



Legislative Assembly

Water Management Amendment Bill

23/10/2002

Hansard

Extract

Second Reading

Mr AQUILINA (Riverstone—Minister for Land and Water Conservation, and Minister for Fair Trading) [12.29 p.m.]: I move:

That this bill be now read a second time.

On 8 December 2000 the Water Management Act was assented to, thereby ushering in a new era of water management in this State. That piece of legislation was the product of an extensive review of how we as a community manage water. It was also the product of close negotiations between government, water users, environmentalists, indigenous people and others. It represented a significant achievement. This bill continues the work of improving the legislative basis of water management. It introduces some new provisions to improve water planning and trading, as well as provisions to clarify a variety of technical matters. While largely machinery in their nature, these amendments to the Water Management Act are important because these will greatly improve its implementation.

Before I turn to the amendments, it is worth reminding ourselves of some of the major changes that the Water Management Act introduced. First, the new legislation heralded the recognition of the environment and sustainability in our water law. It incorporated a way of thinking, as well as a set of principles and practices, that acknowledge the environmental fragility of water systems. For example, it entrenched in law the objective of ecologically sustainable development in the area of water. Further, as fundamental objects and principles, it clearly specified the protection, enhancement and restoration of water sources and their associated ecosystems. In sharing access to water, it gave primacy to environmental health. It also gave legislative recognition to biodiversity, the protection of habitats and the avoidance or minimisation of land degradation as they relate to the use and management of water.

Another major change was the introduction of a broad-based and participatory water management planning system. This system was put in place to allow all parties, including farmers and irrigators, environmentalists, indigenous people and local councils, to jointly resolve crucial water management issues at the local level. To this end, water sharing advisory committees have been established around the State and have produced some 36 draft management plans. These have recently been released for public consultation. Many honourable members would have seen the newspaper advertisements calling for comments. Those comments have been received and reviewed. These plans are now being finalised and are expected to be made in the near future.

The Water Management Act also made major changes in the areas of water sharing and licensing. It introduced a simple concept: water to sustain the health of water sources as first priority; water for basic land-holder rights as next priority; then a framework for sharing the balance between competing interests through the licensing system. The previous concept of a single licence containing three parts was replaced with an access licence, representing a share of the available water; a works approval, representing permission to use a pump or bore to take water; and a use approval, representing the authority to use the water on land. Related to this change was the separation of water rights from land, permitting rights to be more fully tradeable. In turn, free trading of water rights will lead to the re-allocation of water to its highest value and best use. Another important change was that the rights of indigenous people were embedded in the Water Management Act as basic land-holder rights.

The amendments contained in this bill fall into four main areas. Amendments relate to water sharing plans, the access licence register and trading, the access licences and approvals system, and definitional matters. The first group of amendments is very important to the water planning process. They enable water sharing plans to be made in the manner that the water sharing advisory committees have recommended. These plans—which are the practical basis of water management—must be implemented in a way that maximises their benefit and minimises the possibility of adverse effects. Experience to date with the work of the committees has been encouraging, but we need to secure in legislation the mechanisms that permit them to best carry out their path-breaking work.

The second group of amendments enables the arrangements for the access licence register and trading in water entitlements to be given best effect. They make the register more sophisticated and establish rules relating to the rights recorded in the register. These amendments also clarify the nature and rules relating to the various types of dealings with access licences. The third group of amendments concerns the access licences and approvals system and its introduction across the State. Amendments provide for the phased introduction of the new system as well as a more targeted approach to placing embargoes on water sources. Another change will extend the facility to place conditions on approvals to joint water management arrangements between neighbours, such as drainage and floodwork schemes.

The fourth group of amendments deals with some of the Act's definitions. The amendments clarify a number of terms that appear throughout the Water Management Act and in its dictionary. These amendments have arisen from practical experience in administering the Water Management Act, in developing water sharing plans, and in consulting with water users and other interested parties. Several are the direct result of the Crown Solicitor's advice. Many have been developed in conjunction with water users and other interested groups. The amendments are needed so that the important work of managing this most valuable of resources can go ahead in a manner that is consistent and fulfils the objects and principles of the Water Management Act.

I will now deal with the specifics of each of the major amendments. I have already mentioned the committees that have worked so hard to produce draft water sharing plans. The bill contains several amendments to facilitate both their work and the operation of the plans. In making recommendations for water sharing plans, a committee must take into account a range of matters if the plan is to be realistic and meet the legislation's objectives. However, as the Water Management Act currently stands, there are some limitations that restrain committees in their work. For example, section 18 provides that a committee need only have regard to the socio-economic impacts of the proposals in the draft plan.

While clearly important in its own right, this alone is inadequate and out of touch with the full range of practical impacts that a plan can have. For the committees to do their work to best effect it is important that the matters for consideration fully cover real conditions. It is particularly important for the committees to recognise conditions and impacts from upstream and downstream of their area. This is because the area covered by a plan will generally be part of a broader, interconnected water system. Therefore, this bill introduces an amendment to section 18 to provide a more complete set of matters for consideration. Specifically, a committee can now have regard to the effect within the plan area of activities occurring, or likely to occur, outside the plan area. For example, activities upstream could have an impact on the availability and quality of water.

This change to section 18 will give the committees a better indication of what they need to consider when doing work. In turn, this will ensure that the plans are more reflective of the actual situation and consistent with the goals of the legislation. Additionally, a number of minor matters of a clarifying nature have been included in the bill to help committees do their work and for the plans to function. These include changes to ensure that provisions applying to a water management area can also apply to part of an area, ensure that discrepancies in the meaning of "land-holder" are removed and ensure that plans deal with certain core provisions. Further, the bill contains an amendment that provides a clear mechanism for the provisions of the plans to be reflected in existing licences. An amendment provides that matters addressed in a plan can be recorded on licences by way of mandatory conditions.

The next set of amendments I wish to address concern the access licence register. These amendments are very much needed if we are to achieve the objective of developing a market in access licences, thereby permitting them to be put to their highest value use. At present, section 83 of the Water Management Act provides for a register that shows the licences and also any subsidiary rights in them. Section 83 says little more because it was originally intended that the register would be nothing more than a simple list. However, following consultation with a variety of interested parties, it has become clear that a more sophisticated register would provide many benefits. In particular, a system is needed that would, firstly, facilitate a variety of transactions; secondly, ensure priority of interests based on their order of registration; and, thirdly, provide safeguards against fraud. The amendments in this bill deliver the legislative means to meet those objectives.

Dealing firstly with the register, it will be a computerised system with a separate entry for each licence. The entry will show the licence details, such as category, water source, date of expiry and entitlements. The entry will then show the owner's name and any charges, leases, reversionary rights or other interests affecting the licence. It will also contain the licence conditions and useful general information for licence holders, professionals and the public. Licence holders will be able to enter into a variety of transactions and have them recorded in the register. A set of simple forms will be used to modify or assign the licence and to create, vary, assign or extinguish subsidiary interests.

The transactions made on these forms will be stored and available for anyone to examine, as is the case with other public registers in this State. The public will also be able to search the entry for each licence. In other words, the register will be a searchable repository. People will be able to do this in person or through the Internet. To fund this expanded and more sophisticated register, those who use it—to register a document, search a licence, or obtain a copy of a document—will pay a fee. The fees will be set at the same level as the public currently pays in relation to the land register. I note that the fees for land are amongst the lowest in Australia for this kind of registration service, so those using the access licence register will not be unduly burdened.

Next, the bill provides for a system of priorities. A brief but very significant change is the introduction of new section 83C. It provides for a system of priorities that follows the one used in the General Registry of Deeds, which is maintained by Land and Property Information, formerly the Land Titles Office. The amendments alter the common law position by providing that a registered interest has priority over an unregistered interest, no matter when the documents were signed; and the order of priority amongst registered interests is based on the order in which they were registered. Under this system people are rewarded for registering their interest. Through prompt registration they gain priority over other people's unregistered interests even if they are aware of earlier, but unregistered, interests. Honourable members should note that, unlike the Torrens system, this is not a guaranteed system nor does registration cure defects in documents. The validity of documents is based on the common law and registration will not give documents any greater validity than they already have.

As to fraud protection, this will be achieved through the issue to each licence holder of a licence certificate. It will be a requirement for the certificate to be produced to allow a variation, change of ownership or new interest

to be imposed on the access licence. In this way it will be more certain that the licence holder has given his or her permission to the document's registration. This approach is modelled on the certificate of title that is used in the Torrens system, which is based on the title deeds that exist in common law or old system title. As we all know, you cannot legislate against fraud but you can introduce mechanisms that make fraud that much more difficult. This is one of those mechanisms.

The capacity to trade in access licences is one of the fundamental tenets of the Water Management Act. Accordingly, the provisions of the Act relating to the transfer of access licences must be clearly spelt out. There has been some confusion to date over the terminology employed in the Water Management Act in relation to transfers. Chapter 3 uses "transfer" to mean not just assignment—in the sense of change of ownership of a licence—but also the transfer of the exercise of the licence from one stretch of river to another. Further, "transfer" is used to cover the splitting of licences, changes to the water source and changes to the category of licence. The overuse of "transfer" needs to be corrected so that we have a clear and accurate way of describing the many changes that can, on application, be made to an access licence.

This bill introduces a new division 4 to chapter 3 to provide that clarity. Each of the many changes to an access licence is clearly specified. Section 71A, for example, deals with the change of ownership. Section 71B covers the conversion of an access licence to a new category. Section 71C provides for the splitting and reforming of access licences, which are to be known as subdivision and consolidation. Section 71D covers the transfer of part of an entitlement from one licence to another. The new division 4 also deals with the interstate transfer of access licences and what used to be known as "temporary transfers"—the sale of the actual water. A further change is the introduction of the concept of the nominated work. This is the pump, bore or other water management work that is used to actually take the water specified on the access licence. A new section 71J provides a clear means of changing from one pump or bore to another. These amendments are not departures from the original terms of the Water Management Act; rather, they are an elaboration and clarification of those terms. They bring more certainty to the nature of the changes to licences and their administration.

Related to transfers of licences are the subsidiary rights that can be created. Specifically, access licence holders will be able to charge for and lease their licences in accordance with the common law rules and these arrangements will be recorded in the register. I draw the attention of honourable members to a set of consequential amendments flowing from the redrafting of the transfer provisions. These concern some of the offence provisions in chapter 7 of the Act. Changes to the wording of some of the offences were necessary due to the new terminology introduced by the new division 4 and the introduction of the concept of nominated work. However, the redrafts do not change the nature of the offences; they simply make the words consistent with division 4.

The Water Management Act contains transitional provisions in schedule 9 that require the new access licence and approvals system to be introduced throughout the State on the same "appointed day". The system will replace the system run under the Water Act 1912. Changing licences from the Water Act to the Water Management Act is a major task. Amongst other things, it involves the making of numerous water sharing plans and the reviewing of tens of thousands of licences. As I have noted, plan making is well under way for priority areas and an administrative process has been implemented to progressively convert the licences associated with these plans. However, it is clear that both the plan making and licence conversion processes will take a number of years to finalise for the entire State.

If we were to wait until these processes were fully complete the commencement of the new system would be significantly and undesirably delayed. Conversely, if the access licence and approvals system were to be started before the processes were complete there would be great confusion and, possibly, loss of entitlements for some licence holders. As neither of these options is acceptable, this bill amends the Water Management Act to permit the staged introduction of the access licence and approvals system across the State. In particular, the Water Management Act is to be amended to permit the phased introduction of the Act by reference to water source, geographic area or licence category. It would then be phased in as the water sharing plan and data for each water source or group of licences is finalised. This amendment will ensure the earlier, as well as smoother and more systematic, change from the old to the new.

The next amendment that I would like to discuss is the one dealing with the preservation of existing rights in relation to Water Act licences and other forms of entitlements. The amendment provides for the continuation of existing rights and also the preservation of their priority against newly created interests. The amendment is necessary because water rights are no longer to be attached to land. I point out that this amendment fills a gap in the transitional provisions of the Water Management Act. Schedule 9 deals with the conversion of existing entitlements, such as licences under the Water Act, but it fails to address the many types of rights that can exist in relation to those entitlements. These may include things such as mortgages, leases and reversionary rights, as well as trusts and other types of agreements.

As the Act is currently drafted, the rights of the mortgagees and others could cease to exist on conversion of the water licence to an access licence. This is because the nature of the right is changed but, more importantly, the licence is no longer attached to the land that is the subject of the agreement. It would be wrong to deprive the interest holders of their rights due to an oversight in drafting. It would cause not only a clear and significant loss to them but also an unjust windfall to the licence holder. However, as the Water Management Act currently stands, this is precisely what could happen. To avoid this result, an amendment corrects the situation and states what has always been the Government's position—namely, that existing rights over Water Act licences and other entitlements are preserved. This change appears in new section 9A to schedule 9.

The amendment also provides that any priorities between existing rights are preserved. Further, it gives the

right holders 12 months from the date of conversion in which to register their rights in the new access licence register without losing any priority to newly created interests. This will permit people who have entered into agreement with licence holders to become aware, through the publicity that is planned, of the changes and the need to register their interest. The final amendments that I wish to outline are those concerning the Act's definitions. Anyone taking even a brief glance at the Water Management Act would see that it uses a variety of terms that have a particular meaning. Many of these meanings appear in the dictionary at the back of the Act. Since the Water Management Act commenced, practical use of the definitions has revealed some anomalies in their drafting. Of particular concern are the definitions of "commercial activities", "estuary", "flood work", "water source", "water supply work" and "waterfront land".

In relation to town water supplies, a number of words also need to be clarified. In response to the shortcomings of the current definitions, they are to be amended by this bill to make them clearer and more accurate. In this way, the legislation will be a more precise tool for managing this most valuable of resources. In summary, this bill contains a number of important amendments covering various aspects of the Act. They represent refinements, elaborations and articulations of an impressive and leading-edge bill. While largely mechanical and technical in nature, the amendments will ensure the smooth functioning of the Act and an efficient transition from the old system to the new. They will also extend important facilitates to licence holders. I commend the bill to the House.