

Water (Commonwealth Powers) Bill 2008

Explanatory Notes

General Outline

Policy Objectives

The primary object of this Bill is to refer certain matters about water management relating to the Murray-Darling Basin to the Commonwealth Parliament, so as to enable the Commonwealth Parliament to make laws about those matters. The proposed Act will be enacted for the purposes of section 51 (xxxvii) of the Commonwealth Constitution, which enables State Parliaments to refer matters to the Commonwealth Parliament.

The Bill operates by reference to the text of Schedule 1 to the Commonwealth Water Amendment Bill 2008 so as to enable the enactment and future amendment of provisions set out in that Schedule that are to be included in the Commonwealth *Water Act 2007* (Commonwealth Water Act). The Bill also repeals the *Murray–Darling Basin Act 1996*.

The Bill also makes, not related to the referral of powers, necessary operational amendments to the *Water Act 2000* (Water Act), *Land Act 1994* (Land Act) and *Land Title Act 1994* (Land Title Act).

Reason for the Policy Objectives

Referral of Powers to the Commonwealth

On 26 March 2008 the Commonwealth and the Queensland, New South Wales, Victoria, South Australia and Australian Capital Territory Governments (Basin States), agreed in principle to a Memorandum of Understanding for Murray-Darling Basin reform, setting out principles for the co-operative, efficient and effective planning and management of the Basin water and other natural resources.

Under the Agreement on Murray-Darling Basin Reform of 3 July 2008, the Commonwealth and the Basin States agreed to use best endeavours to pass legislation to provide for a limited text referral of State powers to the Commonwealth to achieve new Murray-Darling Basin governance

arrangements; enable the Basin Plan, developed under the Commonwealth Water Act, to provide for critical human water needs and to extend the role of the Australian Competition and Consumer Commission (ACCC) within the Murray-Darling Basin in relation to the application of the water charge rules and water market rules under the Commonwealth Water Act.

The additional amendments under the Bill, unrelated to the referral of powers, are required for the following reasons:

Amendments to Water Act and Water Resource Plans

Amendments to the Water Act are necessary to enable the effective implementation of water resource planning instruments and to make minor technical amendments.

Amendments to Land Act and Land Title Act

It is necessary to extend by one year, the current stay on the registration of tidal boundary plans due to lapse on 8 November 2008 under the Land Act and the Land Title Act. The current stay operates only where the proposal is to change the boundary and only where the public interest is affected.

How the Policy Objectives will be achieved

Referral of Powers to Commonwealth

The referral of powers is based on section 51(xxxvii) of the Commonwealth Constitution '*matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law*'.

The Bill operates by reference to the text of Schedule 1 of the Commonwealth Water Amendment Bill 2008 so as to enable the enactment and future amendment of provisions set out in that Schedule that are to be included in the Commonwealth Water Act. The Bill is also supported by amendments to the Murray-Darling Basin Agreement a copy of which is included in Schedule 1 of the Commonwealth Water Amendment Bill 2008.

The referral of powers provides for new water management arrangements in the Murray-Darling Basin including the:

- (a) Establishment, membership, voting and functions of the new Ministerial Council and Basin Officials Committee.

- (b) Transfer of the existing Murray-Darling Basin Commission duties, functions and powers to the Murray-Darling Basin Authority established under the Commonwealth Water Act and the Basin Officials Committee established under the Murray-Darling Basin Agreement.
- (c) Enabling the Basin Plan, developed under the Commonwealth Water Act, to provide for critical human water needs.
- (d) Strengthening the role of the ACCC by extending the application of water market rules and water charge rules to cover, respectively, all bodies that charge regulated water charges and all irrigation infrastructure operators, and by providing for any State to 'opt in' such that the water charge rules and water market rules apply to water resources outside the Murray-Darling Basin.

The Bill makes two references of matters to the Commonwealth Parliament:

- (a) The first reference (the initial reference) refers in effect the matter of the Commonwealth including in the Commonwealth Water Act provisions in the terms, or substantially in the terms, set out in Schedule 1 of the tabled text. The tabled text is a reference to Commonwealth Water Amendment Bill 2008 as tabled by the Minister for the River Murray in the House of Assembly of South Australia on 23 September 2008.
- (b) The second reference (the amendment reference) relates to the following defined subject matters:
 - (i) the powers, functions and duties of Commonwealth agencies that:
 - i. relate to Basin water resources, and
 - ii. are conferred by or under the Murray-Darling Basin Agreement,
 - (ii) the management of Basin water resources to meet critical human water needs,
 - (iii) water charging in relation to Basin water resources (other than for urban water supply after the removal of the water from a Basin water resource),
 - (iv) the transformation of entitlements to water from a Basin water resource to enable trading in those water entitlements,

- (v) the application, in relation to water resources that are not Basin water resources, of provisions of the Commonwealth Water Act dealing with the subject-matters specified in paragraphs (iii) and (iv) (being an application of a kind that is authorised by the law of this State),
- (vi) the transfer of assets, rights and liabilities of the Murray-Darling Basin Commission to the Murray-Darling Basin Authority established by the Commonwealth Water Act, and other transitional matters relating to the replacement of that Commission.

The amendment reference is only to the extent of making ‘express amendments’ to the Commonwealth Water Act. The expression express amendments are defined as the direct amendment of the text of Schedule 1 to be included in the Commonwealth Water Act. The amendment reference is intended to enable the Commonwealth Parliament to amend all aspects of the tabled text from time to time.

The Bill is underpinned by an intergovernmental agreement (the Referral Agreement), to which the Commonwealth and the Basin States are parties. The Referral Agreement establishes a process for amending the tabled text to be included in the Commonwealth Water Act by which any changes proposed by the Commonwealth to the provisions of the tabled text require approval from the Ministerial Council established under the Murray-Darling Basin Agreement.

Amendments to Water Act and Water Resource Plans

The policy objectives will be achieved by:

- Amending sections 26 and 46 of the Water Act to clarify that a moratorium notice may be published over an area of the State for the same water to which an approved water resource plan or resource operations plan applies.
- Amending sections 103, 104 and 105, and inserting new sections 104A, 104B and 105A to provide a process for a draft resource operations plan to be finalised in stages.
- Reinstating the definition of floodwater into schedule 4 dictionary of the Water Act which was inadvertently omitted.
- Amending a number of Queensland Murray-Darling water resource plans to give effect to the government decision to grant a volume of

unallocated water from the Queensland Murray-Darling catchments to the Commonwealth.

Amendments to Land Act and Land Title

- Amending sections 431NB and 431NF of the Land Act, and section 191B of the Land Title Act, to extend the current stay on the registration of tidal boundary plans, by 12 months, to 8 November 2009.

Alternatives to the Bill

There are no other viable alternatives that would achieve the policy objectives other than the proposed Bill.

Estimated administrative Cost to the Government for implementation

The Bill will not impose any additional financial burdens on the Government.

Consistency with Fundamental Legislative Principles

The Bill is consistent with fundamental legislative principles outlined in section 4 of the *Legislative Standards Act 1992*.

Consultation

The Bill, to the extent it relates to the referral of powers, was prepared through the Parliamentary Counsel's Committee and in consultation between the Commonwealth and Basin States.

The Department of the Premier and Cabinet, the Office of Queensland Parliamentary Counsel, Queensland Treasury, Department of Primary Industries and Fisheries and Environmental Protection Agency have been consulted.

Results of consultation

There is general support of the Bill from the consulted agencies.

Notes on Provisions

Part 1 Preliminary

1 Short title

Clause 1 states that this Act may be cited as the *Water (Commonwealth Powers) Act 2008*.

2 Commencement

Clause 2 provides for the commencement of the proposed Act. In relation to the referral of State powers, clauses 3 to 7 commence on assent and clauses 8 and 17 are to commence by proclamation. The remaining provisions commence on assent.

Part 2 Reference of matters

3 Definitions

Clause 3 defines certain words and expressions used in the proposed Act. The text of the proposed Commonwealth legislation subject to the referral is defined by reference to the text tabled in the House of Assembly of South Australia in conjunction with the introduction of the referral legislation in that State (as South Australia was the first State to introduce its referral legislation).

4 Reference of matters

Clause 4 deals with the references to the Commonwealth Parliament.

Clause 4(1)(a) (“the initial reference”) refers in effect the matter of the Commonwealth including in the Commonwealth *Water Act 2007* provisions in the terms, or substantially in the terms, set out in Schedule 1 of the tabled text. The expression “substantially in the terms” of the tabled text will enable minor adjustments to be made to the tabled text.

Clause 4(1)(b) (“the amendment reference”) refers in effect the matter of the Commonwealth amending in future the provisions enacted in reliance on the initial reference. The referred subject-matters are limited to the following:

- (a) the powers, functions and duties of Commonwealth agencies that:
 - (i) relate to Basin water resources, and
 - (ii) are conferred by or under the Murray-Darling Basin Agreement,
- (b) the management of Basin water resources to meet critical human water needs,
- (c) water charging in relation to Basin water resources (other than for urban water supply after the removal of the water from a Basin water resource),
- (d) the transformation of entitlements to water from a Basin water resource to enable trading in those water entitlements,
- (e) the application, in relation to water resources that are not Basin water resources, of provisions of the Commonwealth Water Act dealing with the subject-matters specified in paragraphs (c) and (d) (being an application of a kind that is authorised by the law of this State),
- (f) the transfer of assets, rights and liabilities of the Murray-Darling Basin Commission to the Murray-Darling Basin Authority established by the Commonwealth Water Act, and other transitional matters relating to the replacement of that Commission.

Clause 4(2) makes it clear that the reference of a matter has effect only to the extent that the matter is not otherwise within the legislative power of the Commonwealth Parliament and to the extent that the matter is within the legislative power of the State Parliament.

Clause 4(3) removes a possible argument that one of the references might be limited by the other.

Clause 4(4) makes it clear that the State Parliament envisages that the Commonwealth Act can be amended or affected by Commonwealth legislation enacted in reliance of other powers and that instruments under the Commonwealth Act may affect the operation of the legislation otherwise than by express amendment.

Clause 4(5) specifies the period during which a reference has effect.

5 Termination of references

Clause 5 deals with the termination of the period of the references specified under clause 4 (namely, the period ending on a day fixed by the Governor by proclamation). The clause enables the period of both references to be terminated or only the period of the amendment reference.

6 Effect of termination of amendment reference before initial reference

Clause 6 makes it clear that the separate termination of the period of the amendment reference does not affect laws already in place. Accordingly, the amendment reference continues to have effect to support those laws unless the period of the initial reference is also terminated.

7 Evidence

Clause 7 provides for the accuracy of a copy of the tabled text to be certified by the Clerk of the House of Assembly of South Australia. Such a certificate is evidence of the accuracy of the tabled text and that the text was in fact tabled as contemplated by the Bill.

8 Repeal

Clause 8 repeals the *Murray-Darling Basin Act 1996*.

Part 3 Amendment of the Water Act 2000

9 Act amended in pt 5

Clause 9 states that this part amends the Water Act.

10 Amendment of s 26 (Moratorium notices)

Clause 10 inserts new subsections 5A and 5B to clarify, consistent with section 26 of the Water Act, the Minister may publish a moratorium notice whether or not a water resource plan has been approved for any water to which the notice applies and, if a water resource plan has been approved,

whether or not a resource operations plan has been approved for the plan. Further, if the Minister publishes a moratorium notice when a water resource plan or a resource operations plan has been approved for any water to which the notice applies, new subsection 5B makes it clear the notice prevails over the plan to the extent the plan is inconsistent with the notice.

In addition, clause 10 amends subsection 26(7)(b) to specify when the effect of a moratorium notice, published under section 26, ends.

Where a water resource plan had not been approved for the water the subject of the moratorium notice when the notice was published, a moratorium notice has effect until a water resource plan is approved for any water to which the moratorium notice applies.

Under section 46 of the Water Act, a water resource plan may continue the effect of a moratorium notice to the extent it relates to the same water as the moratorium notice. This is currently the case. If the moratorium notice applies to other water not dealt with under the water resource plan a new moratorium notice would need to be published.

The Minister may also end the effect of a moratorium notice published under section 26, by publishing a further notice. A number of examples of circumstances, when the Minister may publish a further notice ending the effect of a moratorium notice published under section 26, are given.

The list of examples is not exhaustive and does not preclude the Minister from publishing a notice to end the effect of a moratorium notice published under section 26 in other circumstances, for example, where a water resource plan had not been approved for the water to which the moratorium notice applies when the notice was published.

11 Amendment of s 46 (Content of draft water resource plans)

Clause 11 amends section 46 of the Water Act to clarify that a moratorium notice continued in effect by a water resource plan has effect until a resource operations plan for the water to which the continued moratorium applies is approved.

12 Replacement of s 103 (Preparing and approving final draft resource operations plan)

Clause 12 replaces the existing section 103 to insert, into the existing process for finalising a draft resource operations plan, an interim step by

which the chief executive may progress finalising a draft resource operations plan in stages. This will allow for the timely finalisation of a draft plan where circumstances arise that may otherwise delay the finalisation of the entire draft plan.

In relation to a draft resource operations plan, the chief executive may after the close of submissions and receipt of referral panel recommendations, if applicable, make a decision in relation to preparing a final plan. This decision may be to prepare a final draft plan or not to prepare a final draft plan. The new decision the chief executive may make is to prepare a final draft plan subject to deciding to defer some element of the draft plan. This allows the chief executive to, at a later date, make a future decision about the deferred aspect as to whether it will be finalised or not. If the chief executive makes a decision to defer aspects of the draft plan, a notice must be published stating the final plan has been prepared without the deferred aspect and details of the deferred aspect and give copies of the notice to the required entities.

13 Amendment of s 104 (Public notice of intention not to proceed with making of draft resource operation plan)

Clause 13 provides for the chief executive to also give public notice of an intention to not proceed with making a final draft resource operations plan. The requirement to give notice to relevant entities is still necessary with this requirement now included in new clause 104B.

14 Insertion of new s 104A & 104B

Clause 14 inserts new sections 104A and 104B. The new section 104A requires the chief executive to publish a notice, and give the notice to required entities, if the chief executive decides not to progress finalising a deferred aspect of the associated earlier draft resource operations plan through an amendment to the resource operations plan. The new section 104B provides for a local government to make publicly available a copy of any notice it receives from the chief executive.

15 Amendment of s 105 (Amending resource operations plan)

Clause 15 renames the heading of section 105 of the Water Act.

16 Insertion of new s 105A

Clause 16 inserts new section 105A into the Water Act which provides for how the deferred aspect can be finalised by way of an amendment to the resource operations plan, to which the deferred aspect relates. Subsection (1) makes it clear that this provision can only be used where the plan has not otherwise been amended in relation to the deferred aspect. The Governor in Council may approve an amendment to the resource operations plan, without the need for the deferred aspect to be released again for consultation. The deferred aspect, as part of the previous draft resource operations plan, had been publicly notified, and the chief executive, prior to preparing the final amendment, will have considered any submissions received together with any referral panel recommendations, if applicable.

17 Insertion of new ch 8, pt 6

Clause 17 inserts a new part into the Water Act, to provide that the Minister must table in the Legislative Assembly particular documents in relation to the Murray-Darling Basin. This includes a copy of each annual report of the Murray-Darling Basin Authority received by the Minister under the Commonwealth *Water Act 2007*, and a copy of each amendment of the Murray-Darling Basin Agreement that takes place under the terms of the Agreement.

18 Insertion of new ch 9, pt 5, div 12

Clause 18 inserts a transitional provision into the Water Act to provide that amendments made by the Bill to chapter 2, part 4, division 2 of the Water Act can apply to a draft resource operations plan that was prepared under that division prior to the commencement of this clause.

In addition, this clause makes it clear that the amendments to water resource plans made by the Bill, do not otherwise affect the powers of the Minister, or the Governor in Council, in relation to the detailed matters.

19 Amendment of sch 4 (Dictionary)

Clause 19 inserts a definition for ‘deferred aspect’ into schedule 4 (Dictionary) of the Water Act. Deferred aspect, for a resource operations plan, is an aspect of the final draft of the plan deferred under section 103(3) of the Water Act.

This clause also inserts a definition of ‘floodwater’ into schedule 4 of the Water Act which was inadvertently omitted from the Water Act by the *Water Supply (Safety and Reliability) Act 2008*. This clause reinstates the previous definition of ‘floodwater’.

In addition, this clause amends the definition of resource operations plan to reflect changes to section numbers made by the Bill.

Part 4 Amendment of Water Resource (Border Rivers) Plan 2003

20 Water resource plan amended in pt 4

Clause 20 states that part 4 amends the *Water Resource (Border Rivers) Plan 2003*.

21 Amendment of s18 (Decisions not to increase amount of water taken)

Clause 21 amends section 18(2) of the plan to reflect the insertion of new section 41A by clause 22 of the Bill.

22 Insertion of new s41A

Clause 22 inserts a new section 41A into the plan to provide for the chief executive to grant, from the unallocated water currently held as a strategic reserve under the plan, a water allocation with an average annual volume of 500ML to the Commonwealth Environmental Water Holder. The Commonwealth Environmental Water Holder is established under the Commonwealth *Water Act 2007* for the purpose of managing the Commonwealth’s environmental water to protect and restore the environmental assets of the Murray-Darling Basin.

23 Replacement of schedule 4 (Allocation of unallocated water)

Clause 23 replaces schedule 4 and updates the name of the plan area to more appropriately refer to Stanthorpe Water Management Area and in recognition of the proposed grant of 500ML to the Commonwealth

Environmental Water Holder, a separate volume of unallocated water with the proposed use of any being identified.

Part 5 Amendment of Water Resource (Moonie) Plan 2003

24 Water resource plan amendment in pt 5

Clause 24 states that part 5 amends the *Water Resource (Moonie) Plan 2003*.

25 Amendment of s18 (Decisions not to increase amount of water taken)

Clause 25 amends section 18(2) of the plan to reflect the insertion of new section 41A by clause 26 of the Bill.

26 Insertion of new s41A

Clause 26 inserts a new section 41A into the plan to provide for the chief executive to grant, from the unallocated water currently held as a strategic reserve under the plan, a water allocation in the Moonie River with an average annual volume of 1100ML to the Commonwealth Environmental Water Holder. The Commonwealth Environmental Water Holder is established under the Commonwealth *Water Act 2007* for the purpose of managing the Commonwealth's environmental water to protect and restore the environmental assets of the Murray-Darling Basin.

Part 6 Amendment of Water Resource (Warrego, Paroo, Bulloo and Nebine) Plan 2003

27 Water resource plan amendment in pt 6

Clause 27 states that part 6 amends the *Water Resource (Warrego, Paroo, Bulloo and Nebine) Plan 2003*.

28 Amendment of s18 (Decisions not to increase amount of water taken)

Clause 28 amends section 18(2) of the plan to reflect the insertion of new section 41A by clause 29 of the Bill.

29 Insertion of new s41A

Clause 29 inserts a new section 41A into the plan to provide for the chief executive to grant, from the unallocated water currently held as a strategic reserve under the plan, two water allocations in the Warrego River and Nebine River with an average annual volume of 8000 ML and 1000 ML respectively to the Commonwealth Environmental Water Holder. The Commonwealth Environmental Water Holder is established under the Commonwealth *Water Act 2007* for the purpose of managing the Commonwealth's environmental water to protect and restore the environmental assets of the Murray-Darling Basin.

Part 7 Amendment of the Land Act 1994

30 Act amended in pt 7

Clause 30 states that this part amends the Land Act.

31 Amendment of s 431NB (Application of pt 3B)

Clause 31 amends section 431NB of the Land Act to extend the three year stay on the registration of survey plans with a tidal boundary, introduced in November 2005, until 8 November 2009.

The stay protects the public interest in tidal lands by controlling the registration of survey plans with a tidal boundary. It is necessary to extend the stay to allow for policy finalisation and implementation in relation to particular tidal land boundaries.

32 Amendment of s 431NF (Limit on application of s 358 (Changing deeds of grant – change in description or boundary of land))

Clause 32 amends section 431NF of the Land Act to ensure that all resurveys follow the same process.

The stay protects the public interest in tidal lands by controlling the registration of survey plans with a tidal boundary. It is necessary to extend the stay to allow for policy finalisation and implementation in relation to particular tidal land boundaries.

**Part 8 Amendment of the Land Title Act
1994**

33 Act amended in pt 4

Clause 33 states that this part amends the Land Title Act.

34 Amendment of s 191B (Application of pt 10A)

Clause 34 amends section 191B of the Land Title Act to extend the three year stay on the registration of particular survey plans with a tidal boundary, introduced in November 2005, until 8 November 2009.

The stay protects the public interest in tidal lands by controlling the registration of survey plans with a tidal boundary. It is necessary to extend the stay to allow for policy finalisation and implementation in relation to particular tidal land boundaries.