

[Act 1999 No 87]



New South Wales

Water Amendment (Flood Control Works) Bill 1999

Explanatory note

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

Overview of Bill

Part 8 of the *Water Act 1912* provides for the regulation of “controlled works”. Controlled works are certain works, such as levees, that are constructed on the bank of a river or lake, or within a declared floodplain, which may prevent or mitigate the effect of floods. The construction of a controlled work requires the approval of the Water Administration Ministerial Corporation (*the Ministerial Corporation*) under the *Water Act 1912*. The Ministerial Corporation may also take steps to remove or modify an unauthorised controlled work.

The object of this Bill is to amend those provisions, as follows:

- (a) to expand the scope of Part 8, so that it covers works that affect the flow of water to or from a river or lake and that are used to prevent land from being flooded, and that are not constructed on the bank of a river or lake,
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- (b) to allow the Ministerial Corporation to prepare and adopt floodplain management plans and to simplify the procedure for approval of works that conform with the relevant floodplain management plan,
- (c) to allow the Ministerial Corporation to take into account a wide variety of matters when exercising its functions with respect to approvals under Part 8,
- (d) to require an increased level of co-operation from participants in the approval process,
- (e) to remove the requirement that objections to an approval and protests against conditions of an approval be referred to a local land board for resolution,
- (f) to allow the Ministerial Corporation to impose conditions on an approval during the currency of the approval,
- (g) to make it an offence to fail to comply with the conditions of an approval,
- (h) to increase the penalties for offences under Part 8,
- (i) to give the Ministerial Corporation additional enforcement powers under Part 8,
- (j) to extend the period in which proceedings may be brought for an offence under Part 8 from 6 months to 2 years,
- (k) to allow third parties to take action in the Land and Environment Court to restrain a contravention or threatened contravention of Part 8,
- (l) to make it clear that the Ministerial Corporation, and certain other persons, are not liable for acts done in good faith under Part 8,
- (m) to make other miscellaneous changes to the flood control works scheme.

The Bill also makes consequential amendments to the *Land and Environment Court Act 1979*.

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 on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Water Act 1912* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Land and Environment Court Act 1979* set out in Schedule 2.

Schedule 1 Amendment of Water Act 1912

Definition of “controlled work”

At present, “controlled work” is defined to mean an earthwork, embankment or levee, or other prescribed work:

- (a) that is constructed on land that is or forms part of the bank of a river or lake, or
- (b) that is within a floodplain.

The amendments extend the definition to include an earthwork, embankment, levee, or other work that is the subject of an order by the Ministerial Corporation, that affects the flow of water to or from a river or lake and that is used or to be used for, or has the effect of, preventing land from being flooded by water. It does not matter where the work is situated or proposed to be constructed. (See **Schedule 1 [12]** and **[16]**.) The effect of the extension is that those works will require approval under Part 8 of the Act. At present, similar works are required to be licensed under Part 2 of the Act. That requirement is removed. (See **Schedule 1 [5]** and consequential amendments in **Schedule 1 [4], [6]–[8]**.)

The amendments also replace a provision that allows regulations to be made that extend or limit the definition of “controlled work” with a provision that allows the Ministerial Corporation to extend or limit the definition by order published in the Gazette.

Floodplain management plans

Floodplains are declared by order of the Ministerial Corporation under section 166 of the Act.

The amendments allow the Ministerial Corporation to prepare and adopt a floodplain management plan for each floodplain or proposed floodplain. The plan is to be prepared and adopted, after public consultation, in accordance with the general principles and policies set out in the relevant floodplain development manual. (See **Schedule 1 [19]**, proposed section 166A.)

The Ministerial Corporation will be able to establish committees to assist in the preparation of floodplain management plans and to monitor their implementation. (See **Schedule 1 [19]**, proposed section 166B.)

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The amendments simplify the approval procedure for controlled works that conform with a relevant floodplain management plan. If the Ministerial Corporation is satisfied that a controlled work conforms with the relevant floodplain management plan, it will be able to approve the application without advertising the application or taking objections to the application. The formal objection procedure under the Act will apply only if the controlled work does not conform with the relevant floodplain management plan. (See **Schedule 1 [24]**, proposed section 168B, and **Schedule 1 [25]**, [26] and [27].)

Matters to be taken into account by Ministerial Corporation in exercising approval functions

At present, the Ministerial Corporation is required, when determining whether to grant or refuse to grant an approval, to renew an approval, or to impose conditions on an approval, to have regard to whether the controlled work concerned is likely to affect materially and prejudicially the distribution of flood waters in the vicinity of the work.

The amendments remove this requirement, and give the Ministerial Corporation a broad discretion to take into account any relevant matter in exercising its functions with respect to approvals under Part 8. (See **Schedule 1 [20]**, [29] (proposed section 171) and [37].)

In particular, the matters that may be taken into account by the Ministerial Corporation include the following:

- (a) the contents of any relevant floodplain management plan or any other relevant Government policy,
- (b) the need to maintain the natural flood regimes in wetlands and related ecosystems and the preservation of any habitat, animals or plants that benefit from periodic flooding,
- (c) any geographical features, or other matters, of Aboriginal interest,
- (d) the protection of the environment.

Other matters are set out in proposed section 166C (see **Schedule 1 [20]**).

Approval process

The amendments will allow the Ministerial Corporation:

- (a) to refuse to determine an application for approval that does not comply with the requirements relating to applications, and
- (b) to require an applicant for approval to provide further information in connection with the application, and

- (c) to require a person who formally objects to the granting of an application for approval to provide further information about the objection, and
- (d) to require the applicant and objector to participate in a mediation session, to be conducted by a person appointed by the Ministerial Corporation, for the purpose of resolving an objection to the granting of an approval.

(See **Schedule 1 [23]** and **[24]**, proposed section 168A, and **Schedule 1 [28]**.)

Referral of determination to prescribed tribunal

At present, if the Ministerial Corporation grants an application for an approval despite an objection having been made to the granting of the approval, or grants an approval subject to a condition that is objected to by the applicant, the Ministerial Corporation is required to refer its determination to a “prescribed tribunal” for inquiry and report. A prescribed tribunal is a Magistrate or a local land board. The prescribed tribunal may confirm or vary the determination of the Ministerial Corporation in respect of the application, or cancel an approval granted by the Ministerial Corporation. A determination of a prescribed tribunal may be appealed to the Land and Environment Court.

The amendments remove this review process. Instead, appeals against determinations of the Ministerial Corporation are to be made directly to the Land and Environment Court. (See **Schedule 1 [32]** and **[43]**.)

Conditions of approvals

At present, the Ministerial Corporation may grant or renew an approval subject to conditions. The amendments will allow the Ministerial Corporation to impose conditions on an approval during the currency of the approval. The Ministerial Corporation will be required to give notice to the affected person of its intention to impose conditions on an approval or to vary or revoke conditions. (See **Schedule 1 [40]**.) An affected person will be able to appeal to the Land and Environment Court against a decision of the Ministerial Corporation to impose conditions on an approval or to vary or revoke conditions. (See **Schedule 1 [43]**.)

Offences

Under Part 8, it is an offence to construct a controlled work otherwise than in accordance with an approval that is in force. The penalty for that offence is increased from 200 penalty units to 2,500 penalty units (in the case of a corporation) and from 100 penalty units to 1,200 penalty units in the case of an individual. (See **Schedule 1 [46]**.)

In addition, it will be an offence to fail to comply with the conditions of an approval. (See **Schedule 1 [47]**, proposed section 180A.)

The amendments extend the time limit for taking proceedings for an offence against Part 8 from 6 months to 2 years. (See **Schedule 1 [52]**.)

Enforcement powers of Ministerial Corporation

The amendments will give the Ministerial Corporation power:

- (a) to issue a stop work order where a person is engaging or about to engage in any activity that is an offence under Part 8 (see **Schedule 1 [47]**, proposed section 180B), and
- (b) to apply to the Land and Environment Court for an injunction restraining a threatened or apprehended offence or the continuation of an offence (see **Schedule 1 [47]**, proposed section 180C).

At present, the Ministerial Corporation is also able to remove or modify any controlled work in respect of which an approval is not in force. The amendments will instead allow the Ministerial Corporation to require the occupier of land, by notice served on the occupier, to carry out work for the purpose of removing, modifying, repairing or rendering ineffectual an unauthorised controlled work. In addition, the Ministerial Corporation will be able to require the occupier to carry out other work of a remedial nature, such as work to correct or restore any alterations caused to water flow by the unauthorised controlled work. (See **Schedule 1 [47]**, proposed section 180D.) The Ministerial Corporation will also be able to exercise these powers if a controlled work is constructed in contravention of an approval.

If an occupier fails to comply with such a requirement, the Ministerial Corporation will be able to carry out the work, and recover the costs and expenses incurred in carrying out that work from the occupier or from a person who constructed the controlled work in contravention of Part 8. At present the Ministerial Corporation is able to recover costs and expenses of work carried out by or on behalf of the Ministerial Corporation for the purpose of removing or modifying an unauthorised controlled work. However, it will no longer be a necessary pre-requisite to such recovery that a person be convicted of an offence against Part 8 in respect of the controlled work. In addition, the amendments will allow the occupier to recover from the person who caused the controlled work to be constructed in contravention of Part 8 any costs and expenses incurred by the occupier in carrying out the remedial work or any costs recovered from the occupier by the Ministerial Corporation. (See **Schedule 1 [47]**, proposed section 180G and **Schedule 1 [49]**.)

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The Ministerial Corporation will not be required to give any person prior notice of its decision to exercise its new powers. (See **Schedule 1 [47]**, proposed section 180H.) However, a person aggrieved by a decision of the Ministerial Corporation under the new provisions will be able to appeal against the decision to the Land and Environment Court. (See **Schedule 1 [47]**, proposed section 180J.)

The Ministerial Corporation is also given power to require any person to give the Corporation information about a possible offence under Part 8 or to produce a document containing information about a possible offence under Part 8. (See **Schedule 1 [47]**, proposed section 180I.)

It will remain an offence to remove, damage or modify any work carried out by or on behalf of the Ministerial Corporation under Part 8. However, the penalty for that offence is increased in line with the increased penalties referred to above. (See **Schedule 1 [47]**, proposed section 180F, which replaces section 180 (3) of the Act.) It will also remain an offence to obstruct or hinder an officer of the Ministerial Corporation in carrying out such work. (See **Schedule 1 [47]**, proposed section 180E, which replaces section 180 (2) of the Act.)

Third party enforcement

The amendments will allow any person to bring proceedings in the Land and Environment Court for an order to remedy or restrain a contravention, or a threatened or apprehended contravention, by a person of the relevant offence provisions under Part 8. (See **Schedule 1 [47]**, proposed section 180K.)

Exclusion of liability

At present, the Ministerial Corporation is not liable to pay compensation to any person in respect of any loss or damage suffered by the person as a consequence of the removal or modification of an unauthorised controlled work by the Ministerial Corporation. This provision is replaced with a provision to the effect that the Ministerial Corporation, and certain other persons, do not incur any liability for any advice furnished, or any act done or omitted to be done, in good faith in the exercise of a function under Part 8. The new provision extends to acts done in accordance with the principles contained in the floodplain development manual notified under the *Local Government Act 1993*, similar to the immunity conferred on councils by section 733 of the *Local Government Act 1993*. (See **Schedule 1 [50]**.)

Miscellaneous matters

Amendments are made for the purpose of removing the requirement to prescribe forms and fees under Part 8. Instead these will be approved by the Ministerial Corporation. (See **Schedule 1** [21], [22] and [34]–[36].)

An application for an approval will be required to be accompanied by an assessment of the likely impact of the controlled work. (See **Schedule 1** [22].)

The period in which an appeal can be made against a refusal to grant an application for an approval is reduced from 90 days to 28 days, consistent with the period in which other appeals may be made under Part 8. (See **Schedule 1** [43].)

The Ministerial Corporation is also given power to determine the period in which an approval remains in force, up to a maximum period of 10 years (at present all approvals remain in force for 5 years, subject to any cancellation). (See **Schedule 1** [34] and [39].)

Schedule 1 [53] allows savings and transitional regulations to be made and **Schedule 1** [54] contains other provisions of a savings and transitional nature. These include a provision that allows the Ministerial Corporation to adopt a floodplain management plan that was prepared before the amendments commence.

Other amendments are of a consequential nature. (See **Schedule 1** [1]–[3], [9]–[15], [17], [18], [30], [31], [33], [38], [41], [42], [44], [45], [48] and [51].)

Schedule 2 Amendment of Land and Environment Court Act 1979

The amendments to the *Land and Environment Court Act 1979* are consequential to the additional enforcement powers conferred on the Ministerial Corporation and the enforcement powers conferred on third parties under the amendments described above. The amendments allocate the proceedings concerned to the appropriate classes of jurisdiction of the Land and Environment Court.