

[Act 1997 No 63]



New South Wales

# Water and Environmental Planning Legislation Amendment Bill 1997

## Explanatory note

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

### Overview of Bill

The objects of this Bill are as follows:

- to provide a scheme for interstate water allocation transfers that is similar to the existing scheme for the intra-state transfer of water allocations,
- to enable conditions relating to environmental protection to be included in the conditions to which licences (and other entitlements) under the *Water Act 1912* are subject,
- to provide for relevant governmental policies and certain other matters to be taken into account by the Land and Environment Court, and by local land boards, when carrying out inquiry and appeal functions under the *Water Act*,

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\* Amended in committee—see table at end of volume.

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- to enable a Commission of Inquiry under the *Environmental Planning and Assessment Act 1979* to consider applications for approvals (under the Water Act) for the carrying out of certain water-related works in the same way as a Commission of Inquiry may presently consider applications for water licences and, in so doing, co-ordinate the consideration of such applications for approvals and the consideration of the proposed activities or development in respect of which such applications are made,
- to make other amendments of an administrative and machinery nature.

## 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. Most of the provisions commence on the date of assent, while others (ie the amendments relating to the scheme for the interstate transfer of water, and the amendments enabling a Commission of Inquiry to consider applications for water approvals) commence 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 *Water Administration Act 1986* set out in Schedule 2.

**Clause 5** is a formal provision giving effect to the amendments to the *Environmental Planning and Assessment Act 1979* set out in Schedule 3.

## Schedule 1 Amendment of Water Act 1912

**Schedule 1 [2]** provides that the Land and Environment Court and local land boards are required to take into account, and have due regard to, certain matters when conducting inquiries and appeals under the Water Act. These matters include State-wide water resource management objectives and the actual state of water resources at local, regional and State-wide levels. The court and the boards will also be required to consider the impact that their decisions might have in relation to these matters.

The new section 4A is designed to ensure that any decision under the Water Act by a judicial-type body should not be based solely on the particular circumstances of the case, and that any such decision should not be considered in isolation of relevant matters and policies or in isolation from the wider implications of the decision.

**Schedule 1 [3]–[5] and [9]** qualify the general rule that an entitlement under the Water Act runs with the land to which the entitlement relates (eg the rule provides that the benefit of a water licence lies with the occupier for the time being of the land that is supplied with water by means of the licensed work). This general rule has, in cases involving the transfer of water allocations, resulted in the anomalous situation where the entitlement holder is prevented from being able to complete the transfer of the holder's water allocation if the land to which the entitlement relates has been sold to another party.

The new section 22D provides that if the land to which an entitlement relates is sold before the completion of the transfer of the water allocation for the entitlement, the sale does not operate to pass the benefit of the entitlement to the new occupier of the land. This provision will enable the scheme for the transfer of water allocations to operate independently of the general rule described above.

The new section also applies in respect of the scheme under the *Water (Part 2) Regulations* which makes provision for the transfer of water rights from water sources other than those that are covered by the transfer scheme under the Water Act.

**Schedule 1 [8]** provides a scheme for the interstate transfer of water to, and from, other States. Under the new Division 4E (which is based on the existing Division 4C applying to intra-State water transfers) the Ministerial Corporation (ie the Water Administration Ministerial Corporation established under the *Water Administration Act 1986* and which is the corporate "arm" of the Department of Land and Water Conservation) will be able to approve the following:

- the transfer, by a NSW entitlement holder, of the holder's water allocation to a person outside NSW,
- the transfer, by a person from another State, of that person's water rights to a person in NSW.

The Ministerial Corporation will be able to determine the water sources and the types of transfers (ie permanent and temporary) to which the new Division 4E applies. If it approves the transfer of a NSW entitlement holder's water allocation to an interstate licensee, the Ministerial Corporation may give effect to the transfer by making the necessary adjustments and modifications to the holder's NSW water allocation (or by cancelling the entitlement if the transfer is permanent). The Ministerial Corporation's approval will be subject to advice being given by the relevant interstate licensing authority that it also approves the transfer and has granted the interstate transferee an interstate licence in respect of the transferred water.

In the case of the transfer of water rights into NSW from interstate, the Ministerial Corporation may approve a NSW transferee obtaining an interstate transferor's water rights, but again only if the Ministerial Corporation is advised by the interstate licensing authority that it also approves the transfer. The transfer to NSW will be effected by the Ministerial Corporation adjusting or modifying the NSW transferee's existing entitlement, or by granting a new entitlement.

In both cases, the Ministerial Corporation will be able to make arrangements with the relevant interstate licensing authority to jointly assess and process the application for the interstate transfer, and to liaise with that authority to determine the administrative arrangements that are to apply with respect to the transfer. A transfer under the new Division will be subject to such conditions as the Ministerial Corporation thinks fit to impose when approving the transfer.

**Schedule 1 [6] and [7]** are consequential on the amendment made by **Schedule 1 [8]**, and make it clear that the existing scheme under the Water Act for the transfer of water allocations is an intra-State scheme (ie it applies to water transfers within NSW only).

**Schedule 1 [11]** enables regulations to be made with respect to any matter that is relevant to the scheme for the interstate transfer of water.

**Schedule 1 [10], [12] and [17]** provide that the conditions to which the various types of entitlements (eg water licences) and approvals under the Water Act are subject may include conditions relating to the protection of the environment. These amendments remove any doubt that the conditions relating to those entitlements and approvals can only be "water-related" conditions. The term *environment* is defined widely (see **Schedule 1 [1]**).

**Schedule 1 [13]** enables the Ministerial Corporation to fix an annual charge with respect to licences under Part 5 of the Water Act (ie bore licences). At present, the charge payable under section 117B of the Water Act is on the basis of the quantity of the water taken from the licensed bore. As a result of this amendment, the charge will be payable on the basis of a fixed charge determined by the Ministerial Corporation or on the basis of the quantity of water taken (or a combination of both). This will bring bore water licence charges into line with the charges payable under section 22C of the Water Act in relation to other entitlements such as water licences.

**Schedule 1 [15]** inserts a new section 171A which will apply to applications for approvals under Part 8 of the Water Act that relate to a controlled work in respect of which the Ministerial Corporation receives a notice under section 120A of the *Environmental Planning and Assessment Act 1979* (see **Schedule 4**).

The new section requires the Ministerial Corporation to refer an application for an approval under Part 8 of the Water Act, and any objections relating to the application, to the Commission of Inquiry by which the notice was given, and to defer making a decision on the application until it receives the Commission of Inquiry's report on the application. The Ministerial Corporation will be required to have regard to the Commission of Inquiry's report in making its decision on the application. The provisions of Part 8 of the Water Act relating to public inquiries by local land boards, and for appeals to the Land and Environment Court, will not apply to decisions made by the Ministerial Corporation on an application to which the proposed section applies.

**Schedule 1 [14] and [16]** are consequential amendments that ensure that the provisions of Part 8 of the Water Act are construed subject to the provisions of the proposed section 171A.

**Schedule 1 [18]–[20]** deal with matters of a savings and transitional nature.

### **Schedule 2      Amendment of Water Administration Act 1986**

**Schedule 2 [1]** expressly enables the Ministerial Corporation to implement, and give effect to, any scheme for the interstate transfer of water.

**Schedule 2 [2]** provides for water management charges to be payable to the Ministerial Corporation by Sydney Water Corporation and Hunter Water Corporation.

### **Schedule 3      Amendment of Environmental Planning and Assessment Act 1979**

The amendments made by **Schedule 3** extend the current operation of section 120A of the *Environmental Planning and Assessment Act 1979* so that it will apply with respect to approvals under Part 8 of the Water Act (ie approvals to carry out certain works on river banks and flood plains) and not just to water licences.

As a result of the amendments, a Commission of Inquiry that is investigating a development application under Part 4, or an activity the subject of environmental assessment under Part 5, of the EP&A Act will be required to notify the Ministerial Corporation if it becomes aware that the development or activity involves a work that may require an approval under Part 8 of the Water Act. The Commission of Inquiry will be required to advise the applicant or proponent to make prompt application for such an approval, and must defer concluding its inquiry for so long as is necessary to enable such an application to be made. As soon as practicable after an application for an

approval is referred to it under proposed section 171 A of the Water Act (see **Schedule 1 [15]**), the Commission of Inquiry will be required to hold a public hearing into the application before making its report on the development or activity. To the extent to which the report relates to the application for an approval under Part 8 of the Water Act, a copy of the report must be given to the Ministerial Corporation.