

2013

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

WATER RESOURCES AMENDMENT BILL 2013

EXPLANATORY STATEMENT

Presented by

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Introduction

This explanatory statement relates to the *Water Resources Amendment Bill 2013* (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

Background

The purpose of the Bill is to amend the *Water Resources Act 2007* and *Water Resources Regulation 2007* to ensure consistency and harmonise water resource offences across States and Territories.

The ACT is a signatory to a COAG intergovernmental agreement for compliance and enforcement of water resources, entitled the ‘National Framework for Compliance and Enforcement Systems for Water Resource Management’ (the National Framework). The jurisdictions participating in the National Framework agreed to use their best endeavours to introduce and pass legislation to provide for nationally consistent and adequate legislative requirements to manage compliance and enforcement for regulatory subjects such as:

- take or use water without a licence;
- unauthorised construction of bores;
- unauthorised work in a waterway;
- contravention of the conditions of a licence to take water;
- offences regarding water metering and reporting water usage;
- tampering with water meters;
- impeding authorised officers from performing their enforcement duties; and
- impacting on water quality.

For each issue, the States and Territories were required to have an adequate range of regulatory tools, such as: infringement notices, disciplinary action, sanctions, criminal offences, and offences with certain evidentiary presumptions. The National Framework also required adequate penalty levels.

A review of ACT water resource offences was undertaken relative to the requirements of the National Framework. The review involved primarily the *Water Resources Act 2007* and the *Environment Protection Act 1997*. The review found that many of the required offences were

already covered in the *Water Resources Act 2007*, mainly because this Act is modern and was developed with the Commonwealth *Water Act 2007* in mind. Nonetheless, a number of recommended improvements were identified during the review to ensure the ACT had an adequate range of appropriately scaled water offences.

Overview

The substantive changes of the Bill are outlined below.

- A new strict liability offence will be introduced for failure to submit a bore completion report to the Environment Protection Authority within a required timeframe.
- A new strict liability offence will be introduced for undertaking waterway works without holding the required licence.
- An infringement notice scheme will be required for the new strict liability offences.
- The definition of ACT Drillers licence will be clarified.
- The taking of water for road works, earthworks, construction and landscaping will be removed as an activity that is exempt from requiring a licence to take water. This will result in this type of water taking activity to be subject to existing offence provisions for unauthorised taking of water.
- A new criminal offence will be introduced for tampering with a water meter.

The amendments proposed in the Bill are technical in nature and do not pose a change in policy direction contrary to the intentions or objectives of the *Water Resources Act 2007*. The amendments are complimentary to existing provisions of the *Water Resources Act 2007* and expand the range of reasonable and appropriate enforcement actions that may be applied, relative to the seriousness of a non-compliant incident. The enforcement actions proposed by the amendments are similar to existing penalties, and like existing penalties, are reserved for occasions when the Environment Protection Authority (the Authority) issues a penalty in the public's interests to protect the environment.

The Bill includes strict liability offences. The strict liability offences are in clauses 7 and 8. The use of strict liability was carefully considered in developing the offences. The rationale for their inclusion was to protect water resources. A strict liability offence displaces the fault element, termed 'mens rea', of an offence. However, strict liability does not oust a range of

defences to criminal responsibility in Territory law. For example, a person may raise a defence of honest and reasonable mistake of fact. Strict liability offences do not lead to a reversal in the onus of proof. Such offences require the prosecution to prove the elements of the offence beyond reasonable doubt. It is then open to a defendant to raise defences and to bear an evidential burden only as to their existence. The prosecution must then disprove the existence of any defence beyond reasonable doubt. As the burden of proof on a defendant is an evidential burden, the defendant will only have to point to evidence that suggests a reasonable possibility that the defence applies.

It is acknowledged that the use of strict liability offences could be argued to be a limitation on the right to be presumed innocent under section 22 of the *Human Rights Act 2004* (HRA) and could be argued to unduly trespass upon personal rights and liberties. However, it is considered that it is permissible as a reasonable limitation under section 28 of the HRA because the limitation on rights pursues a legitimate objective and is proportional.

As a signatory to the National Framework, the ACT is required to have an adequate range of regulatory tools that is nationally consistent and adequate to manage compliance and enforcement for water resource management. The strict liability offences are included for this reason and are justified on this basis.

Strict liability offences are an efficient and cost effective deterrent for breaches of regulatory provisions. They are appropriate where the prosecutor is in a position to readily assess the truth of the matter and that an offence has been committed. The use of strict liability offences (in this case for failure to submit a bore completion report; and performing waterway work without holding a waterway work licence) are for minor offence provisions to address minor environmental issues. It is also readily apparent that an offence has been committed. The purpose of the limitation to the right of presumption of innocence is to deter non-compliance, to avoid subjecting a person to the ordeal of prosecution, and to provide an appropriate small penalty (infringement notice fine) that does not carry a criminal record.

As such, an infringement notice scheme is the most appropriate regulatory tool to use because the associated penalty would be considered proportional to the consequential environmental impact of non-compliance. Current alternative offences available in the *Water Resources Act 2007* carry excessive penalties and inadequate deterrents. The strict liability offences are the

least restrictive means available to achieve the object of the amendment and its intended outcome.

Outline of provisions

Clause 1 Name of Act

This clause 1 indicates the name of the amendment Act. This Bill, if passed, will become the *Water Resources Amendment Act 2013*.

Clause 2 Commencement

This clause indicates that the Act will commence on the day after its notification.

Clause 3 Legislation amended

This clause notes that the Bill amends the *Water Resources Act 2007*. The note indicates that schedule 1 amends the Magistrates Court (Water Resources Infringement Notices) Regulation 2007 and the Water Resources Regulation 2007.

Clause 4 Licence to take water – where water may be taken New section 32 (2)(c)

This clause inserts new section 32 (2) (c) in section 32. Section 32 sets out where water may be taken from under a licence to take water. Section 32 (1) refers to water utilities and section 32 (2) refers to persons other than a water utility. Presently section 32 (2) states that a licence to take water may authorise the person to take surface water under the licence from the water management area stated in the water access entitlement on which the licence is based or if the water management area is prescribed by regulation for this paragraph - a place in a waterway that is downstream from the water management area. New section 32 (2) (c) inserts that a licence may authorise the person to take surface water under a licence for road works, earthworks, construction or landscaping from a water management area. The Authority must not issue a licence unless satisfied that the water taking activity is exempt under a regulation. See cross reference to [1.3] new section 8A.

Clause 5 Offences – do bore work without licence Section 77B (1)(b), new note

This clause inserts a new note in section 77(1)(b) to make it clear to interstate drillers that they require an ACT Drillers licence to drill bores in the ACT.

Clause 6 Section 77B (3) (b) new note

This clause inserts a new note in section 77B (3)(b). It has been inserted for consistency with clause 5.

Clause 7 Offence – do waterway work without licence new section 77C (1A) and (1B)

This clause inserts a new section 77C (1A). New section 77C (1A) creates a strict liability offence if a person does waterway work and does not have a waterway work licence for the waterway work. The maximum penalty is 50 penalty units as an infringement notice in the Magistrates Court (Water Resources Infringement Notices) Regulation 2007 – see ‘Schedule 1 Other amendments’. The limitation is reasonable, in that the no fault element of the offence is isolated to the matter of whether a person engaged in the act of waterway work without holding the required licence. The purpose of the limitation to the right to presumption of innocence is to deter unauthorised waterway work. The limitation avoids subjecting a person to the ordeal of criminal prosecution; avoids expending government resources on a criminal prosecution; and provides a proportionally small penalty (infringement notice fine) that does not carry a criminal record and is appropriate to an incident with low environmental impact. It is the least restrictive means available to achieve the purpose of the limitation because current alternative enforcement options in the *Water Resources Act 2007* carry large penalty or are not applicable to instances of unlicensed waterway work.

Clause 8 Offence – contravening licence conditions Section 77F (2)

This clause substitutes a new section 77F (2). New section 77F(2) provides that the holder of a bore work licence or driller’s licence commits an offence if the holder’s licence is subject to a condition requiring the holder to give the Authority a bore completion report and the holder does not provide the report. It is a strict liability offence and the maximum penalty is 25 penalty units as an infringement notice in the Magistrates Court (Water Resources Infringement Notices) Regulation 2007 – see ‘Schedule 1 Other amendments’. New section 77F(4) defines ***bore completion report*** as a report prepared by the person who drilled the bore that sets out the details of the bore. The limitation is reasonable, in that the no fault element of the offence is isolated to whether or not a person gave a bore completion report to the Authority within a specified time. The purpose of the limitation to the right to presumption of innocence is to deter non-lodgement of bore completion reports which prevents important information about groundwater and potential extraction points being made

available for water resource management. The limitation avoids subjecting a person to the ordeal of criminal prosecution; avoids expending government resources on a criminal prosecution; and provides a proportionally small penalty (infringement notice fine) that does not carry a criminal record and is appropriate to an incident with low environmental impact. It is the least restrictive means available to achieve the purpose of the limitation because it is an appropriately scaled enforcement action compared with current alternative enforcement options in the *Water Resources Act 2007* that carry large penalty or involve administrative disciplinary action.

Clause 9 New section 77J

This clause inserts new section 77J. New section 77J provides that a person commits an offence if the person tampers with a water meter. The maximum penalty is 50 penalty units. A penalty unit is presently \$110 under the Legislation Act 2001. New section 77J (2) states that the section does not apply if the person is a person prescribed by regulation who is installing, maintaining, repairing or replacing the water meter or acting with the written permission of the Authority, or a holder of a licence to take water is complying with a requirement under this part. New section 77J(3) provides the meaning of tamper for the section. Tamper with a water meter means interfere with, damage or destroy the water meter, and includes:

- (i) unsealing any sealed component of the meter;
- (ii) blocking any part of the meter;
- (iii) attaching to the meter any device that is likely to affect the operation of the meter; or
- (iv) disconnecting the meter from its power source.

Schedule 1 Other amendments

Schedule 1 makes amendments to the *Magistrates Court (Water Resources Infringement Notices) Regulation 2007* and the *Water Resources Regulation 2007*.

Part1.1 Magistrates Court (Water Resources Infringement Notices) Regulation 2007

[1.1] Schedule 1, new items 2A and 2B

Paragraph 1.1 inserts new items 2A and 2B in schedule 1 of the *Magistrates Court (Water Resources Infringement Notices) Regulation 2007*.

Part 1.2 Water Resources Regulation 2007

[1.2] Section 6 (1) (b)

Omits a water taking activity that was exempt from requiring a licence to take water.

[1.3] New section 8A

Paragraph 1.4 inserts new sections 8A and 8B in the Water Resources Regulation 2007.

New section 8A Exemption from requirement for water access entitlement – road works, earthworks, construction or landscaping – Act, s30 (2)(a)

This relates to Schedule 1 [1.2] and clause 4. Paragraph 1.4 (section 8A) enables the taking of water for road works, earthworks or other construction, or landscaping, to be eligible for issue of a licence to take water but be exempt from requiring a water access entitlement, provided the water taking activity will result in improved environmental outcomes or other public benefit.