

What's new with water rights?

By Paul Frederick, Kemp Strang Lawyers

We are in a transitional phase as far as water rights are concerned in New South Wales. The Water Management Act 2000 (the new Act) commenced on January 1, 2001, but in part only. Many points of the old act are still in operation. So one might well ask: "Why be concerned at this stage with water rights under the new Act?"

Reasons for considering the water rights provisions of the new Act at this time include:

- The domestic and stock rights, the harvestable rights and native title rights provisions of the new Act are, with minor qualifications, operational;
- Mortgagees need to amend existing security documents and prepare new ones to take account of the water rights provisions of the new Act when they commence operation; and,
- Borrowers will need to be able to assess security documents submitted to them which deal with the 'new regime' of water rights.

It is not possible in an article of this length to deal with all changes to water rights which arise out of the new Act. But set out below are some structural changes to the old water licences and authorities with which readers may be familiar, as well as some comments on Basic Landholder Rights under the new Act.

RIGHTS UNDER THE NEW ACT

Water licences, joint water supply authorities and bore licences are, under the new Act, split into a number of separate and distinct parts:

Access licence

An access licence entitles the holder to a designated share of a specific water source. This designated share (the share component) is probably defined by the number of megalitres. The access licence also entitles its holder to take water at specified times at specified rates or in specified circumstances and in specified areas or from specified locations (called the extraction component).



The holder of the access licence does not have to be an owner or occupier of land — it could be owned by an investor or a superannuation scheme. There are a number of different types of access licences listed in the new Act.

Regulated river (supplementary water) access licences must be held by the same person who holds some other associated access licence. The regulated river (supplementary water) access licence seems to be the equivalent of the off-allocation entitlement which hangs off surface water entitlements. Special additional licences do not appear to have a counterpart under the new Act, but it may be the intention to deal with these under the catch-all “other categories of access licences as may be prescribed by the Regulations”(s.57).

The term of an access licence is 15 years, other than those for major utilities and local water utilities which are 20 years, and the regulated river (supplementary water) access licence which has the same term as the access licence with which it is associated.

Water use approval

A water use approval confers a right on the holder to use water for a particular purpose at a particular location. This approval is site specific, and is deemed to be held by and for the benefit of the landholder for the time being of the land benefited by the approval. In the Dictionary of the new Act, “landholder” is defined to include “the owner of the land or (if the owner is not in occupation of the land) the lawful occupier of the land”.

Water supply work approval

This approval authorises the holder to construct and use a specified water supply work (for example a 610 mm axial flow pump, or a diversion channel of a particular capacity or a diversion pipe of a particular diameter) at a specified location. The water supply approval is one of three approvals which are, together, called water management work approvals (see below).

The above three elements — the access licence the water use approval and the water supply work approval — replace the licence issued under s.10 of the old Act, the joint water supply authority issued under s.20 of the old Act, and the bore licence issued under s.115 of the old Act.

Water management work approval

There are three types of approval which come under the heading of water management work approval — one is the water supply work approval mentioned above. The other two are the drainage work approval that authorises the construction and use of a specified drainage work at a specified location and a flood work approval that authorises a construction and use of a specified flood work at a specified location.

Joint water supply authorities

The provisions relating to the transformation of the joint water supply authorities are not as clear as those relating to licences. It is not clear from the new Act whether an authority is replaced by several access licences, one for each member of the authority, or by one access licence to be held by all of the holders of the authority. I believe the relevant provision in the new Act can be read either way.

The former alternative would perhaps be the more logical one but it doesn't seem to fit with another provision of the new Act

BASIC LANDHOLDER RIGHTS

Domestic and stock rights

The provisions of the new Act relating to domestic and stock rights are operational, save for s.52(2). Section 52(2) provides that a landholder is not entitled to construct a dam or bore without a water supply work approval.

An owner or occupier of a landholding is entitled, without the need for an access licence, water supply work approval or water use approval:

- To take water from any river, estuary or lake to which the land has frontage or from any aquifer under the land;
- To construct and use a water supply work; and,
- To use the water for domestic consumption and stock watering on the land.

Harvestable rights

The provisions of the new Act relating to harvestable rights are operational.

An owner or occupier of a landholding within a harvestable rights area is entitled without the need for any access licence, water supply work approval or water use approval:

- To construct and use a dam for the purpose of capturing and storing rainwater run-off; and

- To use the water so captured and stored — in accordance with the harvestable rights order covering the region where the land is situated.

A single dam may be used for both rainwater run-off and other water taken from a water source but only if the harvestable rights order so provides.

The landholder cannot supply other land with the water so captured and the landowner cannot construct or use a dam that obstructs the flow of a river unless the river is declared by the harvestable rights order to be a minor stream.

The Minister's order by which a harvestable rights area is constituted must specify:

- The proportion of the average rainwater run-off that may be captured by landholders in the area (being not less than 10 per cent of that average); and
- The procedures to be followed for calculating the average rainwater run-off for a landholding in that area.

Native title rights

The provisions of the new Act relating to native title rights are operational, save for s.55(2). Section 55(2) provides that a native title holder is not entitled to construct a dam or bore without a water supply work approval or to construct or use a water supply work otherwise than on land he or she owns.)

A native title holder can take and use water in exercise of native title rights.

CONCLUSION

The above is a review of the structure of water entitlements under the new Act. As mentioned in the introductory paragraph, the new Act is not yet operational as regards water rights. The real effect of the changes will best be able to be appreciated once the Regulations for the new Act have been drafted — and this may be 12 months or more into the future.

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