

1998

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

WATER RESOURCES BILL 1998

EXPLANATORY MEMORANDUM

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Minister for Urban Services**

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Outline

The Water Resources Act has been passed to allow for the effective management of ACT's water resources and to ensure the health of waterways. It is an important element of the ACT Government's effort to meet its targets for Council of Australian Governments' water reforms.

The Act contains provisions for the allocation of water, licences to take water, drillers' licences, bore construction permits and works permits to control the construction of water control structures. The Environment Management Authority is given water management functions under the Act and provision is made for inspections and other functions.

Part I Preliminary

1.1 Formal requirements

Clauses 1 & 2 of the Act are formal requirements of all Acts, specifying the title and commencement arrangements. These clauses and clauses 3, 4, 7, 74 and 76 take effect from the day on which the Act is notified in the *Gazette*. The rest of the Act's provisions take effect from the date, or dates, the Minister notifies in the *Gazette*. There is also provision for any remaining parts of the Act to take effect 6 months after it is first notified in the *Gazette*. This provision will ensure all provisions commence no later than six months after first notification.

1.2 Objects

The Act is to be interpreted and administered to give effect to the objectives listed in Clause 3. Most fundamentally, the Act is designed to ensure that the Territory's water resources are managed sustainably.

1.3 Interpretation

The interpretation clause sets out the meanings of important terms used throughout the Act. Not all terms used in the Act are defined. Some simply have their dictionary definition, while others are terms which are used in many Acts and are defined in the *Interpretation Act 1967*.

1.4 Environmental Flow Guidelines

Clause 5 provides for Environmental Flow Guidelines which will be used to determine the environmental flow necessary to ensure that a waterway or aquifer can sustain aquatic ecosystems. The guidelines will be disallowable instruments to ensure they are subject to appropriate public scrutiny.

The Government envisages that Environmental Flow Guidelines will contain prescriptions to be used to determine environmental flows for each type of ecosystem (natural, modified, water supply and created)

Part II Crown Rights to Water

2.1 Crown rights to water

Clause 7 sets out clearly that the right to control the Territory's water, other than certain groundwater, is vested in the ACT Government and exercisable by the Minister. Groundwater under land the subject of leases granted before the commencement of this clause would not be covered by clause 7.

Part III Administration

3.1 Administration

Clause 8 sets out functions of the Environment Management Authority under this Act. The Environment Management Authority is established under Section 11 of the *Environment Protection Act 1997*. Clause 9 provides that the Authority can delegate any of its or her powers under this Act (except this power to delegate) to another public employee. This enables other public employees to assist with the administration of the Act. The instrument of delegation can either be general or can place certain restrictions on the delegated powers.

3.2 Inspection of documents

Clause 10 provides a list of documents which the Authority must make available upon request to any member of the community. Upon payment of a determined fee, the Authority has a reasonable time to produce the documents. The clause will ensure that the public can obtain information about the management of water resources.

Part IV Water Resources Investigation

4.1 Water resources investigation

Clause 11 ensures that a program of monitoring and assessment of water resources can be conducted to provide the Authority with adequate information to manage water resources effectively. Such a program is intended to be of minimal impact on the land and a compensation provision has been added to clause 70 to ensure the rights of lessees are protected. Often water investigations include setting up equipment on private land and clause 12 ensures that any

such equipment remains the property of the ACT Government and is not taken to belong to a lessee

Part V Water Resource Management Plan

Part V to the Bill covers the preparation, consultation and formalisation of a Water Resource Management Plan to provide the ACT community through the Assembly with an opportunity to become involved in planning for the use of this important resource

5.1 Content of plan

Clause 13 details the sections which must be included in the Plan. It is likely that other matters will be included in the Plan but as a minimum the plan must describe the water resources of the Territory and detail environmental flows for individual waterways. It must also identify water resources expected to be available for allocation over a 10 year timeframe, how and when they may be made available, and where they could be extracted.

5.2 Preparation and variation of management plan

The Authority is required to prepare a draft management plan and is permitted to prepare draft variations to the plan. This might need to happen if it is desirable to change the proposed allocations over the next ten years or to change the way that the Environmental Flow Guidelines affect a particular waterway.

5.3 Consultation

Clause 15 ensures that proper public consultation takes place on the contents of the Plan or an amendment to the Plan. The Authority must make copies of the draft plan or an amendment available for inspection and comment for a period of 60 days.

5.4 Formal changes

Variation of the management plan to correct formal mistakes such as grammatical errors or minor changes to make the meaning clearer without changing the intent are not subject to public consultation.

5.5 Revision of the plan and submission to the Minister

The Authority can revise the draft plan or variation according to any comments received as a result of the public consultation but regardless the Authority must prepare a report showing each comment received, whether it was included in the revision and if not, why not. The report also details how the Authority consulted with the

public The revision and the report are then submitted to the Minister for consideration

5.6 Consideration by the Minister and resubmission

Clause 15 requires that, if the draft plan or variation is acceptable to the Minister, it is to be determined by notice in the *Gazette* as a disallowable instrument. If the Minister is not satisfied with the draft plan or amendment it is returned to the Authority with instructions on how it should be modified.

The revised plan or amendment is then resubmitted to the Minister for reconsideration as many times as is necessary for the Minister to be satisfied.

Part VI Allocation of Water

6.1 Control of taking of water - general principles

This part applies to all water other than groundwater which is under land subject to a lease granted before commencement of clause 7.

Control of the taking of water from ACT's waterways and groundwater reserved to the Territory is by water allocations and licences to take water. Control of the taking of groundwater which is not reserved to the Territory is by licences only.

Allocations provide a general right to take water under the control of the ACT Government consistent with the objectives of the Bill. Allocations would only be made where provision for the allocation exists in the Water Resource Management Plan and it is environmentally sound to do so. If the Water Resource Management Plan allows, an allocation could be for a particular volume or rate of flow of water to be taken from some point in the ACT downstream to the mouth of the Murray River. The amount of water which could be taken under an allocation would be less downstream from the ACT due to losses to evaporation and percolation into streambeds.

An allocation is the right to certain water and can be traded as an asset. However, for the water to be physically taken at a particular place within the ACT, a licence to take water is also required to ensure that taking water at a particular point does not interfere with environmental flows or cause environmental damage and that the applicant has a satisfactory environmental record.

6.2 Allocation of Water

Clause 22 provides that allocations can be fixed by specifying volume or rates of water taken. This range of

measures is necessary to ensure that the most appropriate measure can be chosen for water in various waterways, and to take account of seasonal and annual differences in flow rates

This clause also provides that water allocations held by the Authority must normally be allocated by auction or tender to ensure public accountability

Provision is made in this clause for the Minister to allocate water to a particular person without using the public auction or tender process. The decision to grant an allocation must still be based on the matters in section 23

Within 14 days of allocating water in such a manner, the Minister must publish notice of the allocation in the Gazette

6.3 Matters to take into account - allocation of water

The Authority will not allocate all waters controlled by the ACT immediately but, when the Authority or Minister decides it might be appropriate to allocate some water, matters in clause 23 will be taken into account in that decision. Allocations can only be made if provision for them is made in the Water Resource Management Plan

6.4 Reduction of allocation

Clause 24 provides that, where the Authority determines that harm is occurring to ACT's water resource through mechanisms such as climatic change or recognition that environmental flows are not adequate, the Authority can reduce one or more water allocations to reduce the harm. Such a reduction will be permanent. The Authority is required to give 90 days notice before the reduction takes effect. This is to allow the holder of the allocation or a licence which depends on the allocation to make any necessary adjustments to their activity before the reduction comes into effect.

The clause also ensures that licences to take water are reduced by the amount of water by which an allocation has been reduced

6.5 Transfer of allocation

Clause 25 provides for reasonably open transfer of allocations between individuals whether in ACT or not, provided that the ACT can keep track of who possesses its allocations

Clause 26 is included to ensure that licences to take water are reduced by the amount of water which has been transferred from an allocation on which the licence depends

Part VII Licences, etc to Take Water

Division 1 Licences to take water

7.1 Unlicensed taking of water

Clause 27 provides a number of circumstances when a licence is not required to take water. This exemption is only intended for lower volume uses that should be recognised as incidental to ownership of land adjacent to a waterway or otherwise in the public interest.

7.2 Limitation of right to take water

Clause 28 gives the Minister power to restrict the right to take water during shortages caused by drought or other temporary conditions. Restrictions can apply to some or all water users in the ACT as each circumstance requires. This provision applies to bulk water users and is entirely separate to the power of the Minister responsible for the *Energy and Water Act 1988* to impose water restrictions on reticulated water users.

The Authority must give notice directly to each holder of a licence to take water who is affected that the Minister has placed a limit on the licensee's right to take water. This is to ensure that individuals do not inadvertently become liable for a penalty if they miss a notice in a newspaper or the *Gazette*.

7.3 Licences to take water

Clause 29 allows the Authority to grant a licence to take water subject to conditions such as specifying the location, requirements to provide information, and any others necessary to protect the water resource and ensure that the public interest and rights of other water users are taken into consideration. An allocation is not required although a licence is for the use of groundwater under land subject to a lease granted before the commencement of clause 7.

Conditions will also be used to permit the reuse of water or wastewater without the need to obtain a further licence, wherever this is appropriate.

Clause 29 also includes the criteria on which the Authority could refuse to grant a licence to take water.

7.4 Surrender, transfer and cancellation of licences

Clauses 30 and 32 cover the surrender and cancellation of licences to take water.

Under clause 31, transfer of a licence to take water is allowed subject to establishing the identity and

environmental record of the person to whom the licence is being transferred. This provision only applies where the water taken under the licence will continue to be used for the same activity at the same location.

Division 2 Drillers' licences

7.5 Driller's licence

The drilling of bores needs to be regulated to ensure groundwater resources are protected. Under clause 33 the Authority can only grant a driller's licence if the applicant has the prescribed qualifications to hold a driller's licence.

A National Drillers Licence System has been adopted by other States and Northern Territory. Under mutual recognition such an interstate licence would be recognised in the ACT and an ACT driller's licence would normally be granted automatically to the holder of an interstate licence.

Clause 36 allows the Authority to require that drillers provide information and samples on bores which they are drilling in the ACT.

Division 3 Bores

7.6 Bores

As further protection of groundwater clauses 37 and 38 require that bores may not be drilled, except in certain circumstances, without a bore construction permit. The clauses will ensure that bores are not drilled unless

- there is a relevant licence to take water;
- environmental flow requirements are met; and
- the impact on other water users is acceptable.

7.7 Wasting bore water

Groundwater resources can be seriously depleted and the water quality in waterways affected by water running to waste from bores. Clause 39 ensures that bores are not permitted to run to waste even when the bore water is being used some of the time.

7.8 Directions relating to bores

If the Authority is concerned that a bore is adversely affecting a water resource, clause 40 permits the Authority to give directions to the occupier of the land containing the bore. The directions will be designed to halt the adverse effect and may include a direction to discontinue using the bore.

Division 4 Recharge Licences

7.9 Recharge Licences

Clause 41 makes it an offence to add water to groundwater through a bore or other structure without a recharge licence and allow the Authority to grant such a licence after considering the impact of the recharge on the groundwater, waterways, other water users and landholders. Such a licence can be granted for a period not exceeding ten years.

Division 5 General

7.10 Variation of conditions on licences or permits

Where the Authority wishes to change, revoke or add a condition to a licence or permit, Clause 43 provides that, after notifying the licence or permit holder, the Authority may vary, revoke or impose a condition.

7.11 Notification of grants, etc

To insure that all affected parties become aware of the granting or varying of a licence or permit, clause 44 requires that the Authority publish the details of each grant or variation in the *Gazette* and a newspaper.

7.12 Self-incrimination

Clause 45 ensures that a person who is required under this Act to answer a question, furnish information or produce a document does not incriminate themselves. This is done by the provision that such information is not admissible as evidence in any proceedings other than Clause 46 or Clause 47 which relate to providing false or misleading information, and obstructing authorised officers respectively.

7.13 False or misleading information

Clause 46 makes the giving of false or misleading information on matters under this Act an offence.

7.14 Obstructing authorised officers

Clause 47 provides it is an offence to obstruct or hinder the work of authorised officers, or to refuse to comply with their lawful directions. The work of authorised officers is central to the administration of the Act, and this clause reflects the gravity of interfering with those duties.

Part VIII Enforcement

Division 1 Preliminary

8.1 Interpretation

Clause 48 gives definitions used only in this Part

Division 2 Entry and Inspection Generally

8.2 Entry - routine inspections

Clause 49 provides that authorised officers can enter premises at any reasonable time with the consent of the occupier (Please see 8.5 - *Consent to entry* below for more information on this point)

8.3 Entry - search warrants

Under clause 50 search warrants give authorised officers power to enter premises without the constraints provided by clause 49. Warrants can only be obtained if authorised officers have reasonable grounds for suspecting there is something on the premises connected with an offence (Please see 8.6 - *Search warrants* below for more information on this point)

If a search warrant is granted, authorised officers can enter any premises at any time, and can use necessary and reasonable force to do so. In addition, police officers may be called to assist in the execution of a search warrant

8.4 Inspection of premises

While on the premises, clause 52 permits authorised officers to gather information through a variety of means including taking photographs, making observations and taking materials or documents.

Authorised officers can also require people on the premises concerned with the conduct of the activity in respect of which entry is made to answer questions and to give them reasonable assistance in carrying out their duties

8.5 Consent to entry

Clause 53 sets out the procedure authorised officers must follow in obtaining consent from an occupier to enter premises

8.6 Search warrants

Search warrants are issued by magistrates if there are reasonable grounds for suspecting a contravention of the Act. Under clause 54, search warrants give authorised officers powers to enter premises without the constraints provided in clause 49

Division 3 - Seizure, retention and disposal of things

8.7 Seizing items

Clause 55 gives authorised officers the power to seize items if the officers have reasonable grounds for believing the items are connected with an offence under this Act, and that the item should be seized to secure it, to prevent an offence being committed or obtain evidence from it

Officers must issue a receipt for any item seized

8.8 What happens to items after they are seized?

Under clause 56, unless its release to its owner is authorised by the Authority, seized items are held as pieces of potential evidence. The Authority then has six months in which to begin a prosecution for an offence

If prosecuted and found guilty

If the person is found guilty, the court can order either that

- the thing be forfeited to the Authority, or
- the defendant buy back the thing from the Authority at the price determined by the court

If not prosecuted, or prosecuted and found not guilty

If the Authority does not prosecute for an offence, or a prosecution occurs but the defendant is found not guilty, the Authority must release the seized item to its owner

Division 4 - Other powers

8.9 Power to require name and address

Under clause 57 authorised officers can require people who are committing, or who they reasonably believe have committed, an offence under this Act to provide their name and address. Officers must

- inform the person of the reasons they are being required to give this information; and
- record those reasons as soon as practicable

Part IX Miscellaneous

9.1 Register of allocations, licences and permits

Clause 58 requires the Authority to keep a register of licences which would contain information identifying the

holder, contact details and location and other relevant information

9.2 Duty not to damage waterways

Clause 59 requires that a lessee or occupier of land protect the beds and banks of waterways from any significant damage which could be caused by the lessee/occupier's activities. This clause is intended to protect waterways from the most common forms of damage which would interfere with water flow. When the lessee or occupier fails to carry out his/her duty the Authority can serve a notice requiring that actions to prevent or rectify the action are undertaken. Failure to take these actions can result in the Authority may take the action and charge reasonable expenses to the lessee or occupier. Minor damage and damage which results from an activity authorised by this Act are not considered to be damage for the purpose of this clause.

9.3 Destruction of works

Clause 60 makes it an offence to damage or destroy any works or equipment which the Authority uses to monitor or investigate water resources or associated with a licence or permit under the Act.

9.4 Interference with supply and drainage

Clause 61 makes it an offence for a third party to interfere with the taking of water or drainage of land. This clause will help to protect the rights of water users.

9.5 Unauthorised works

Clause 62 makes it an offence to construct or alter structures which can adversely affect the flow of a waterway without a permit. The clause provides an exception for structures which will be prescribed in the Regulations. These exceptions will include most farm dams, drainage channels and other works which do not significantly impact on water flows. In the case of farm dams, the Regulations will prescribe a dam size over which a permit will be required.

9.6 Permits to construct water control structures

Clause 63 allows the Authority to grant a permit to construct a water control structure which is necessary to take water. A permit will only be granted where a licence to take water is already held by the applicant.

Clause 64 provides that the Authority may serve notice on a lessee or occupier of land to take action to remove an unauthorised structure or repair the damage it has caused and includes provision for recovery of expenses should the Authority need to take the action if the lessee or occupier refuses.

9.7 Annual Fees

Clause 65 requires the payment of annual fees as determined by the Minister for licences, permits and allocations

9.8 Recovery of unpaid moneys

Clause 66 provides that when a person fails to pay a fee or charge for a licence, permit or other service under this Act, the Authority may suspend or cancel the licence or permit or stop providing the service. This clause will ensure annual and other fees are paid on time

9.9 Conduct of directors, servants and agents

Clause 67 contains provisions concerning the state of mind of certain people committing an alleged offence under this Act. Related provisions are described below

Subclauses 67(1) & (5)

Subclause (1) attributes the state of mind of directors, servants and agents to their company or principal for conduct within the scope of their actual or apparent authority. For these purposes, Government corporations are included in the term 'company' through subclause (5)

Subclauses 67(2) & (3)

Subclause (2) explains what matters are part of a person's state of mind for the purposes of this provision while subclause (3) provides that any conduct by a Director, servant or agent of a person or body (the Principal), within their authority (real or apparent), is attributed to the Principal unless the Principal can establish a defence of due diligence

Subclause 67(4)

Subclause (4) prohibits prison terms for convictions which rely on this clause, because the conduct mental state of mind may be imputed rather than real

9.10 Criminal liability of officers of body corporate

Clause 68 provides that prescribed officers (defined in the clause) of a body corporate which is convicted of an offence are all taken to be guilty of the offence individually, provided they were in a position to influence the conduct concerned

The clause is designed to give directors and other decision-makers in a company the strongest possible incentive to take all available steps to ensure their company does not commit offences under the Act. This clause reflects similar clauses in other States

9.11 Evidentiary

Clause 69 contains evidentiary provisions which provide that a certificate stating the following is evidence of the matter stated

- a person was or was not the holder of a licence or a permit,
- a person was or was not a lessee of particular land, and
- a particular location is a waterway or bore

9.12 Compensation

Under clause 28, the Authority can require that structures be modified or removed so that they do not block water when the Minister requires that the rate at which water is taken is reduced. Clause 70 provides for compensation for such modification or removal as the requirement is imposed in the public interest.

The Territory is also liable to pay compensation for any damage to a lessee/occupier's property as a result of the Authority undertaking activities to assess the Territory's water resources as provided in clause 11.

9.13 Review of decisions

The effect of clause 71 is to create comprehensive rights of review. Decisions made under this Act, pursuant to the sections listed, are subject to review by the Administrative Appeals Tribunal.

Decisions subject to appeal include those relating to refusal to grant, conditions imposed, time period, cancelling or suspending a permit or licence. Other decisions such as directions and requirements that actions be taken are also appealable. Clause 71(3) ensures that the Authority cannot avoid making a decision concerning the grant of a licence or permit as a way to avoid a person appealing against a decision.

Ensuring that people can exercise their appeal rights is done by the provisions in clause 10 which ensures documents are available to inspect, clause 22 which requires a public notice whenever the Minister grants a water allocation, and clause 44 which requires a notice whenever the Authority grants or varies a licence or permit.

9.14 Determination of fees

Under clause 72 the Minister can determine fees and administrative charges under the Act. It is important to note that fees can be determined through a formula. Formulae could vary the fee applicable by reference to such matters as the volume of water taken or the variable cost of considering an application. This will allow "user pays" charging, to which the Territory is committed under the Inter

9.15 Regulation-making powers

Under clause 73, Regulations may be made for the purposes of this Act, including those prescribing penalties for offences where the penalty is currently \$1000 or less for an individual

Regulations may also be made for other matters, including

- the transfer of licences,
- how the quantity of water taken is to be assessed (for example a requirement for meters on bores), and
- requirements to provide information to the Authority

Regulations are disallowable instruments which must be tabled in the Legislative Assembly

Part X Transitional and Consequential Provisions

10.1 Rights to take water existing before commencement

Many people are using water before the commencement of this Act and it is not intended that they be at risk of committing an offence before they have an opportunity to obtain a licence to take water. Clause 74 provides a transitional arrangement which will apply to persons who were using water before 1 May 1998 which permits them to continue to take water for 12 months after commencement or until they are notified that the Authority has refused to grant a licence

At the end of the 12 month transition period this clause will no longer apply and clause 27 will cover all unlicensed taking of water whether it existed before the Act or not

10.2 Allocation

Subclause 74 (3) provides that a person who was using water, other than groundwater under land the subject of a lease granted before commencement of clause 7, at 1 May 1998 and successfully applies for a licence to take water will receive an allocation for the same amount of water. While subclause 74 (4) makes that allocation free, it is restricted to the purpose and location for which it is first issued

10.3 Arbitration

Subclause 74 (5) provides that, where an existing user disputes their water allocation, they may ask that the dispute be referred to arbitration

10.4 Notification

Subclause 74 (6) permits the Authority to publish a notice requiring each lessee or occupier of land taking water for which a licence is required to provide information specified in the notice to the Authority. The information required will enable the Authority to ensure that licences are not granted for waterways or groundwater which are under threat of overuse

10.5 Consequential amendments

Clause 75 repeals Sections 11 and 12 of the *Lakes Act 1976* which provided for licences to use water from lakes. Section 13 requires consultation with the Authority before the level of water in the lake is raised or lowered or the rate of flow of water from the lake is changed

Clause 76 changes the *Land (Planning and Environment) Act 1991* by adding a section which does not permit a lease of Territory Land granted after the commencement of this clause to confer the right to the use, flow or control of water. This will have no impact on the rights of lessees who hold leases granted before this clause's commencement, but will gradually mean that, as new or renewed leases replace old ones, the ACT Government will gain control of all of the Territory's waters