

Water Management Amendment Bill 2005

Explanatory note

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

Overview of Bill

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

- (a) to clarify the provisions relating to planned environmental water and to provide for access licences to be converted to planned environmental water in certain circumstances, and
- (b) to provide for access licences with adaptive environmental water conditions, and
- (c) to include new provisions in relation to compensation under amended or remade water management plans, as required by the National Water Initiative, in accordance with agreements for the sharing of compensation that are to be entered into with the Commonwealth, and
- (d) to include measures, as required by the National Water Initiative, to require irrigation corporations to arrange their affairs so as to remove certain barriers to shareholders transferring their water entitlements away from the corporations, and
- (e) to facilitate co-holders of access licences exiting from those access licences, and
- (f) to enable management plans to establish different rules of priority of categories and subcategories of access licence to those established in the Act, and
- (g) to remove the mandatory 5-year review of a local water utility access licence to allow the Minister to review the licence at any time or on request, to expand the range of commercial activities to be considered and specify the relevant criteria when determining in any such review whether the water entitlements conferred by the licence should be increased, and to provide for civil penalties for certain contraventions by local water utilities of the Act or their access licences, and
- (h) to extend the scheme of “water tagging” to enable the holder of an access licence, within certain specified water tagging zones within the State, to nominate a water supply work by which water will be taken under the licence that is located in a different water source to that to which the licence relates, and
- (i) to enable the Minister to impose conditions on water management works approvals relating to cold water releases, and
- (j) to enable the Ministerial Corporation to construct, maintain and operate gauging stations and other monitoring equipment, and
- (k) to make amendments relating to savings and transitional matters, particularly to facilitate transition in overallocated water sources, and to improve procedures for the recording of matters in the Water Access Licence Register, and
- (l) to enable certain management plans to be amended by the Minister to make further provision with respect to planned environmental water, adaptive environmental water and floodplain harvesting, and
- (m) to make other minor amendments and amendments by way of statute law revision.

The Bill also amends the *Protection of the Environment Operations (General) Regulation 1998* to exempt a person releasing cold water in accordance with

conditions referred to in paragraph (b) above from the offence of polluting waters under the *Protection of the Environment Operations Act 1997*.

Outline of provisions

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

Clause 2 provides (with certain exceptions) for the commencement of the proposed Act 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 and 2.

Clause 4 is a formal provision that gives effect to the amendment to the *Protection of the Environment Operations (General) Regulation 1998* set out in Schedule 3.

Schedule 1 Amendment of Water Management Act 2000

Amendments relating to environmental water

Schedule 1 [1] amends section 8 of the Principal Act so as to specify the ways in which a management plan may commit water as planned environmental water.

Schedule 1 [2] inserts proposed sections 8A–8E into the Principal Act dealing with environmental water.

Proposed section 8A enables the Minister to cancel a supplementary access licence or a licence of a prescribed category or subcategory that is held by the Minister and commit an equivalent amount of water as planned environmental water in the relevant water source.

Proposed section 8B permits the holder of an access licence to request the Minister to impose an adaptive environmental water condition on the licence if the relevant management plan so provides. The condition is to be amended or removed at the request of the holder of the access licence. An adaptive environmental water condition is a condition that commits water for specified environmental purposes, either generally or at specified times or in specified circumstances.

Proposed section 8C enables the Minister to grant an access licence of a category or subcategory determined by the Minister to the Minister, a catchment management authority or other public body. An access licence may only be granted under the proposed section if the relevant management plan so provides and the licence is equivalent to water in the water source concerned that is not identified for commitments to basic landholder rights and other extraction rights that is saved by work or other actions.

Proposed section 8D enables the Minister to keep a surrendered access licence or transfer it to a catchment management authority or other public body if the Minister imposes an adaptive environmental water condition on the licence and the licence has been surrendered as a result of water savings (for example, water savings achieved by means of works or other improvements or recycling).

Proposed section 8E contains provisions relating to adaptive environmental water conditions and their operation.

Schedule 1 [3] makes a consequential amendment to section 20 of the Principal Act to require the water sharing provisions of a management plan to deal with adaptive environmental water.

Schedule 1 [45] amends Schedule 1A to the Principal Act to require adaptive environmental water conditions to be recorded in the Water Access Licence Register.

Schedule 1 [9], [15], [61] and [64] make consequential amendments.

Water tagging

Schedule 1 [25] amends section 71W of the Principal Act to permit the holder of an access licence to nominate as the water supply work by means of which water is extracted under the licence a water supply work that is situated in a NSW water tagging zone or an interstate tagging zone (if the operation of the work is lawful in the interstate tagging zone and certain arrangements are in place with the other State or Territory in which the zone is located). This concept is known as “water tagging”.

Currently, a water supply work can only be nominated if it is in the same water source as that for which the access licence was granted.

Schedule 1 [4] and [28] amend sections 20 and 71Z of the Principal Act to provide that the access licence dealing principles only may establish NSW water tagging zones and interstate water tagging zones.

Schedule 1 [41] amends section 341 of the Principal Act to make the holder of an access licence liable if the person who manages or controls a water supply work nominated for the access licence takes water by means of that water management work in contravention of that section.

Schedule 1 [14], [27] and [42] contain consequential amendments.

Amendments to and other matters relating to management plans

Schedule 1 [6] amends section 42 of the Principal Act to provide that amendment of a management plan by an Act does not prevent its later amendment in the normal manner provided for in the Principal Act.

Schedule 1 [50] amends Schedule 9 to the Principal Act to validate any management plans and amendments to management plans published in the Gazette before the commencement of the amendment and to validate any actions done under those plans.

Schedule 1 [59] inserts proposed Schedule 12 into the Principal Act which makes certain amendments to certain management plans.

Part 1 of the proposed Schedule will amend all management plans made before the commencement of the Part to include provisions relating to adaptive environmental water.

Part 2 of the proposed Schedule will amend all management plans made before the commencement of the Part to include provisions relating to planned environmental water.

Part 3 of the proposed Schedule will amend all management plans for regulated and unregulated rivers made before the commencement of the Part to include provisions relating to floodplain harvesting.

Provisions facilitating trading in water

Schedule 1 [30] inserts proposed section 74 into the Principal Act to provide an easier procedure for the exit of a co-holder from an access licence. The proposed section enables the Minister, on the application of one or more co-holders, to extinguish their holdings in one access licence and to grant a new separate access licence. The Minister may only take action if at least a majority of the co-holders of the original access licence consent or the Supreme Court makes an order dispensing with the consent.

Schedule 1 [48] inserts proposed Schedule 1B into the Principal Act which contains the procedure for determining the share component, extraction component, conditions and water allocations applying to the new licences created under proposed section 74.

Schedule 1 [40] and [63] make consequential amendments.

See also the amendments contained in Schedule 2 relating to irrigation corporations.

Water Access Licence Register procedures and dealings in access licences

Schedule 1 [29] inserts proposed section 72A into the Principal Act to make it clear that a dealing in an access licence that is held by more than one person (with the exception of a dealing under proposed section 74) requires the consent of all of the co-holders and relates to the licence as a whole rather than to the individual holdings. The only dealing that is permitted under the Act in relation to an individual holding in an access licence is a transfer of the holding or a term transfer of the water entitlements under the holding.

Schedule 1 [46] and [47] amend Schedule 1A to the Principal Act to require the time and date of the recording of a dealing in the Water Access Licence Register to be

recorded in the register itself rather than endorsed on the dealing.

Compensation

Schedule 1 [35] amends section 87 of the Principal Act to provide that no compensation is payable under that section for reductions in water allocations due to a variation of a bulk access regime because of an amendment made by an Act to a management plan.

Schedule 1 [36] amends section 87 of the Principal Act to limit the payment of compensation under that section to reductions in water allocations arising during the operation of the first management plan.

Schedule 1 [37] inserts proposed sections 87AA and 87AB into the Principal Act. Proposed section 87AA provides for the payment of compensation to the holders of certain access licences in respect of a reduction in water allocations due to changes arising under management plans that operate after the first management plan or during certain extensions of the first management plan. Compensation is only payable in respect of changes in government policy or changes providing more environmental water because of the availability of more accurate scientific knowledge showing a need for the provision of that water. Compensation in respect of the provision of more environmental water is calculated over a 10-year period and is not payable for reductions of 3% or less. The liability for the payment of such compensation is to be shared between the State and Commonwealth governments and is not payable by the State unless funding is received from the Commonwealth for its share. Some other exceptions to the payment of compensation under the proposed section are specified, including where the reduction in water allocations concerned is for the purpose of restoring water to the environment because of natural reductions in inflow to the water source.

Proposed section 87AB provides that no compensation is payable in respect of conduct in relation to a management plan or an amendment of a management plan occurring before its commencement. Conduct includes representations of any kind as to the effect of government policy concerning or the content of any such plan or amendment.

Schedule 1 [7] and [8] amend section 43A of the Principal Act to require the Natural Resources Commission to state if amendments suggested to management plans are for the purposes referred to in proposed section 87AA.

Schedule 1 [10] inserts proposed section 46 into the Principal Act to require the Minister when replacing or amending a management plan to state to what extent any changes to existing provisions are for purposes referred to in proposed section 87AA.

Schedule 1 [11] amends section 47 of the Principal Act to provide that any such statement of the Minister as to the purpose of changes to a management plan can only be questioned before the Land and Environment Court within a specified time.

Schedule 1 [33] inserts proposed section 86 into the Principal Act to define certain terms used in Division 9 of Part 2 of Chapter 3 of that Act dealing with compensation.

Schedule 1 [34] makes a consequential amendment.

Local water utilities

Schedule 1 [16] amends section 66 of the Principal Act to enable the Minister to review a local water utility access licence at any time to determine whether the water entitlements need to be increased to deal with variations in populations and associated commercial activities. Currently, the Minister must conduct such a review every 5 years. The amendment provides that before the Minister increases the water entitlements of a local water utility on a review, the Minister is to seek the advice of the Minister for Utilities on certain matters and take into account that advice and other specified matters, including whether the relevant management plan contains provisions indicating whether or not there is capacity in the relevant water source for increases in entitlements for local water utilities. The definition of **associated commercial activities** is expanded to include food and fibre processing and criteria

for making a determination are included. **Schedule 1 [17]** makes a consequential amendment.

Schedule 1 [32] amends section 78 of the Principal Act to enable the Minister to impose civil monetary penalties on local water utilities instead of or in addition to suspending their licences for failure to comply with certain provisions of the Act or the access licences. Currently, the imposition of such penalties applies only to major utilities.

Schedule 1 [43] amends section 368 of the Principal Act to include a right of appeal to the Land and Environment Court on a decision to order a local water utility to pay a civil penalty to the Minister.

Savings and transitional matters

Schedule 1 [49] amends Schedule 9 to the Principal Act to enable regulations of a savings and transitional nature to be made consequent on the enactment of the proposed Act.

Schedule 1 [51] amends Schedule 10 to the Principal Act to change the provisions currently applying to the conversion of water entitlements under the *Water Act 1912* to access licences so as to provide that the water entitlements conferred by the new access licence are to be of the same quantity as conferred by the old entitlement unless the regulations and the relevant management plan specify a methodology for calculating a different quantity of water. Currently, the Schedule provides that the quantity of water conferred under the new access licence is to be the same as that conferred under the old entitlement.

Schedule 1 [52] amends Schedule 10 to the Principal Act to enable an access licence that replaces an entitlement to water under the *Water Act 1912* to provide for a reduction of the quantity of water that a person may take under the licence, or a reduction in the share component of the licence, over a specified time if the regulations and the relevant management plan so provide.

Schedule 1 [53] amends Schedule 10 to the Principal Act to enable the regulations to amend Schedule 11 to that Act to make provision for categories and subcategories of licences prescribed by the regulations. Schedule 11 contains a table that sets out the entitlements under the *Water Act 1912* and lists the categories and subcategories of access licence to which they are converted. However, section 57 (1) (l) and (2) of the Principal Act currently enable the regulations to prescribe additional categories and subcategories of access licence for the purposes of that Act.

Schedule 1 [54] amends Schedule 10 to the Principal Act to preserve authorisations conferred by entitlements under the *Water Act 1912* to take water for the purposes of food safety or essential dairy care.

Schedule 1 [55] and [56] amend Schedule 10 to the Principal Act to provide that certain calculations in relation to the water entitlements to be conferred by an access licence that replaces entitlements held by a local water utility for town water supply purposes are to take account of the area or water management works covered by all the entitlements held by the local water utility.

Schedule 1 [58] amends Schedule 10 to the Principal Act to extend from 24 months to 36 months the period within which persons may claim security interests in access licences that replace entitlements under the *Water Act 1912*.

Miscellaneous matters

Schedule 1 [5] amends section 41 of the Principal Act to provide that the manner of making a management plan is by order published in the Gazette.

Schedule 1 [18] makes an amendment to the Principal Act by way of statute law revision.

Schedule 1 [12] amends section 56 of the Principal Act to enable the extraction component of an access licence to authorise, in addition, the taking of water from a water source not referred to in the share component of the licence if the two water sources are vertically abutting (either wholly or partly). **Schedule 1 [14] and [57]**

make consequential amendments.

Schedule 1 [13] amends section 58 of the Principal Act to enable management plans to establish different rules of priority to those established in the Principal Act.

Schedule 1 [19] amends section 68A of the Principal Act to enable the Minister to amend the share component or extraction component (or both) of an access licence in circumstances where erroneous location data has resulted in the holder of the access licence taking water from a different location to that specified in the licence.

Schedule 1 [57] makes a consequential amendment.

Schedule 1 [21] and [23] amend sections 71B and 71N of the Principal Act to enable a term transfer of the water entitlements conferred by an access licence to be extended. **Schedule 1 [20] and [22]** make consequential amendments.

Schedule 1 [24] amends section 71S of the Principal Act to enable the Minister, by order published in the Gazette, to declare that the right to apply for the amendment of the extraction component of an access licence for a particular water source is to be acquired by auction, tender or other means.

Schedule 1 [38] amends section 100 of the Principal Act to enable the Minister to impose conditions on water management work approvals in respect of the release of cold water. (See also amendments contained in Schedule 3.)

Schedule 1 [39] amends section 102 of the Principal Act to provide that notice is not required to be given by the Minister of the proposed variation of a discretionary condition on a water management work approval if the variation is made with the consent of the holder of the approval.

Schedule 1 [44] amends section 372 of the Principal Act to give the Ministerial Corporation under that Act the function of constructing, maintaining and operating gauging stations and other monitoring equipment.

Schedule 1 [60] corrects a wrong cross-reference.

Schedule 1 [62] updates an out-of-date reference to a Department.

Schedule 2 Amendment of Water Management Act

2000 relating to irrigation corporations

Schedule 2 inserts proposed section 71ZA into the Principal Act to enable the Minister to order an irrigation corporation to pay a civil penalty if its constitution, any contract entered into by it with a member of the corporation or any other document associated with the operation of the corporation (such as transfer rules of the corporation), or any conduct of the corporation, prevents arrangements being made for the permanent transfer of a member's water entitlement to another access licence not held by the corporation. The proposed section will only apply to regulated river (high security) access licences and regulated river (general security) access licences held by an irrigation corporation (but not to any subcategory of those categories of access licence). The proposed section does not prevent an irrigation corporation from having barriers to transfer of a member's water entitlement in circumstances where the transfer would reduce the share component of the corporation's access licence by more than 4% (or such other percentage prescribed by the regulations) in any one year.

The amount of civil penalty that may be imposed is not to exceed \$500,000 and a further amount not exceeding \$20,000 for each day that the circumstances giving rise to the initial civil penalty continue to exist.

The proposed section also enables an irrigation corporation to unilaterally amend a water supply contract entered into with a member of the corporation for the purposes of complying with the section.

Schedule 3 Amendment of Protection of the Environment Operations (General)

Regulation 1998

Schedule 3 amends the *Protection of the Environment Operations (General) Regulation 1998* to exempt a person releasing cold water in accordance with

conditions relating to those matters imposed on an access licence under the *Water Management Act 2000* from the offence of polluting waters under the *Protection of the Environment Operations Act 1997*.