of water to the environment. New South Wales was the first State to give licence holders statutory rights to compensation for reductions in water entitlements. The Government intends to continue this proud tradition of water reform.

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 to catch water thieves. The improvements made by the bill are necessary to ensure that our farmers, and our precious riverine environments, get the water to which they are legally entitled. The improvements are particularly timely as the record drought continues across much of the State. 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 bill was initially introduced as cognate legislation with the Water (Commonwealth Powers) Bill 2008. The bills were introduced as cognate as they both went to the same issue: safeguarding the future of our rivers and river communities. The bills were also introduced together because stakeholders had previously expressed concern about water compliance and there was a pressing need to close known loopholes before the summer irrigation period.

While the Commonwealth Powers Bill was passed by Parliament, Minister Costa agreed to defer debate in this place to enable him to meet with stakeholders and hear their views firsthand. The Minister has met with stakeholders in Deniliquin, Dubbo, Moree and Narrabri. He will shortly be meeting with stakeholders in Griffith and Wagga Wagga. I am pleased to report that the Government has had very positive feedback from those stakeholders on the proposed amendments and that there is widespread support for a stronger compliance framework for water.

However, stakeholders did raise four concerns about broader water management issues that relate to the amendments. Stakeholders are concerned about the role of the Commonwealth in water management, particularly in relation to purchase of environmental water, the role of the Australian Competition and Consumer Commission and the content of the Basin Plan under the Commonwealth Water Act 2007. The New South Wales Government understands these concerns and will continue to work with the Commonwealth and stakeholders to obtain outcomes that are in the best interests of New South Wales.

The second issue of concern to stakeholders was whether the amendments affected the floodplain harvesting policy that is currently under development. Floodplain harvesting is the collection, extraction or impoundment of water flowing across floodplains. This activity does not currently require a licence under the Water Management

Act 2000. The bill does not change this fact. Nor does the bill change the current requirements for approval under the Water Act 1912 for floodplain structures such as levees. The floodplain harvesting policy is being implemented so that, consistent with the National Water Initiative, floodplain harvesting will be licensed in the near future in a similar way to other forms of water use. This is because floodplain harvesting reduces the amount of water reaching or returning to rivers. That means it needs careful management to ensure it does not have negative impacts on downstream rivers, wetlands and other water users. So far the Government has developed a draft floodplain harvesting policy and is consulting with key stakeholders with a view to having the policy finalised in 2009.

The third issue raised by stakeholders relates to concerns about the possible impacts of the amendments on water users whose meters have unexpectedly failed. There obviously must be flexibility in the system to ensure that unforeseeable meter failure does not put an irrigation business out of action for a season. However, water cannot be managed and shared fairly unless it can be measured. This is why most licences require a meter to be installed, properly maintained and calibrated.

However, in exceptional circumstances it is appropriate that the Minister be able to approve the taking of water even though there is no working water meter and this would be a breach of the water user's licence conditions. This is intended to recognise genuine unforeseeable meter failures that cannot be rectified in a timely manner. It is not a way of avoiding meter maintenance or avoiding prompt repair or replacement of meters. It is not an excuse for failing to check that the meter was working before placing an order for water.

To ensure this is not abused the regulations may require the water user to provide information to the Minister such as when the meter failure was identified, the cause of the meter failure, when maintenance was last carried out on the meter and who conducted the maintenance, when the meter was last calibrated, when the water is required by, what steps have been taken to rectify the problem including when that action was taken, the identity of persons with whom orders for replacement parts or repairs have been placed and any consultant reports about the cause of the failure. The regulations may also specify information that the water user must provide about the amount of water taken if approval is given to extract water without a working meter. This may include information such as the number of hours the pump was operated or evidence of power or fuel usage.

The final issue raised by stakeholders relates to compliance within irrigation corporations. The irrigation corporations have expressed concern that they do not have adequate tools available in the event that one of their members takes more than their entitlement. This concern is very reasonable as the common law does limit the size and type of penalties that may be imposed through a contract. This means the penalties that irrigation corporations can impose on their members are limited. This proposal requires further consideration to ensure that the appropriate balance is struck between the rights of the irrigation corporations and the rights of their members. Minister Costa has therefore asked the irrigation corporations to work with his department to develop this proposal and to consult with their members in order to enable consideration of further possible amendments in the future. I seek leave to incorporate the remainder of my speech in *Hansard*.

Leave granted.

I turn now to consider the contents of the bill. 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 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 each of these changes in more detail.

ENFORCEMENT ARRANGEMENTS

Investigator Powers

The first matter is investigative 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 there is critical to providing the community 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.

Directions

The next component of a compliance framework is the power to direct or order persons to do or not to do certain things, for example to stop an unlawful activity or to remediate harm caused by such activity. The Water Management Act 2000 currently empowers the Minister to issue various orders and directions to landholders and other persons. The bill clarifies and extends some of these powers, including clarifying who can be issued with an order or a direction and the measures that may be specified.

The bill ensures that persons can be directed to do things to ensure that works or activities are brought into compliance with the Act or with a licence or approval (for example, that repairs are carried out to a pump). It strengthens the Government's ability to manage the water resource by providing for directions to remediate land or to repair or restore works where actions have been carried out unlawfully or actions have been carried out that have caused harm to a water source or are likely to cause such harm. It also makes provision for obtaining a report as to the measures to be taken by a particular person to comply with the direction.

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 that can be used 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 in fact 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 common sense 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 river bed) 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 actually carrying out an activity.

The bill adopts a more common sense 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 common sense approach.

These presumptions make no change to the existing requirement that the prosecution must prove beyond reasonable doubt that an offence has occurred. Section 367 of 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.

Responsibilities of owners

As I have just mentioned the Water Management Act 2000 already contains provisions addressing the responsibilities of occupiers and landholders. These are currently dealt with through the evidentiary provisions in the Act. The bill builds on these provisions by making it clear that occupiers will be responsible for what happens on their land. This means that landowners will need to ensure that there are appropriate arrangements in place when contractors or other third parties are taking water or building structures on their land.

PENALTIES

Increased fines

The next item is increased fines and 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 am proposing 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 as a low act in the bush. These new penalties send the message that taking water illegally should be regarded the same way.

Under s.363B of the bill the maximum penalties for individuals found guilty of offences under the Act, including for water theft, have been increased and 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.

In addition, under s.363B of the bill corporations will also be subject to new higher maximum penalties. Under the bill the maximum penalty 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.

NEW OFFENCES AND SENTENCING OPTIONS

Offences

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, negligent and reckless behaviour. The offence provisions in the bill dealing with intentional, negligent and reckless behaviour are the most serious offences and attract the highest penalties.

For example, sections 60A(1) and (3) give rise to offences where a person intentionally or negligently takes water without obtaining an access licence permitting the taking of that water.

Sections 60C(1) and (3) give rise to offences where a person takes water and where that person intentionally or negligently fails to ascertain whether there is any or sufficient water credited to that person's access licence.

Section 911(1) gives rise to an offence where a person takes water by means of a metered work while its metering equipment is not operating properly and where that person intentionally or negligently fails to ascertain whether the metering equipment is operating properly.

Section 91K (1) gives rise to an offence where a person intentionally or recklessly interferes with, damages, destroys or disconnects metering equipment.

Section 345 (1) gives rise to an offence where a person intentionally or negligently harms an aquifer or waterfront land.

These provisions are aimed at addressing deliberate behaviour that has the effect of removing precious water from our environment. The provisions also address other deliberate behaviour that has the effect of harming the environment, or interfering with important equipment used to measure the volume of water a person can lawfully use.

Consistent with the current Water Management Act the bill also contains offences that do not require the prosecutor to prove intentional, negligent or reckless behaviour. Although these offences are serious, they attract lower penalties than those offences involving intentional, negligent or reckless behaviour.

These changes will help ensure everyone gets the water they are legally entitled to.

Sentencing

The bill sets 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.

The 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 MANAGEMENT PLANNING

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. The effect of suspending a plan at the moment is to suspend all the rules in the plan, which can adversely affect some water users.

The bill replaces the existing section 60 (2) of the Act with a new provision, section 49A. The amendment will allow only parts of a plan to be suspended during a severe water shortage, and will 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 by the bill is in relation to local areas where groundwater extraction has had adverse impacts, for example subsidence. The water sharing plans for groundwater currently provide that local rules and restrictions can be made but do not provide any framework for how these local access rules and restrictions should be made or publicised. The bill gives the Minister the power to impose temporary water restrictions on the taking of water from an aquifer if this is necessary for the maintenance or protection of that aquifer or groundwater-dependent ecosystems or to address localised impacts and hot spots in groundwater. It also provides a mechanism for the publication of these orders.

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.

The bill amends section 123 to allow 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.

ACCESS LICENCES

The bill addresses two issues concerning water access licences.

Firstly, the bill makes it clear that a person's basic rights in section 52 of 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—a landholder may still exercise their basic rights without an access licence. However, this change will promote equity amongst users and ensure that water is used responsibly—something that is particularly important in times of increasing water scarcity.

This 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 their holding in the licence. This will create efficiencies in the system and further facilitate trading by reducing red tape.

PUBLICATION

This 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 new section 324 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.

CONCLUSION

This bill is critical for the ongoing reform of water management in New South Wales and for safeguarding the future of our rivers and river communities. In order to support our irrigation industries and our riverine environments I commend the bill to the House.