DRAFT – FOR DISCUSSION PURPOSES

Water Management Act Amendment Bill 2004

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Introduction

The Water Management Amendment Bill 2004 (**Bill**) was introduced in Parliament on 12 May 2004 and the second reading speech by the Minister for Infrastructure, Planning and Natural Resources, Mr Craig Knowles (**Minister**) was completed on 1 June 2004. It is likely that the Bill will be debated in the Upper House of Parliament in the very near future and any amendments proposed by Members considered.

The Bill proposes to amend the *Water Management Act 2000* (**Act**) in respect of the following matters:

Schedule 1

- The definitions of environmental water
- The Minister's Plan making powers
- The need for the Minister for the Environment's concurrence for the making of water management plans
- The power to extend water sharing plans on the recommendation of the Natural Resources Commission (**NRC**)
- The extent of judicial review of water sharing plans

Schedule 2

- Limitations on water usage for stock and domestic water

Schedule 3

- To provide for the keeping of a Water Access Licence Register (**Register**)
- To categorise dealings that may be carried out in respect of access licences
- To create security interests over water access licences and holdings of such licences by the registration of such interests
- To enable caveats to be lodged with respect of recorded dealings in interests in access licences
- To enable the transfer of water entitlements conferred by a licence to another person for a period of not less than 6 months

Schedule 4

- Changes to the types of access licences
- Modification of the procedures for the granting, surrendering, suspension and cancellation of access licences and recovery of outstanding amounts in relation to access licences
- Changing the period for which approvals are granted under the act and to enable extensions to be granted
- Modification of the procedures for the granting, surrendering, suspension and cancellation of approvals
- Interstate agreements for water trading

Schedule 5

- Miscellaneous amendments

Schedule 6

- savings and transitional amendments relating to the conversion of former entitlements to access licences and approvals

Schedule 7

- consequential amendments to other Acts, including the *Catchment Management Act 2003* including the establishment and operation of Environmental Water Trust Funds

From the perspective of the Environmental Defender's Office Ltd (**EDO**), the critical amendments are those that deal with the following issues:

- environmental water,
- plan making (including public participation and judicial review),
- stock and domestic water entitlements,
- Judicial review and the role of the Land and Environment Court,
- the grant etc.. of licences and approval (in particular the issuing of licences in perpetuity and the rolling over of existing approvals without environmental impact assessment)
- the scheme for embargos on dealings in water sources, and
- the role of the Catchment Management authorities (**CMAs**) and the NRC.

For the purposes of this paper, we do not comment in any detail on the establishment and management of the Register.

Environmental Water

The Bill proposes to change the definition of environmental water in s.8 of the Act from three classes - being: environmental health water, supplementary environmental water

and adaptive environmental water; to two classes – being planned environmental water and adaptive environmental water. Expressly, the new definition states:

> **8 Environmental water**
>
> (1) For the purposes of this Act, ***environmental water*** comprises the following:
> (a) water that is committed by management plans for fundamental ecosystem health or other specified environmental purposes, either generally or at specified times or in specified circumstances, and that cannot to the extent committed be taken or used for any other purpose (***planned environmental water***),
> (b) water that is committed by the conditions of access licences for specified environmental purposes, either generally or at specified times or in specified circumstances (***adaptive environmental water***).
> (2) A management plan must contain provisions for the identification, establishment and maintenance of planned environmental water (***environmental water rules***). The environmental water rules relating to a water source do not need to specify that a minimum quantity of water is required to be present in the water source at all times.
> (3) Environmental water rules are to be established for all of the water sources in the State as soon as practicable after the commencement of this section.
> (4) A management plan must contain provisions relating to adaptive environmental water.

The effect of the new definition is to combine the previous categories of environmental health water and supplementary environmental water into one category – planned environmental water. The reason for the change arises from the practical difficulty in managing supplementary environmental water, particularly where many of the categories set out in water sharing plans were arguably related to fundamental ecosystem health.

The EDO is generally supportive of the new definition and the removal of an arbitrary distinction between fundamental and other environmental health purposes. However, it may be noted that planned environmental water is not committed "at all times" as environmental health water previously was. It is acknowledged that water does not need to be flowing in a water source at all times and that there may be benefits of managing a particular water source in a wetting and drying cycle. This point is picked up in clause 8(2) of the Bill. However, that issue of requiring a certain amount of water within the river system is different to committing water to the management of environmental flows at all times (for example holding the water in reserve for future events in a water storage). Having regard to the current wording of clause 8, it is arguable that, in practical terms, the distinction between environmental health water and supplementary environmental water as outlined in the water sharing plans will remain.

Plan making provisions

The Bill proposes to make a number of changes to the plan making process, in particular the making of Minister's plans. At the outset, it is important to remember that, although the Act provides for the making of management plans that address water sharing, water source protection, drainage management and floodplain management, only water sharing plans have been made. Furthermore, all but one of the water sharing plans gazetted to

date have been Minister's plans as distinct from plans prepared by management committees in accordance with Part 3 of Chapter 2 of the Act.

The amendments proposed by the Bill seek to simplify the process for making Minister's plans and to clarify the commencement provisions for existing plans. Firstly, the timing and duration of a management plan in section 43(1) of the Act is clarified at para [13] of Schedule 1 of the Bill to confirm that the 10 year period of operation for management plans runs from 1 July in any year. This is intended to coincide with the water accounting year. At para [15] of Schedule 1 the Bill proposes to introduce cl 43(4) which clarifies that "*a new management plan can be made in accordance with this Act to replace an earlier management plan …"* This clause is of relevance when considering the amendments to the compensation provisions set out below.

Importantly, the Bill proposes to introduce cl 43A of the Bill which deals with the extension of water sharing plans. Cl 43A states:

(1) The Minister may, on the recommendation of the Natural Resources Commission and by notice published in the Gazette before its expiry under section 43 or this section, extend a management plan that deals with water sharing for a further period of 10 years after the plan was due to expire.

(2) More than one such extension of a management plan that deals with water sharing may be made.

(3) Before deciding whether to extend a management plan that deals with water sharing or to make a new management plan, the Minister is to consider a report of the Natural Resources Commission that reviews (within the previous 5 years) the following:

(a) the extent to which the water sharing provisions have materially contributed to the achievement, or the failure to achieve, the relevant State-wide natural resource management standards and targets in the relevant catchment management area (as referred to in section 5 of the *Catchment Management Authorities Act 2003),*

(b) whether changes to those provisions were warranted.

(4) For the purposes of a report under subsection (3):

(a) the Natural Resources Commission is to call for public submissions and to have regard to any duly received, and

(b) the Natural Resources Commission is to have regard to any other relevant Statewide and regional government policies or agreements that apply to the catchment management area.

(5) A report of the Natural Resources Commission under subsection (3) is to be made public after the decision of the Minister with respect to the extension of the management plan or on the expiration of 6 months after the report is received by the Minister, whichever first occurs.

(6) If the Minister decides not to extend a management plan under this section, the Minister may, by notice published in the Gazette, extend the existing management plan until the commencement of a replacement management plan or until the first anniversary of the date the plan would otherwise have expired, whichever first occurs.

The purpose of introducing the section is to provide greater security to water users as to the basis upon which their share of water entitlements will be issued, as water sharing plans determine the bulk access regimes for a water source. In attempting to balance this desire for security with environmental concerns, the Bill seeks to introduce a process of auditing the water sharing plan by the Natural Resources Commission (**NRC**). The NRC is a body appointed by the Minister under the *Natural Resources Commission Act 2003* with objects:

… to establish an independent body with broad investigating and reporting functions for the purposes of:

(a) establishing a sound scientific basis for the properly informed management of natural resources in the social, economic and environmental interests of the State, and

(b) enabling the adoption of State-wide standards and targets for natural resource management issues, and

(c) advising on the circumstances in which broadscale clearing is to be regarded as improving or maintaining environmental outcomes for the purposes of the *Native Vegetation Act 2003*.

The NRC audit process is intended to operate on an independent and transparent basis. However, the NRC is nevertheless a body established within the context of the Department of Infrastructure, Planning and Natural Resources (**DIPNR**). Conservation groups have raised concerns about the independence of this body and suggested that it would be preferable for the Department of Environment and Conservation (**DEC**) to play a role in the review process.

It is also important to note that the NRC report will review performance within the previous 5 years. Essentially, this will be a review of the last 5 years of the current plans. Pursuant to section 50(5) of the Act, the Minister is required to cause Minister's plans to be periodically reviewed at intervals of not more than 5 years. The Bill proposes to delete this requirement. Having regard to the present levels of uncertainty as to how the plans will perform, variability in the systems and changing scientific knowledge, it is imperative for the plans to be reviewed on a regular basis to ensure ecosystems are being managed appropriately. It is strongly recommended that more regular reviews of the performance of the water sharing plans be undertaken.

Flowing on from this, sub-clause (3) of this clause sets the terms of reference for the NRC review. This is focussed on achieving Statewide natural resource management standards and targets. Of note in this section is the absence of a direct reference to the performance of the plan against its own vision, objectives, strategies and performance indicators. The palsn themselves could fall broadly inder the heading "government

policy". However, it is recommended that more detailed terms of reference for the NRC review be set out in the Bill.

The review process under cl 43A proposes to include a call for public submissions which are to be considered by the NRC. However, at this stage, it is not clear exactly what the submissions are responding to. We presume that is will be a draft report prepared by the NRC, but this needs to be clarified. Additionally, the Bill does not set timeframes within which submissions will be invited. It is recommended that a minimum time for public consultation is set out in the Bill.

Whilst the Bill proposed at para [20] of Schedule 1 to amend cl 50(3) to require the Minister for the Environment's concurrence to the making of a Minister's plan under section 50 of the Act and for the amendment of a management plan in cl 45(3), there is no equivalent provision for the extension of a water sharing plan in cl.43A.

We assume that the absence of concurrence in relation to the extension of water sharing plans is that the NRC review will be a comprehensive independent audit. Therefore, if, after carrying out its assessment of the operation of the plan, it is of the view the plan is working satisfactorily, it will recommend extension. In order to promote consistency in the operation of the laws and to provide an appropriate level of oversight, it is submitted that the Minister for the Environment's concurrence should also be obtained.

In relation to the proposed amendments to the power of the Minister to amend or repeal a management plan in para [17] of Schedule 1 of the Bill, the first point to note is that "*the Minister may at any time, by order published in the Gazette, amend a management plan"*. Whilst the Minister for the Environment's concurrence is required by dint of cl 45(3), there is no role for public consultation in respect of amendments. It is arguable that safeguards are in place to protect the environment by reference to the basis upon which a plan may be amended or repealed in cl 45(1) and (2) that enable the Minister to act:

(1) (a) if satisfied it is in the public interest to do so, or
(b) in such circumstances, in relation to such matters and to such extent as the plan so provides, or
(c) if the amendment is required to give effect to a decision of the Land and Environment Court relating to the validity of the plan.

(2) Without limiting the circumstances in which he Minister may act under subsection (1)(a) the Minister may amend a management plan under subsection (1)(a) for the purpose of enabling a catchment management authority, the Minister or other public body to obtain an access licence (containing conditions for the adaptive environmental water use) as a result of the availability of additional water that has been conserved by public expenditure or works.

In relation to sub-clause 45(1)(b), the water sharing plans gazetted to date only provide for amendments to the plans in very limited circumstances, such as to add new water sources to the water management area. There are internal review mechanisms to alter the bulk access regime, for example to keep allocations below Cap or the long-term average

extraction limit, but these do not address the situation where Cap or the LTEL is found to be unsustainable and further reductions are required.

Whilst it may be in the public interest to make amendments to the environmental water rules or the bulk access regime pursuant to clause 45(1)(a), the benefit of this provision may be illusory, particularly in circumstances where compensation will be payable if such amendments are made during the life of the plan and have a detrimental impact on water users (see below).

In respect of amendments made to give effect to Land and Environment Court decisions in sub-clause 45(1)(c), it should be noted that already two Land and Environment Court decisions have been appealed to the NSW Court of Appeal. This provision should refer more broadly to decisions of any Court.

Sub-clause 45(7) of the Bill restricts the variation of a bulk access regime without the Minister having consulted with the management committee if a committee is in place for the water management area. This will, however, only be relevant where a management committee has actually been constituted under Part 3 of Chapter 2, as distinct from an advisory committee which is the case for all but one of the plans gazetted to date. Furthermore, there is some uncertainty as to what role (if any) management committees will play under the amended Act. This is of relevance if it is proposed that CMAs will take over many of the functions under the Act, particularly where the *Catchment Management Act 2003* is rather vague in relation to the powers and functions of those bodies in relation to water management.

Minister's plans

In respect to the making of Minister's plans, the Bill proposes at para [19]of Schedule 1 to introduce a new cl 50(2A) which provides:

> (2A) Part 3 (except sections 15 and 36-41 applies to a Minister's plan. However, the Minister:
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> (a) may adopt any of the provisions of sections 36-41 in a particular case, and
>
> (b) may dispense with a particular requirement of Part 3 in the case of a Minister's plan referred to in subsection(1A). (IM *being a plan for more than one water source or water management area)*

These amendments give the Minister a very broad discretion when making management plans (note that this discretion was expanded by the 2002 amendments which inserted the words "in general terms" into section 50 to avoid strict compliance with Part 3). Importantly, the sections excluded include notification of the scope of the plan (s.36), referring a draft Plan to the Minister to consider (s.37) public exhibition of a draft management plan (s.38) the ability to make submissions on a draft management plan (s.39) resubmission of the draft management plan to the Minister (s.40) and making a management plan (s.41). Whilst some of these provisions are cumbersome and duplicitous when the plan making process is initiated by the Minister, other provisions, in

particular sections 36(1) and (2), 38, 39(1), 40(1) are essential to maintaining public involvement in the plan making process. These provisions should not be excluded.

As noted above, the Bill proposes at para [21] of Schedule 1 to delete the existing section 50(5) which requires Minister's plans to be periodically reviewed, and to insert cl 50(5) which gives the Minister a broad discretion to make a Minister's plan or a management plan in respect of any matter. The removal of periodic review of Minister's plans (particularly when dealing with matters other than water sharing plans – which are reviewed by the NRC) is not supported.

Judicial review

Significant amendments are proposed to section 47 of the Act which deals with the validity of management plans. The new provision set out in para [18] of Schedule 1 of the Bill states:

(1) The validity of a management plan may not be challenged, reviewed, quashed or called into question before any court in any proceedings, other than before the Land and Environment Court in proceedings commenced within the judicial review period.

(2) The judicial review period in respect of a management plan is:

(a) the period of 3 months after the date the plan was published in the Gazette, except as provided by paragraph (b), or

(b) in relation to a provision of the plan that was inserted by an amendment of the plan (other than an amendment under section 45 (1) (c), the period of 3 months after the date that the amendment was published in the Gazette.

A judicial review period does not arise as a result of the extension of the duration of a management plan.

(3) The judicial review period cannot be extended by the Land and Environment Court or any other court, despite any other Act or law.

(4) Without limiting subsection (1), the exercise by a designated person of any plan-making function may not be:

(a) challenged, reviewed, quashed or called into question before any court in any proceedings, or

(b) restrained, removed or otherwise affected by any proceedings,

other than before the Land and Environment Court in proceedings commenced within the judicial review period.

(5) The provisions of or made under this Act and the rules of natural justice (procedural fairness), so far as they apply to the exercise of any plan-making function, do not place

on a designed person any obligation enforceable in a court (other than in the Land and Environment Court in proceedings commenced within the judicial review period).

(6) Accordingly, no court (other than the Land and Environment Court in proceedings commenced within the judicial review period) has jurisdiction or power to consider any question involving compliance or non-compliance, by a designated person, with those provisions or with those rules so far as they apply to the exercise of any plan-making function.

(7) This section is not to be construed as applying the rules of natural justice to the exercise of plan-making functions for the purposes of proceedings instituted within the judicial review period.

(8) In this section:

court includes any court of law or administrative review body.

designated person means the Minister, a management committee, the Director-General or any person or body assisting or otherwise associated with any of them.

exercise of functions includes the purported exercise of functions and the non-exercise or improper exercise of functions.

judicial review period – see sub-section (2).

management plan includes purported management plan.

plan-making function means a function under this Act relating to the making of a management plan (including relating to the amendment, replacement or repeal of a management plan or the extension of the duration of a management plan).

proceedings includes:

(a) proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, and

(b) without limiting paragraph (a), proceedings in the exercise of the inherent jurisdiction of the Supreme Court or the jurisdiction conferred by section 23 of the *Supreme Court Act 1970.*

The Explanatory Note to the Bill states that this provision "ensures that water management plans are not subject to challenge before or after the 3 month's judicial review period before the Land and Environment Court".

At the outset it should be noted that privative clauses, such as cl 47, offend the rule of law and privilege certainty and efficiency over the proper operation of the Act. Generally, legal challenges are already limited as they cannot be made unless there are "reasonable prospects of success" and otherwise unmeritorious appeals can be dealt with by mechanisms such as adverse costs orders. The introduction of a privative clause to frustrate the transparent judicial review process is not supported.

Clause 47(4) purports to limit the ability of any other Court (such as the Supreme Court or an administrative review tribunal) to judicially review the exercise of plan making functions by a designated person. For the purposes of this clause, proceedings are defined to include orders for prohibition, certiorari and mandamus and the proceedings within the inherent jurisdiction of the Supreme Court, which is stated in section 23 of the *Supreme Court Act 1970* to be "*all jurisdiction which may be necessary for the administration of justice in New South Wales".*

Neither the Explanatory Note, nor the Minister's Second Reading Speech point to the types of Supreme Court (or other Court or Tribunal) actions that the Minister is seeking to exclude. Of note is the fact that the clause only relates to challenges to the validity of management plans, and not other challenges that may be available in respect of the broader operation of the Act (such as nuisance or negligence – it is unclear whether these tort based causes of action that lie in the Supreme Court would ever be relevant in respect of management plans). Guidance may, however, be found in clauses 47(5) and (7) which make it clear that the Bill is seeking to exclude the operation of judicial review on the ground of denial of natural justice / procedural fairness except where proceedings are commenced in the judicial review period.

The rules of procedural fairness are essentially rules that require a decision maker to give interested parties a fair and unbiased hearing before decisions are taken which affect them. For example, in a number of the cases being heard in the Land and Environment Court challenging water sharing plans, Applicants are claiming that by appointing management committees (albeit on an advisory not statutory basis) and failing to make plans in accordance with their recommendation, the decision maker has failed to accord members of the committee procedural fairness. This argument was rejected in the case of *Murrumbidgee Groundwater Preservation Association v The Minister* (2004). However, it is likely to be pleaded other cases.

Notwithstanding the proposed express limitation of procedural fairness, it is arguable that this cause of action is presently unavailable in the Land and Environment Court. Section 20(2)(b) and (c) of the *Land and Environment Court Act 1979* confers that Court with the same jurisdiction as the Supreme Court to review or command the exercise of functions conferred by "planning or environmental laws" – which currently do not expressly include the Act. Rather, the power of the Court to review administrative actions under the Act is limited to Class 4 applications pursuant to section 336 (which enables any person to remedy or restrain a breach of the Act). It may be the case that the jurisdiction of the Land and Environment Court will be altered in the near future to include a reference to the Act (this is likely having regard to the extensive new functions being conferred on the Court in relation to the register) and that the amendment proposed by cl 47(6) and (7) of the Bill is necessary to clarify the extent of that jurisdiction. In any event, the purpose of sub-clauses (5)(6) and (7) needs to be clarified.

It is also unclear whether the purpose of clause 47 is to limit the ability of appellate Courts to reconsider the validity of management plans. It is unlikely that this is the case,

as an appellate Court will ordinarily be determining whether a decision in the Court below was legally sound, and so a clause with that intention would not be legally valid as it is purporting to exclude fundamental rights of appeal to Superior Courts. However, it may be the case that the legislature is seeking to prevent an Appellate Court making a declaration that a plan is invalid (in other words, trying to get the decision on invalidity referred back to the court of original jurisdiction). The role of Appellate Courts in the judicial review process should be clarified.

A further point to note is, with the exception of challenges currently on foot in the Land and Environment Court, the provisions of clause 47 are proposed to apply retrospectively to management plans (see Schedule 6 para [7] cl 65).

Other amendments relating to planning

Note that at para [25] of Schedule 2 the Bill proposes the establishment of a Water Innovation Council (cl387A) – This idea is supported.

Note that at para [26] of Schedule 2 the Minister can confer powers under the Act on catchment management authorities. Consequential amendments to the *Catchment Management Act 2003* are also proposed in Schedule 7 of the Bill.

Stock and Domestic Rights

The Bill is seeking to limit stock and domestic water rights so as to protect those rights (for example where land is subdivided) and to protect environmental water. At para [2] of Schedule 2 the proposed amendment to cl.52(2) seeks to restrict the ability of new landholders (of subdivided land) to take water contrary to prohibitions or restrictions imposed by the Regulations. Until the Regulations are drafted, it is unclear what limitations may be imposed. However, it would appear that restrictions will be developed.

The definition of stock watering is proposed to be amended to exclude "*stock animals being raised on the land, but does not include the use of water in connection with the raising of stock animals on an intensive commercial basis that are housed in feedlots or buildings for all (or a substantial part) of the period during which the stock animals are being raised."* This clarifies the earlier term "intensive animal husbandry".

Further amendments of note are the expansion of the provisions in section 325 of the Act see para [6] of Schedule 2 which proposes to grant the Minister broad ranging powers to make directions to landholders to ensure water is beneficially used and not wasted or improperly used and, in regards to stock and domestic water, that water be used in accordance with guidelines establishing reasonable use of water for domestic consumption and stock watering. Extending the Minister's powers in this regard is supported.

However, it is arguable that the proposed amendments do not go nearly far enough. Firstly, directions are made to individual landholders and not at a larger scale, such as city wide water restrictions. Secondly, the directions are discretionary and it is likely that they will only be made if a particular landholder is known to be using water improperly (a situation which may be difficult to police). Thirdly, the mechanism to ensure beneficial use is proposed to be through Guidelines. As a general rule, guidelines are not strictly enforceable and non-compliance will not directly lead to sanction (unless a direction is made and contravened). The provisions for the proper use of stock and domestic water should be strengthened to enable more stringent limitations to be placed on the way this water is used.

Dealings and other Matters

The bulk of the amendments in Schedule 3 of the Bill deal with the establishment of the Water Access Licence Register (**Register**) and the registration of dealings, security interests, caveats and other matters in that Register. The Explanatory Note to the Bill provides a concise overview of these provisions and need not be expanded upon save for the following matters:

Firstly, proposed cl 71K enables a person dissatisfied with a decision of the Minister in relation to the keeping of the Access licence to apply to the Minister for reasons for his or her decision and for the Minister to provide those reasons. However, there is no time period within which the Minister must provide those reasons.

Secondly, and more generally, the amendments in Schedule 3 confer additional powers on the Land and Environment Court in relation to matters deriving from the operation of the Register (eg [21] & [33]). The Supreme Court of NSW deals with similar matters under the *Real Property Act 1900* and *Conveyancing Act 1919*, such as improper or fraudulent registration, disputes between security holders etc. The Supreme Court operates an extremely long and busy case list in these matters. Whilst the Land and Environment Court is a Court of superior record and, if jurisdiction is conferred upon it to deal with these matters, it is able to do so, the exercise of essentially quasi property law functions significantly extends the jurisdiction of the Court and does not properly reflect the Court's intended area of expertise (being environmental and planning law). Further, additional Judges may be required to deal with a potentially increased case load under these provisions.

Thirdly, at para [6] and [11] of Schedule 3 clauses 71M, 71N and 71D deal with the transfer and assignment of access licences and entitlements to facilitate water trading. These provisions appear to be intended to commence in respect of all entitlements when the Bill is passed or at a later date (currently mooted as 1 July 2004). It is also intended that all water sharing plans (excluding the 6 groundwater plans) are to commence on 1 July 2004. By virtue of section 71K of the Act (which is proposed to be renumbered 71Y under the Bill) applications for the Minister's consent to dealings is to be dealt with in accordance with (amongst other things) access licence dealing principles and access licence dealing rules established by a management plan. Conservation groups have

raised concern that where management plans have not been prepared or are not in force, it is uncertain what rules, if any, will govern trading in those areas (in particular groundwater). It is recommended that the Bill, through its savings and transitional provisions, limit the circumstances where trade can occur in the absence of principles and rules.

Access Licences and Approvals

Schedule 4 contains at para [3] the proposal that in addition to specifying the share component of an access licence as a specified volume or portion, it may also be expressed as a specified number of units.

At para [4] the categories of access licences are revised and reordered. This is of relevance when considering the priority granted to access licence holders under the bulk access regime.

At para [9] the Bill seeks to omit section 65 of the Act – which provides for the Minister to impose embargoes on applications for access licences for specified water management areas. The Bill proposes to insert a new cl 65 that relevantly provides:

> (1) The Minister may, by order published in the Gazette, declare that the right to apply for an access licence for a specified water management area or water source is to be acquired by auction, tender or other means specified in the order "
>
> …
>
> (2) An order under this section:
>
> (a) may relate to one or more particular access licences, or a particular class of access licences or all access licences, for a specified water management area or water source, and
>
> (b) may specify a limited period for which such an access licence is to have effect.
>
> (3) If a management plan so provides, the Minister may grant a licence of a category or subcategory determined by the Minister to the Minister, a catchment management authority or other public body without the need for an application to be made for the licence in accordance with this Part.
>
> (4) The Minister must impose a condition on a licence granted under subsection (3) to the effect that the water credited from time to time to the licence must be used for environmental purposes either generally or at specified times or in specified circumstances.

We are instructed that the intent of this section (along with the proposed deletion of Chapter 3, Part 2, Division 7 – para [21]) is to reverse the existing situation whereby the Minister declares an embargo over the issuing of new licences in certain water management areas. What cl 65 purports to do is to establish, in effect, an embargo over the whole of NSW and the Minister may then auction new licences. The intent of this

proposal is supported. However, the circumstances in which new licences will be declared should be clarified.

In respect of specific purposes access licences, at para [11] of Schedule 4, it is proposed to insert a new sub-clause 66(2A) requiring the Minister to impose conditions requiring special purposes licences to be used only for the purpose so specified. At par [12] of Schedule 4 it is also proposed to insert a new clause 68A which enables the Minister to amend the share component or extraction component of an access licence in accordance with the relevant management plan and give notice of such an amendment to the holder of the entitlement or a security interest therein. As noted above, in the absence of a provision for amendment of the bulk access regime within a water sharing plan, compensation may be payable for such alteration (which may operate as a deterrent to proper environmental management).

Perpetual Rights

One of the most significant changes proposed by the amendments is arrived at in para [13] of Schedule 4 where it is proposed to delete sections 69 and 70 of the Act dealing with duration of licences and replace them with cl 69 which states *"A access licence ceases to be in force on the date that the cancellation of the licence is recorded on the Register."* This is effectively establishing licences that operate in perpetuity, or until surrendered, revoked, etc.. The revocation of such licences, except where they are otiose or cancelled may give rise to compensation. However, this issue remains open in light of risk sharing matters to be dealt with by the National Water Initiative.

Surrender and cancellation etc..

Paras [15] and [16] of Schedule 4 provide for surrender and cancellation of access licences. Interestingly, proposed sub-clause 77 (5) enables the Minister to subsequently deal with a surrendered access licence in any matter that a holder of the licence may deal with it (for example, transferring the licence). This provision has the effect, in certain circumstances, of conferring the benefit of a licence for use or trade on the Minister and introduces him or her as an active player in water trading markets.

In respect of cancellation of licences no longer used or required, cl 77A of the Bill states:

(1) The Minister is to cancel a supplementary access licence when the relevant management plan ceases to make provision for the extraction of water under such an access licence.

(2) The Minister is to cancel a specific purpose access licence if the Minister is of the opinion that the purpose for which the licence was granted no longer exists.

(3) The regulations may prescribe criteria which the Minister is to consider when determining under subsection (2) whether the purpose for which a specific purpose access licence was granted no longer exists.

(4) The Minister is to cancel an access licence of a category prescribed by regulations referred to in section 57 (1) (1) (other than a specific purpose access licence) if the regulations prescribe the period for which such a licence is to have effect and the period has expired.

(5) The Minister is to cancel an access licence if the period for which the licence is to have effect was specified in an order under section 65 and the period has expired.

(6) The Minister may cancel any access licence of which the Minister is the holder.

Para [17] of Schedule 4 the Bill proposes to amend section 78(1)(c) of the Act to expand on the circumstances in which the Minister may suspend or cancel an access licence if fees charges or civil penalties have not been paid. Para [18] of Schedule 4 further proposes to amend section 78(3) of the Act to clarify the limitations placed on a licence holder when his or her licence is suspended. The limitations affect the taking of water under the licence and any dealings with entitlements under the licence. In particular sub para (c) states that *"appropriate water allocations continue to accrue to the account for the licence."* Whilst this provision appears perverse initially, it is understood that the primary cause for licence suspension will be no payment of fees and charges, which are usually made good within a few weeks or months. If water allocation accrual was suspended, this would have potentially significant impacts on water users over a water year. Read in conjunction with the proposal to enable the Minister to extract water debit penalties for water taken illegally in para [20] of Schedule 4 (clause 85B) this provision seems reasonable.

Uncontrolled flows

The provisions for keeping water allocation accounts under section 85 of the Act are proposed to be amended to reflect the nature of amendments to provisions of the Bill dealing with water trading (cl71T or 71V). Additionally, the Bill makes special provision for taking water from uncontrolled flows in clause 85A. These provisions allow – in circumstances where a management plan makes provision for the taking of water from uncontrolled flows - the Minister, by order in writing, to authorise holders of regulated river high or general security access licences to take water from water sources that has not been credited to the accounts of those licences. This provision is arguably introduced to legitimise provisions to take uncontrolled flows that currently exist in water sharing plans for areas such as the Murrumbidgee and Murray. Subsection (3) states that the order must be in accordance with a relevant management plan and water sharing provisions and must specify the circumstances in which water may be taken (for example in accordance with announcements made by the Minister).

Taking water illegally

As noted above, cl 85B creates an offence of water taken illegally in the following terms:

(1) If the Minister is satisfied that a person who is the holder of an access licence has taken water in contravention of section 341 (whether or not the person has been prosecuted for such a contravention), the Minister may do either or both of the following:

(a) debit up to 5 times the amount of the water so taken from any water allocations credited or to be credited to the account for the licence,

(b) in addition to any fee or charge in respect of the water so taken, order the holder of the licence to pay a civil penalty of an amount not exceeding 5 times that fee or charge.

(2) Action under this section may not be taken in relation to an access licence unless the Minister:

(a) has given written notice to the holder of the access licence that the Minister proposes to take such action, and

(b) has given the holder of the access licence a reasonable opportunity to make submissions to the Minister with respect to the proposed action, and

(c) has taken any such submissions into consideration.

This clause represents a novel approach to environmental penalties. Whilst it is arguable that the maximum multiplier should be higher for the most serious offences (assuming the Minister will rarely impose the maximum penalty) the provision is nevertheless supported. In the Second Reading Speeches on 1 June 2004, Members of the Opposition raised the issue of whether these provisions created a "double jeopardy" situation which would penalise those persons who took water illegally by way of fines and water paybacks. As the proposed clause notes, the range of penalties will be at the discretion of the Minister and the potential combined penalty will be in response to an offence, not trying the same offence twice as is the ordinary case with double jeopardy.

Compensation

The proposed amendments in relation to compensation are found in para [22-24] of Schedule 1 and para [24] of Schedule 4. For the purpose of understanding the implications of these provisions section 87 as proposed to be amended is set out below:

(1) A holder of an access licence (other than a supplementary water access licence) whose water allocations are reduced as a consequence of the variation of a bulk access regime may claim compensation for loss suffered by the holder as a consequence of that reduction.

(2) Despite subsection (1), compensation may not be claimed if the variation of the bulk access regime results from:

(a) a management plan that has been made or extended in relation to a water management area for which a bulk access regime has not been established by any other management plan, or

(a1) a management plan that is made following the expiry of the management plan that established the bulk access regime, or

(b) a management plan that has been made on the basis of a draft management plan prepared by a management committee, and is in the form in which it was finally submitted to the Minister by the committee, as referred to in section 41 (1) (a), or

(c) an amendment of a management plan by the Minister under section 45 that is authorised by the plan or that is required to give effect to a decision of the Land and Environment Court relating to the validity of the plan.

(3) The regulations may make provision for or with respect to the manner and form in which such a claim is to be made.

(4) The Minister may determine whether or not compensation should be paid and, if so, the amount of any such compensation and the manner and timing of any such payments.

(5) The amount of any such compensation is to be determined on the advice of the Valuer-General.

(6) In formulating advice for the Minister, the Valuer-General is to have regard to the market value of the water foregone to the claimant for compensation as a consequence of the variation of the bulk access regime.

(7) A person who is dissatisfied with the amount of compensation offered to the person under this section, or with any delay in the payment of compensation, may appeal to the Land and Environment Court.

(8) Payment of compensation under this section is to be made out of the Consolidated Fund which is, to the extent necessary, appropriated accordingly.

87A No compensation payable in relation to access licence

(1) No compensation is payable by or on behalf of the Crown to any person who suffers loss or damage because of any of the following:

(a) the suspension or cancellation of an access licence,

(b) any error, misdescription or omission in the Access Register,

(c) the registration in the Access Register of any person as the holder of an access licence or a security interest in an access licence,

(d) the registration of a caveat in the Access Register.

Under the Act, the primary circumstance in which the payment of compensation is contemplated relates to the reduction in water allocations as a consequence of the variation of the bulk access regime that has not resulted from the establishment of a management plan. The current section 87(2)(a) of the Act appears to be focused on the first management plan for a water management area (ie: where a bulk access regime has not been established), but arguably could apply if a management plan has expired.

Further, the Act originally contemplated participation by management committees in the plan making process – hence the assumption that the Minister would act on the committees recommendation. In reality this has not occurred and the role and operation of management committees, and therefore section 87(2)(b), is uncertain.

As a result of proposed amendments to the duration of water sharing plans that establish the bulk access regimes (that there will be a presumption that the plan will be extended) and the possibility that amendments may need to be made as a result of legal challenges to the plans, the provisions for compensation have been revised. In particular, it would now appear that almost any alteration to the bulk access regime associated with a management plan will be protected from compensation. The interesting point to note is that an amendment to the bulk access regime made by the Minister in the public interest may be compensable. This may act as a deterrent to the Minister exercising his power to amend the bulk access regime on that ground.

The current framework for compensation is premised on the existence of prescribed period licences. At the expiration of a licence, the Minister would have the discretion not to renew the licence for reasons that may relate to the environmental health of the water source. The proposed shift to perpetual licences limits the Minister's discretion in this regard. Whilst the Minister retains the ability to revoke, suspend or cancel a licence, clause 87A of the Bill states that compensation will not be payable if an access licence is suspended or cancelled. It is assumed that compensation will be payable if a licence is revoked. This assumption is supported by the fact that the Minister will pay compensation if a licence is acquired by the Minister pursuant to clause 79.

In the Minister's Second Reading Speech, it was noted that *"The Government is reviewing its approach to reducing water access in [stressed groundwater] systems, and is considering ways of assisting users in these systems to ease the burden of change and avoid causing social dislocation."* The Minister also flags the possibility of further amendments which will address risk sharing between Government and landholders for such reductions in entitlement. These future changes will be required to give effect to the National Water Initiative (**NWI**) which is contemplating a Coordinated approach between States and Territories to water management underpinned by an Intergovernmental Agreement (**IGA**). There are a range of options for risk sharing spilt in response to whether the reduction in entitlement is due to government policy or scientific knowledge and climate change. NSW has tentatively expressed a preference for capping the amount of uncompensated change in a 10 year period. However other models that place the risk burden on government for changes in policy and landholders for science/climate change are also being discussed. This issue will need to be addressed once the draft IGA is released for consultation in June 2004.

Use Approvals

Paras [31] [32] and [33] of Schedule 4 propose amendments to sections 102, 104 and 105 of the Act dealing with the imposition or variation of conditions on approvals, the

duration of approvals and the extension of approvals. These provision need to read in conjunction with the savings and transitional provision of Schedule 6 of the Bill which facilitate a "roll-over" of existing entitlements to approvals under the Act. Essentially, all existing works, use and activity approvals will remain in force for their duration and when their term comes to a close, the holder may apply for an extension of that approval. Clause 105 proposes that:

(1) the holder of an approval may, in accordance with the regulations, apply for an extension of the period for which the approval has effect.
(2) A period for which an approval has effect may be extended more than once under this section, but each extension may not exceed the period for which an approval of that type could have originally been granted.
(3) An application for an extension must be granted unless:
    (a) the relevant management plan provides, or the regulations provide, that an extension of such an approval must be assessed as if it were an application for a new approval, or
    (b) the application is required to be refused under subsection (4).
(4) An application for an extension must be refused if:
    (a) in the case of a water use approval, the applicant has not certified that the extension is necessary because the particular purposes for which the approval was granted still exists, or
    (b) in the case of a water management work approval, the Minister is not satisfied that the applicant complies with section 97(5), or
    (c) the applicant has not certified that the terms and conditions of the approval have been complied with,
(5) If assessment of an application for extension of an approval (the original approval) is required, the provisions of section 92(2)-(6) apply to the application and the application is to be assessed as if it were an application for the granting of a new approval to authorise:
    (a) in the case of a water use approval, the continuing use of the water for the particular purpose and at the particular location specified in the original approval, or
    (b) in the case of a water management work approval, the continuing maintenance and use of the work to which the original approval relates, or
    (c) in the case of an activity approval, the continuing carrying out of the activity to which the original approval relates in the same location or area specified in the original approval.

Conservation groups have expressed concerns that the rolling over of approvals will deny Government and stakeholders the opportunity to review the environmental impacts of activities that may have been approved of in a policy/practical climate where such concerns were not of primary relevance to the decision maker. The above provisions are clearly intended to simplify the process for converting approvals to the new regime and to make environmental impact assessment the exception and not the rule. The EDO acknowledges the practical difficulty in reviewing tens of thousands of approvals.

However, it is suggested that the impact of existing water works/activity approvals should be assessed – possibly by a basin wide audit (starting in the most stressed and intensely developed areas) so that the cumulative effects of continuing existing water

developments can be assessed and mechanisms to respond to them (such as by triggering an assessment process) implemented.

Additionally, it is the EDO's opinion that approvals should not continue to be "rolled over" indefinitely. Whilst it may initially be convenient to extend the first approval as part of transitional arrangements, it is submitted that only one extension should be granted without environmental assessment and that the extension should be for a finite period.

A further point to note in respect of the extension of approvals is that the public consultation process and consideration of an application by the Minister set out in sections 93-96 of the Act do not need to be followed. This expands the Minister's discretion when considering matters relevant to the decision to extend an approval. It is recommended that proposed clause 105 be amended to require the Minister to follow the same process when considering a licence extension as would be required for the grant of a new approval (or at least the first extension).

It is arguable that this issue is better dealt with in proposed clause 107(5) of the Bill which requires amendments to an approval that result in the approval concerned relating to additional uses, works, activities or land to be advertised and determined in the same way as an application for a new approval.

Role of CMAs

The role and functions of CMAs in relation to water management should be clearly specified, including their relationship with existing water management committees (both advisory and actual).

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