

RIGHTS IN WATER AND IRRIGATION AMENDMENT BILL 1999

Council's Amendments

Amendments made by the Council now considered.

Consideration in Detail

The amendments made by the Council were as follows.

No 1.

Clause 5, page 3, after line 20 - To insert the following new paragraph -

“

(c) after the definition of “Crown land”, by inserting the following definition —

“

“**degradation**”, in respect of water, includes the sensible diminishing of the quality or quantity of that water;

”
”
”
”

No 2.

Clause 14, page 10, after line 11 - To delete “section 12(2)(a)” in the Table.

No 3.

Clause 14, page 10, after line 21 - To delete “section 12(1)(a) and (b)” in the Table.

No 4.

Clause 15, page 11, after line 17 - To delete “section 12(1)(a) and (b) and (2)(a)” in the Table.

No 5.

Clause 18, page 16, line 1 - To delete “(b)”.

No 6.

Clause 18, page 16, line 5 - To insert after “5C” -

“

; or

(b) a person taking or using water from a water resource does not take all reasonable steps to minimise the degradation of the water resource.

”

No 7.

Clause 18, page 16, line 7 - To insert after “of” -

“

(a) in respect of subsection (1)(a),

”

No 8.

Clause 18, page 16, line 8 - To insert after “subsection” -

“

(1)(a)(i) or (ii); or

(b) in respect of subsection

”

No 9.

Clause 18, page 16, line 8 - To insert after “(1)(b)” -

“

, a person directly affected by the degradation of the water resource referred to in that subsection.

- No 10. Clause 25, page 20, lines 1 to 20 - To delete the clause and insert instead -
“
25. Section 12 repealed
Section 12 is repealed.
”.
- No 11. Clause 28, page 22, after line 14 - To insert the following new subclause -
“
(4) The operation of this section does not prevent the owner or occupier of land from making any dam or tank on the land as long as the owner or occupier is taking water in accordance with this section.
”.
- No 12. Clause 31, page 24, after line 14 - To insert the following new subclause -
“
(1) Section 22(1)(a)(i) is amended by inserting after “Division” the following —
“
or is not taking all reasonable steps to minimise the degradation of the watercourse or wetland ”;
”.
- No 13. Clause 39, page 30, line 2 - To insert after “amended” -
“
—
(a)
”.
- No 14. Clause 39, page 30, after line 4 - To insert the following new paragraphs -
“
(b)by inserting after paragraph (b) the following paragraph —
“
(ba)is being taken or used without all reasonable steps being taken to minimise the degradation of the water resource; and
(c)by inserting after “(b),” the following —
“ (ba), ”.
”.
”.
- No 15. Clause 44, page 37, after line 13 - To insert the following new subclauses -
“
(2) Subject to an order made under subsection (4), a committee may from time to time appoint, discharge or alter, subcommittees of members of the committee, or members and other persons, as it thinks fit to advise it on any matter within the functions of the committee, particularly a matter of localized interest.

- (3) A subcommittee is to be presided over by a member of the committee and sections 26GL(3), 26GN, 26GO, 26GR and 26GS apply in respect of a subcommittee as if a reference in those sections to “committee” were a reference to “subcommittee”.

”.

No 16.

- Clause 44, page 37, line 21 - To insert before “other” -
“ any ”.

No 17.

- Clause 44, page 37, line 21 - To insert after “provisions” -
“ the Minister thinks fit ”.

No 18.

- Clause 44, page 37, line 21 - To delete “its” and insert instead -
“ subcommittees or the committee’s ”.

No 19.

- Clause 44, page 37, line 24 - To delete “be varied,” and insert instead -
“ vary ”.

No 20.

- Clause 44, page 37, line 25 - To delete “at the same time” and insert instead -
“ simultaneously ”.

No 21.

- Clause 44, page 38, line 27 - To insert after “practicable” -
“ and, with respect to the functions of the committee, relevant ”

No 22.

- Clause 44, page 38, line 28 - To delete “all or any of”.

No 23.

- Clause 44, page 43, after line 10 - To insert the following new subclause -

“

- (3) Despite subsection (1), neither the Commission nor the State is relieved of any liability that it might have for a member of a committee having done anything as described in that subsection.

”.

No 24.

- Clause 44, page 45, after line 14 - To insert the following new subclause -

“

- (3) A regional management plan is to specify the monitoring and reporting (which is to occur at least once in every 7 years) to be carried out by the Commission to ensure, as far as is practicable, that the objects of this Part are achieved in the implementation of the plan.

”.

No 25.

- Clause 44, page 46, line 11 - To insert after “entitlements” -
“ , and of agreements, ”.

No 26.

- Clause 44, page 46, after line 20 - To insert the following new subclause -

“

- (3) A sub-regional management plan is to specify the monitoring and reporting (which is to occur at least once in every 7 years) to be carried out by the Commission to ensure, as far as is practicable, that the objects of this Part are achieved in the implementation of the plan.

”.

No 27.

Clause 44, page 47, line 15 - To insert after “entitlements” -

“ , and of agreements, ”.

No 28.

Clause 44, page 47, after line 23 - To insert the following new subclause -

“

- (3) A local area management plan is to specify the monitoring and reporting (which is to occur at least once in every 7 years) to be carried out by the Commission to ensure, as far as is practicable, that the objects of this Part are achieved in the implementation of the plan.

”.

No 29.

Clause 44, page 51, after line 16 - To insert the following new subclauses -

“

- (2) Without limiting when action may be taken under subsection (1), the Commission, within 7 years from the day —
- (a) on which a plan had effect; or
 - (b) the Commission last considered whether action under subsection (1) needed to be carried out in respect of a plan,
- is to consider whether action needs to be taken in respect of the plan under subsection (1) after taking into account any relevant report or information under section 26GW, 26GX or 26GY regarding the extent to which the objects of this Part have been adhered to in the implementation of the plan.
- (3) Notice that the Commission is to consider whether action needs to be taken in respect of a regional management plan under subsection (1) must be published in a newspaper circulating throughout the State, and is to specify —
- (a) the places at which —
 - (i) a copy of the plan may be inspected; and
 - (ii) copies of the plan may be obtained; and
 - (b) the effect of subsection (4) and the period and the address or addresses referred to in that subsection.
- (4) Written submissions on the need for action to be taken under subsection (1) may be made by any body or person —
- (a) within the period determined by the Commission, which must be not less than 2 months after the day on which the notice under subsection (3) is published in the newspaper; and
 - (b) by delivering or posting them, so that they are received within that period at an address designated by the Commission.

”.

No 30.

Clause 45, page 52, line 28 - To insert after “licensees” -

“

, persons whose names are endorsed on a licence as being a person with whom the holder of a licence has an agreement referred to in clause 30 of Schedule 1

”.

No 31.

Clause 48, page 59, line 28 - To insert after “licence” -

“ or a water entitlement under the licence ”.

No 32.

Clause 50, page 64, after line 31 - To insert after proposed section 27B the following new section -

“

27C. Minister to review and report on this Part

- (1) The Minister is to carry out a review of the operation and effectiveness of this Part as soon as is practicable after the expiry of 5 years from the commencement of the *Rights in Water and Irrigation Amendment Act 2000*.
- (2) In the course of that review the Minister is to consider and have regard to —
 - (a) the effectiveness of the operations of the Commission under this Part;
 - (b) the attainment of the objects of this Part and the need for the continuation of this Part; and
 - (c) any other matters that appear to the Minister to be relevant to the operation and effectiveness of this Part.
- (3) The Minister is to prepare a report based on the review and, as soon as is practicable after the report is prepared, is to cause the report to be laid before each House of Parliament.

”.

No 33.

Clause 51, page 65, after line 9 - To insert the following new definition -

“

“public interest” means public interest having regard to any economic, social or recreational benefits to the public, or to a section of the public.

”.

No 34.

Clause 51, page 71, line 3 - To insert before “A” -

“ If ”.

No 35.

Clause 51, page 71, line 3 - To insert before “granted” -

“ is ”.

No 36.

Clause 51, page 71, lines 3 to 5 - To delete the words after “granted” to “subclause (1),” and insert instead -

“

to an owner or occupier of land —

- (a) authorizing the continued taking of water —
 - (i) from a water resource which is below the land, or runs through, is contiguous to or partly situated within the land; and

(ii) which, before, and at the time of, the application of section 5C to that water resource, was taken periodically or continually from the water resource;

and

(b) the application for the licence is made within 12 months after the day on which section 5C became applicable to the water resource,
the licence is

”.

No 37.

Clause 51, page 71, line 5 - To delete “the” and insert instead -

“ a ”.

No 38.

Clause 51, page 71, line 6 - To delete “referred to in that” and insert instead -

“ from the day on which ”.

No 39.

Clause 51, page 71, line 6 - To delete “; and” and insert instead -

“ 5C ”.

No 40.

Clause 51, page 71, lines 7 and 8 - To delete the lines and insert instead -

“

became applicable to the water resource.

(4) In subclause (3) —

“**water resource**” means a watercourse, wetland or underground water source to which section 5C applies.

”.

No 41.

Clause 51, page 71, after line 8 - To insert the following new subclause -

“

(4) Sufficient details to identify a licence granted for a period exceeding —

(a) a period specified in a relevant plan approved under Part III Division 3D Subdivision 2; in respect of that type of licence; or

(b) if a period is not specified in such a plan in respect of that type of licences, 10 years or such period as is prescribed in respect of that type of licence,

are to be included in the annual report submitted by the accountable authority of the Commission under section 66 of the *Financial Administration and Audit Act 1985*

”.

No 42.

Clause 51, page 71, line 23 - To insert before “the land” -

“ all of”.

No 43.

Clause 51, page 71, line 26 - To delete “the” appearing first and insert instead -

“ that ”.

No 44.

Clause 51, page 74, after line 25 - To insert the following new subclauses -

“

(4) In this clause —

“licensee” in relation to a licence, includes a person whose name is endorsed on the licence as a person with whom the holder of the licence has an agreement referred to in clause 30 relating to the taking of water under the licence by that person.

(5) The Commission may give a direction to a person included as a licensee due to subclause (4) only if the Commission —

(a) is of the opinion that it is the responsibility, and within the power, of that person to comply with the term, condition or restriction included in the licence; and

(b) gave that person sufficient written notice of that term, condition or restriction for the person to comply with it.

”.

No 45.

Clause 51, page 75, line 2 - To insert after “licence” -

“ or in relation to the taking of water under the licence by that person ”.

No 46.

Clause 51, page 78, lines 4 and 5 - To delete “licensee has consistently not taken the”.

No 47.

Clause 51, page 78, lines 5 and 6 - To delete “the licensee is entitled to take” and insert instead -

“ may be taken ”.

No 48.

Clause 51, page 78, line 6 - To insert after “licence” -

“ has consistently not been taken ”.

No 49.

Clause 51, page 78, lines 15 to 22 - To delete the lines and insert instead -

“

(f) in the opinion of the Commission, the exercise of the power is necessary to prevent a serious inconsistency arising as a result of—

(i) the approval of a plan, or the alteration, revocation or substitution of a plan, under Part III Division 3D Subdivision 2; or

(ii) the making, amendment or repeal of relevant local by-laws;

”.

No 50.

Clause 51, page 78, line 23 - To insert after “licensee” -

“

, or a person whose name is endorsed on the licence as a person with whom the licensee has an agreement referred to in clause 30,

”.

No 51.

Clause 51, page 78, line 31 - To insert after “licence” -

“ or of an agreement referred to in clause 30 ”.

No 52.

Clause 51, page 78, line 33 - To insert after “transfer” -

“ or agreement ”.

No 53.

Clause 51, page 79, lines 22 to 28 - To delete the lines and insert instead -

“

(b) in the opinion of the Commission, the exercise of the power is necessary due to a serious inconsistency, which cannot be resolved by an amendment under clause 24, arising as a result of —

- (i) the approval of a plan, or the alteration, revocation or substitution of a plan, under Part III Division 3D Subdivision 2; or
- (ii) the making, amendment or repeal of relevant local by-laws;

”.

No 54.

Clause 51, page 79, line 29 - To insert after “licensee” -

“

or a person whose name is endorsed on the licence as a person with whom the licensee has an agreement referred to in clause 30,

”.

No 55.

Clause 51, page 81, line 20 - To insert after “**entitlements**” -

“ **and agreements with licensees to take water** ”.

No 56.

Clause 51, page 81, line 28 - To insert after “may” -

“ transfer ”.

No 57.

Clause 51, page 81, line 29 - To delete “transfer”.

No 58.

Clause 51, page 81, line 29 - To delete “to another person”.

No 59.

Clause 51, page 81, line 30 - To delete “transfer”.

No 60.

Clause 51, page 82, lines 8 to 16 - To delete the clause and insert instead -

“

30. Agreements with licensees to take water

- (1) Subject to this Division, the holder of a licence may enter into an agreement with another person (“**the third party**”) relating to the taking of water under the licence by the third party for a limited period of time.
- (2) An agreement referred to in subclause (1) is of no effect to the extent that a relevant local by-law prohibits such agreements in relation to licences, licences of a particular kind or in particular circumstances.
- (3) An agreement referred to in subclause (1) is of no effect unless —
 - (a) it is entered into with a person who holds, or is eligible in terms of clause 3 to hold, a licence of the same kind;
 - (b) it has been approved by the Commission; and
 - (c) the licence is endorsed in accordance with clause 36(d).
- (4) Subject to clauses (2) and (3)(a), the grant or undertaking to grant approval under clause (3)(b) is at the discretion of the Commission.
- (5) In exercising that discretion the Commission is to have regard to all matters that it considers relevant, including those set out in clause (7)(2).
- (6) If the Commission would approve an agreement referred to in subclause (1) but for the fact that the third party is not a person who is eligible in terms of clause 3 to hold such a

licence, the Commission may undertake to approve the agreement if the third party becomes a person who is eligible to hold the licence within the period of time specified in the undertaking.

- (7) Without limiting subclause (4), the Commission may refuse to approve an agreement, or to undertake to approve an agreement, if the third party is a person who has committed an offence against this Act.

”.

No 61.

Clause 51, page 83, line 10 - To insert after “entitlement” -

“ or of an agreement referred to in clause 30 ”.

No 62.

Clause 51, page 83, line 29 - To insert after “licence” -

“ , or of an agreement referred to in clause 30, ”.

No 63.

Clause 51, page 85, lines 1 to 9 - To delete the clause and insert instead -

“

36. Endorsement and record of dealings

The Commission must —

- (a) in the case of the transfer of a licence, endorse on the licence as licensee the name of the person to whom the licence has been transferred;
- (b) in the case of the transfer of a water entitlement under a licence to a person who does not hold a licence of the same kind, issue a licence to the person to whom a water entitlement has been transferred endorsed with such particulars as the Commission thinks fit relating to the transfer;
- (c) in the case of the transfer of a water entitlement under a licence to a person who holds a licence of the same kind, endorse on the licences affected such particulars as it thinks fit relating to the transfer; and
- (d) in the case of an agreement referred to in clause 30 between the holder of a licence and a third party relating to the taking of water under the licence by the third party, endorse on the licence the name of the third party, the period of the agreement and any other particulars it thinks fit relating to the agreement.

”.

No 64.

Clause 51, page 86, lines 13 to 20 - To delete the lines.

No 65.

Clause 51, page 86, line 26 to page 87, line 28 - To delete the lines.

No 66.

Clause 51, page 89, lines 16 to 20 - To delete the lines.

No 67.

Clause 51, page 89, line 30 - To insert after “29” -

“ , 38 or 41 ”.

No 68.

Clause 51, page 90, line 21 - To insert after “licensee” -

“

and a person whose name is endorsed on a licence as a person with whom the licensee has an agreement referred to in clause 30

”.

No 69.

Clause 51, page 90, line 21 - To insert after “must” -

“ , to the extent that it is under his or her power to do so, ”.

No 70.

Clause 51, page 91, line 9 - To insert after “licensee” -

“

, or a person whose name is endorsed on a licence as a person with whom a licensee has an agreement referred to in clause 30,

”.

No 71.

Clause 51, page 91, line 13 - To delete “licensee” and insert instead -

“ person ”.

No 72.

Clause 51, page 91, line 20 - To delete “licensee” and insert instead -

“ person ”.

No 73.

Clause 51, page 93, after line 4 - To insert the following new subclause -

“

6. An agreement referred to in clause 30, including a prohibition or restriction on any such agreement.

”.

No 74.

Clause 64, page 100, line 2 - To insert after “licence” -

“ , or an agreement referred to in clause 30 of Schedule 1 ”.

No 75.

Clause 64, page 100, line 7 - To insert after “transferred” -

“ or a person who is a party to the agreement ”.

No 76.

Clause 64, page 100, lines 23 to 26 - To delete proposed section 26GJ.

No 77.

Clause 69, page 101, line 18 to page 105, line 17 - To delete the clause.

No 78.

New Clause 45, page 51, after line 24 - To insert the following new clause -

“

45. Section 26K amended

Section 26K(3) is amended by inserting after “legislation” the following —

“

and section 42 of that Act applies to such an order as if the order were a regulation

”.

”.

No 79.

New Clause 80, page 110, after line 18 - To insert the following new clause -

“

80. Standing to bring proceedings in respect of breach of this Act

- (1) Any person may bring proceedings in the Supreme Court for an order to remedy or restrain a breach or a threatened breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
- (2) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.
- (3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.

Dr HAMES: I move -

That amendments Nos 1 to 64 made by the Council be agreed to.

Dr EDWARDS: I will make some comments about what has happened since the Bill was transmitted to the upper House. After some discussion in the upper House, the Bill was referred to a committee and a report was issued. The report contained nine wide-ranging recommendations. On behalf of the Opposition, I thank the minister and his officials for the courtesy of providing us with a number of briefings. The Opposition has had numerous briefings, including one that ran late into a Friday night. I was subsequently stopped at a breath testing facility and chased when I turned off the main road to go into my street. Fortunately I had not consumed any alcohol so the Water and Rivers Commission had protected me.

Dr Hames: Had you been drinking water?

Dr EDWARDS: I had been drinking water. At the end of the test I was given a safer driving certificate, which was hilarious. The police also mentioned to me the names of a couple of members who had been given speeding fines. Reverting quickly to water, amendments Nos 1 to 64 cover some contentious issues from within the broader community. The Opposition is grateful that the minister allowed the amendments to be moved in the other place so that those concerns could be met. Some of the matters that the committee report mentioned, and on which we received briefings and on which there were amendments in the other place, concerned springs, the duty to avoid degradation of water resources, the capacity to construct dams, the nature of water resource management committees, regional management plans and reviews. Many amendments included in Nos 1 to 64 cover capital gains tax and related issues. The Bill now makes it clear that the legislation will be reviewed after five years. A definition of “public interest” is included. Two minor drafting errors were corrected and crown exemptions may now be treated by regulation. I want to put on the table the breadth of matters that have been dealt with and clarified since the Bill left this House. When this Bill was in this House, the Opposition had two concerns. One was that the capital gains tax issues, at that stage, remained unresolved, and the second was that we preferred a different appeals system. With the passage of time and after all the work that has occurred, there will be a new appeal system. The Opposition is grateful for that. I support the motion to agree to Council’s amendments Nos 1 to 64.

Dr HAMES: I thank the Opposition and the opposition parties in the other place for their support. This legislation has involved a very long and often contentious process, and has required a huge amount of work. I commend the two officers here today for the work they have put into getting the legislation to this stage. It has been done with the full cooperation of the member for Maylands and Hon Ken Travers from the other place. The idea has always been that we wanted good legislation which covered all the issues that had been raised. The committee from the other place went into some detail about the legislation and made recommendations that were fully supported by both the Government and the Opposition. While there was some consternation about the 79 amendments, we are in agreement on all of them except for one at the end which was not initiated by the Opposition. We have made tremendous progress getting to this stage and I thank all concerned.

Question put and passed; the Council's amendments agreed to.

Dr HAMES: I move -

That amendment No 65 made by the Council be agreed to, subject to the following further amendment -
Clause 51, page 86, after line 25 - To insert the following new Division -

“

Division 9 — Compensation

39. Compensation

- (1) If a person suffers damage, including loss of profit —
 - (a) due to the exercise of a power under clause 24(2)(e)(i) in relation to a licence held by the person;
 - (b) due to the exercise of a power under clause 25(2)(e) in relation to a licence held by the person;
 - (c) due to the exercise of a power under —
 - (i) clause 24(2)(b), (e)(ii) or (iii), (f) or (h);
 - (ii) clause 25(2)(a), (b) or (d); or
 - (iii) if so prescribed for the purposes of this paragraph, in particular circumstances prescribed under clause 25(2)(g) in relation to a licence held by the person;
 - (d) due to the exercise of a power under clause 7(1) to refuse an application for a licence, as a result of which the continued taking of water from a water resource to which section 5C applies is not authorized, where, before, and at the time of, the application of section 5C to that water resource, water was taken periodically or continually from the water resource; or
 - (e) in circumstances prescribed by a local by-law,

the Commission is, in accordance with this clause, to compensate that person for the damage, to the extent that it was due solely to the exercise of a power referred to in paragraph (a), (b), (c) or (d) or is in a circumstance prescribed under paragraph (e), if the person requests compensation.
- (2) Damage may be compensated for only if —
 - (a) it is due to the loss of a use which was —
 - (i) reasonable;
 - (ii) authorized by the relevant licence, or not inconsistent with this Act; and
 - (iii) consistent with the objects of Part III; and
 - (b) the person requesting compensation is not responsible for the damage and has attempted to offset or mitigate the damage as far as is practicable.
- (3) Local by-laws may prescribe —
 - (a) the time within which compensation may be claimed and the procedures for making claims;
 - (b) the types of damage for which compensation is to be made; and
 - (c) how compensation is to be assessed.
- (4) The Commission may require the person requesting compensation to provide information to it to enable it to make a decision with respect to compensation, and may require that person to verify that information by statutory declaration.
- (5) Compensation is not payable in respect of an exercise of power referred to in subclause (1)(c) to a person who has requested compensation, unless —
 - (a) the effect of the exercise of the power on the person is permanent; and

- (b) the Commission is of the opinion that the effect of the exercise of the power on the person is not fair and reasonable having regard to the exercise of the power in respect of other licence holders in the surrounding area.
- (6) Compensation is not payable in respect of an exercise of power referred to in subclause (1)(d) to a person who has requested compensation, unless —
 - (a) the effect of the exercise of the power on the person is permanent;
 - (b) the Commission is of the opinion that the effect of the exercise of the power on the person is not fair and reasonable having regard to the exercise of the power in respect of other applications for a licence in the surrounding area; and
 - (c) the Commission is of the opinion that the damage suffered by the person is in respect of the lawful taking and use of water by that person since 1 July 1999 or before.
- (7) The Commission is to notify the person who made the request for compensation of the outcome of the request and, if the request is refused, the Commission is to notify that person of the reasons for that decision.
- (8) A dispute about the amount of compensation is to be determined by arbitration under the provisions of the *Commercial Arbitration Act 1985*, unless the parties agree on some other method of determination.
- (9) Compensation under this clause, and any costs incurred by the Commission under subclause (8), are to be charged to the Consolidated Fund, which this section appropriates to the necessary extent.

Clause 64, Page 100, after line 13 - To insert the following new subclause -

- (2) A person who requested compensation may appeal under Schedule 2 if the person is aggrieved by a decision of the Commission to refuse compensation under clause 39(5)(b) or (6)(b) or (c) of Schedule 1.

This amendment replaces the compensation provision provided by Council amendment No 65. There are limits on the powers of the Legislative Council that prevent the Council implementing recommendations 4, 5 and 6 of the Standing Committee on Legislation, to expand the compensation provisions. This limitation is imposed by section 46 of the Constitution Acts Amendment Act 1899, which prevents the Council introducing amendments with financial implications. Accordingly, an amendment to delete the unsatisfactory compensation provisions proposed in division 9 of schedule 1 of the Act was carried by the Council. The House has agreed to Council amendment No 65, which deletes the compensation provisions in the original Bill.

We seek now to insert, through this amendment, much more comprehensive compensation provisions. Under the amended clause, compensation can be paid if a licence is altered for any of the following reasons: It is in the public interest; a person is affecting other people; to protect the water resource from damage; to protect the environment; the supply is inadequate; to regulate use of the water resource; to make the licence consistent with a plan or by-laws, or to make the licence comply with other laws. Compensation would also be payable if a licence for existing use is refused when licensing is introduced. Compensation would not be paid if a licence is altered because a person contravenes the law, the change is necessary to prevent serious damage or loss of life, or the licence is not being issued.

Dr EDWARDS: The Opposition supports the amendment. The minister summarised in less than five minutes some fairly significant changes, and some issues that arose as serious concerns from the upper House report. Now compensation will be payable if a licence for existing use is refused when licensing is introduced. That is a significant step forward, and answers some major concerns about compensation. Underlying this is the notion that environmental flows need to be protected, and to some extent that takes first priority. I again thank the minister and the officers for all the discussions we have had, working out what this new division covering compensation means. While the minister has reduced it to a fairly simple set of points, it took a number of briefings and doodling on the whiteboard to work out what was involved, and to try as an Opposition to fully understand all the implications and the principles behind why various classes of people under the Act were being compensated. We thank the minister for agreeing to move the amendment in this House.

Dr HAMES: I have distilled my comments for use in this Parliament, but it is one of two major issues that have been of contention for some time during the negotiations. It was very difficult to come up with something that satisfied everybody, and very clearly delineated those items that required compensation and those that did not. The Government has a responsibility to the taxpayer not to pay compensation in areas where it is not deserved, and it was a difficult exercise to clarify which areas are deserving. The Government is pleased to make sure compensation is payable where people have an existing use which is removed. That point was put very strongly by the Coalition of Water Users, the Pastoralists and Graziers Association, and by various farming bodies and individual farmers, who had existing uses and were concerned that the Government might remove those uses without paying compensation. Very little compensation will need to be paid, because this State, through the Water and Rivers Commission, has been very prudent in allowing water use in areas where there is apparently an unlimited resource. Some areas are not licensed because there is plenty of water in them, and there is no reason for restrictions at this stage. If the stage is reached at which the water is fully used and the Government must license that use, it will be necessary to take away water rights and pay compensation only in cases where the water use has been underestimated.

In that case the fault would be ours and not theirs. I am confident we will not have to pay compensation in that area. However, the provision gives security for the future to people in unlicensed areas.

Question put and passed; the Council's amendment, as amended, agreed to.

Dr HAMES: I move -

That amendments Nos 66 to 75 made by the Council be agreed to.

Dr EDWARDS: Amendment No 69 relates to clause 51 of the Bill. At page 90, line 21, after "must" it reads -
" , to the extent that it is under his or her power to do so,"

Although I have been given explanations of almost every amendment in the past six weeks, I have been given no explanation of this one. This clause requires a licensee to maintain in good order works, facilities and equipment to which the licence refers. Although the Australian Labor Party is happy to agree to the amendment, the clause will now state that a licensee must maintain facilities "to the extent that it is under his or her power to do so". Do those words water down the responsibilities the licensee otherwise has?

Dr HAMES: In the Rights in Water and Irrigation Act currently there is no power to lease and the licensee has the responsibility to maintain the facility. When that facility is leased to someone else, the licensee may not have the power to perform the maintenance required. That is the reason for inserting the words "under his or her power to do so". The responsibility for maintenance will then fall to the lessee.

Dr EDWARDS: Is it a recognition of where the real responsibility lies rather than a diminution of responsibility, as I interpreted it when I first read it?

Dr HAMES: It is for practical purposes. When someone has leased a property and does not have the power to maintain the facilities, it then becomes the lessee's responsibility to perform those works.

Question put and passed; the Council's amendments agreed to.

Dr HAMES: I move -

That amendment No 76 made by the Council be not agreed to, and that the following amendments be substituted -

Clause 64, page 99, lines 17 and 18 - To delete "to the Minister" and substitute "under Schedule 2".

Clause 64, page 100, lines 11 and 12 - To delete "to the Minister" and substitute "under Schedule 2".

Clause 64, page 100, line 16 - To delete "to the Minister" and substitute "under Schedule 2".

These amendments are made because it was agreed in the other place to appoint a tribunal to consider disputes. Under the previous version of the Bill, the minister had the final power to decide disputes in an arbitration system. Under this proposal the minister will no longer have that power. Instead, we will move to a tribunal system and there will be further amendments to establish that system.

Question put and passed; the Council's amendment not agreed to, and the substituted amendments agreed to.

Dr HAMES: I move -

That amendment No 77 made by the Council be agreed to, subject to the following further amendments -

New clause 69, page 101, after line 17 - To insert the following new clause -

69. Schedule 2 added

After Schedule 1, added by section 51, the following schedule is added -

Schedule 2 - Appeal provisions

1. Definition

In this Schedule -

“**appeal**” means an appeal under Part III Division 3B;

“**decision**” means a decision, direction or variation of a direction against which an appeal may be brought;

“**tribunal**” means a tribunal established under clause 5.

2. Bringing an appeal

- (1) A person who is entitled to bring an appeal against a decision may do so by lodging a written notice of appeal with the Minister within 21 days of being given notice of the decision.
- (2) The Minister may accept a notice of appeal after the expiry of the period of 21 days referred to in subclause (1) if the Minister considers it would be equitable to do so.
- (3) An agent may bring an appeal on behalf of a person entitled to bring the appeal, but the agent must, if required by the Minister, satisfy the Minister of the agent’s authority.

3. Notice of appeal

A notice of appeal must -

- (a) state the name and address of the appellant;
- (b) set out or otherwise identify sufficiently the decision appealed against;
- (c) set out the grounds of the appeal and state briefly the facts on which the appellant relies; and
- (d) indicate whether the appellant wishes the Minister to exercise the power conferred on the Minister by clause 4.

4. Decision may be suspended

The Minister may suspend the operation of the decision appealed against during the period when the appeal is pending, but otherwise the bringing of an appeal does not affect the decision during that period.

5. Referral of appeals to tribunal

- (1) If a notice of appeal is lodged with the Minister under clause 2 the Minister, with as much speed as possible, is to -
 - (a) establish a tribunal consisting of not less than one person and not more than 3 persons appointed by the Minister -
 - (i) from a panel of names submitted to the Minister in accordance with the regulations; and
 - (ii) who in the Minister’s opinion have suitable expertise to hear and determine the matter; and
 - (b) refer the notice of appeal and any other relevant materials to the tribunal for the hearing of the matter.

- (2) Subject to subclause (3), the tribunal is to hear and determine the matter and is to make such decision as it thinks fit.
- (3) Before taking action under subclause (2), the tribunal may appoint a person to assist the Commission and the appellant to resolve the issues on which the appeal is brought with a view to the appeal being withdrawn in whole or in part.
- (4) The Minister may -
 - (a) direct that any person who is appointed under subclause (1) or (3) is to be paid remuneration or allowances, or both; and
 - (b) determine the amount of any such payments on the recommendation of the Minister for Public Sector Management.
- (5) A decision of the tribunal on an appeal is final and must be given effect to by the Commission.
- (6) The tribunal is to give notice of the decision on an appeal and of the reasons for the decision in writing, or in such other manner as is prescribed, to -
 - (a) the appellant;
 - (b) the Commission; and
 - (c) any water resources management committee established under Part III Division 3C for a locality to which the subject matter of the appeal relates.

6. Hearings

- (1) A tribunal may sit at such place and time as it considers appropriate or the Minister directs.
- (2) The tribunal is to afford -
 - (a) every person who has appealed; and
 - (b) any other person who, in the tribunal's opinion, should be given the opportunity to respond to any appeal,

a reasonable opportunity to call or give evidence and to make submissions (whether written or oral) to the tribunal.

- (3) A person may appear before the tribunal personally or be represented by counsel or, with the leave of the tribunal, by any other person.
- (4) The chief executive officer of the Commission, counsel for the Commission, or a person employed or engaged in the Commission and authorized by the chief executive officer to do so, may appear before the tribunal to represent the Commission.

7. Proceedings at hearing

- (1) The tribunal is to act according to equity and good conscience and the substantial merits of the case without regard to technicalities and legal forms and with as much speed as possible.
- (2) The tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit.
- (3) To the extent that it is not prescribed by the regulations the tribunal is to determine its own procedure.

8. Case stated

- (1) If a question of law arises in proceedings before the tribunal, the tribunal may, in accordance with the rules of court, state a case for the opinion of the District Court upon the question.

- (2) The District Court has jurisdiction to consider and determine any case stated and to make such orders as it thinks fit with regard to the case and to the costs of and incidental to the consideration and determination of the case.

9. Costs

The tribunal may make such orders for costs as it thinks fit.

10. Tribunal may dismiss frivolous or vexatious appeals

The tribunal may dismiss any appeal if in the tribunal's opinion the appeal has been made frivolously, vexatiously or for an improper purpose.

11. Powers of tribunal

The tribunal may -

- (a) by summons require any person -
 - (i) to attend before the tribunal; or
 - (ii) to produce any document before the tribunal;
- (b) inspect any document produced before it, and retain it for such reasonable period as is required, and make copies of the document or any of its contents;
- (c) require any person to swear to answer truly any relevant question put to that person by the tribunal or any person appearing before the tribunal (and for that purpose may administer any oath or affirmation); or
- (d) require any person attending before the tribunal (whether that person has been summoned to appear or not) to answer any relevant question put to that person by the tribunal or any person appearing before the tribunal.

12. Offences

- (1) A person who -
 - (a) having been served with a summons to attend before a tribunal, fails without reasonable excuse to attend in obedience to the summons;
 - (b) having been served with a summons to produce before a tribunal any document, fails without reasonable excuse to comply with the summons;
 - (c) misbehaves before a tribunal, wilfully insults a tribunal or a member of the tribunal, or interrupts the proceedings of a tribunal;
 - (d) refuses or fails without reasonable excuse to swear, or to answer any question, when required to do so by a tribunal; or
 - (e) makes, before a tribunal, a statement that -
 - (i) the person knows to be false or misleading in a material particular; or
 - (ii) omits anything without which the statement is, to the person's knowledge, misleading in a material particular,

commits an offence and is liable to a fine not exceeding \$2 000.

- (2) For the purposes of subclause (1)(d), it is not a reasonable excuse for a person to refuse or fail to answer any question, on the ground that the answer to the question might incriminate the person or render the person liable to a penalty.
- (3) Despite subclause (2), an answer given by a person pursuant to a requirement under clause 11 is not admissible in evidence against the person in any civil or criminal proceedings other than proceedings for perjury or for an offence against this clause.

13. Staff of tribunals

There are to be appointed under Part 3 of the *Public Sector Management Act 1994* such officers as are necessary to assist tribunals to perform their functions under this Act.

14. Regulations relating to tribunals

- (1) The regulations may provide for any matter necessary or convenient to give effect to this Schedule.
- (2) Without limiting subclause (1), the regulations may -
 - (a) provide for the procedure for selecting a panel of names with relevant expertise for submission to the Minister under clause 5(1)(a)(i), including, but not limited to, the persons who are to select the panel, the number of persons in the panel, and the collective expertise of the panel;
 - (b) prescribe matters relating to the practice and procedure of tribunals;
 - (c) provide for the enforcement of orders of tribunals; and
 - (d) prescribe fees payable in respect of anything done under this Schedule.

Clause 72, Page 106, after line 29 - To insert the following subclause -

- (2) After the commencement of this Act but before regulations under Schedule 2 of the Principal Act regarding a panel of names from which a tribunal is to be appointed are made, an appeal to which that Schedule applies -
 - (a) if the appellant so agrees, is to be heard and determined as if clause 5(1)(a)(i) of that Schedule were deleted; or
 - (b) if the appellant does not so agree, is to be heard and determined as soon as is practicable after those regulations are made.

The proposed amendments reinstate appeal procedures to the Bill. The Government considers that an independent tribunal system is more appropriate than a ministerial system. I have previously advised the House that I will review the ministerial appeal system and make changes if these are warranted. These changes are being made now to accommodate appeals made under the expanded compensation provisions. It is not appropriate for these appeals to be determined by the minister. This would put the minister in an invidious position if he is required to determine whether the Government should pay compensation. It would create a real risk of justice not being seen to be done.

The proposed amendments require regulations to be made to establish a selection committee to appoint a panel of people competent to determine the types of appeals able to be brought under the Act. The minister will appoint a tribunal of up to three people from this panel to hear and resolve each appeal. The minister may also suspend a decision of the Water and Rivers Commission until the appeal is resolved. The tribunal may appoint a mediator to try to settle the appeal before conducting formal hearings. The procedures for hearings will be flexible and the tribunal will not be bound by legal technicalities that could get in the way of equity and good conscience.

The tribunal will have the power to issue summons, take sworn evidence and award costs. Penalties will apply for knowingly misleading the tribunal and refusing to cooperate. The tribunal's decision will be final; however, matters of law can be taken to the courts for resolution. A transitional amendment allows appellants to choose if they would like the minister to appoint a tribunal prior to the regulations being established, to create a panel of people from which the minister would ordinarily select a tribunal.

Mr Acting Speaker (Mr Sweetman), when we were debating this matter in this House I was opposed to a tribunal system and disagreed strongly with the groups who lobbied me to have one established. I believed the system of appeal which I use now - that is, the appointment of three independent people which you, Mr Acting Speaker, know about as it has been established in Carnarvon - is a fairer system for small operators in a local area who have a dispute.

Many people disagreed with me, particularly those mentioned previously - the Pastoralists and Graziers Association and the Water Users Coalition. Part of our compromise position with this legislation was to support a tribunal, but I am now convinced, because we have changed the compensation procedures, that it is the appropriate mechanism. I have read out some of the rules that we have put in place to make it as fair as we possibly can to all concerned. In some ways, by doing that, we have included my position and the wishes of those who prefer a more litigious tribunal so that we can compromise and have the best of both worlds to resolve compensation provisions and disputes.

Dr EDWARDS: The Opposition supports this amendment. When the Bill was in this House previously, the Opposition argued strongly to move away from the ministerial appeals system and to have a system that is much

more independent. We are pleased that the minister has picked this up. We were also concerned when the Bill was here last time that the minister had instituted a review of the appeals system, but that we were not able to see the results of the review before final decisions were made. I am glad that the minister has had a change of heart.

I would like to comment about the appeals system. We believe that the proposed selection committee panel is entirely appropriate and we are happy with the negotiations that have occurred and the final outcome to set up the tribunal. We are also pleased that this amendment still covers mediation, because we hope that in a large number of cases an appeal can be mediated and resolved quickly.

We also support what the minister said about hearings being flexible and that there be a degree of flexibility and simplicity in the way that the tribunal is run, rather than its becoming overly legal. At the end of the day, we believe it is important, as a principle of government - it was something that was spelt out by the Commission on Government - that as far as possible, ministers be removed from these types of decision-making review processes and that they are done independently. We are pleased that the minister has picked this up and that he has agreed to go to the trouble of redrafting the amendment and presenting it in this House so that it can be incorporated in the Bill.

Question put and passed; the Council's amendment, as amended, agreed to.

Dr HAMES: I move -

That amendment No 78 made by the Council be agreed to.

Question put and passed; the Council's amendment agreed to.

DR HAMES: I move -

That amendment No 79 made by the Council be not agreed to.

The Government is opposed to this type of provision. It is government policy that the courts are the proper jurisdiction to determine who should be able to bring legal action of this type. I consider this to be a separation of powers issue with the courts and a discretion to decide not only on matters brought before them but also who should have the right to take action. There is no need for Parliament to restrict the courts' discretion in this matter. This provision, which was inserted in the upper House, gives a third party the right to appeal to the Supreme Court in relation to any breaches of the Act. We believe that only those who are affected by those decisions should have the right to appeal and we do not support third party appeals of this nature.

Dr EDWARDS: We disagree with the Minister for Water Resources. This amendment was moved by Hon Giz Watson in the other place and seeks to allow standing for people to bring civil action. The amendment is based on the provisions of the Environmental Planning and Assessment Act of New South Wales and, furthermore, it gives the person standing. I quote from the amendment moved by Hon Giz Watson -

Any person may bring proceedings in the Supreme Court for an order to remedy or restrain a breach or a threatened breach of this Act . . .

It is giving standing only to the extent that there is either a breach or a threatened breach of the Act. In our opinion, it does not open the door to vexatious litigants. We believe that the courts are generally moving to expand their notion of standing, but that this is an issue that Parliament should look at. We have a number of representations across a number of fields to allow this sort of standing to occur.

I also point out that if there were a breach or a threatened breach of the Act, presumably the Water and Rivers Commission would be aware of that and take action. Hopefully, Hon Giz Watson's amendment, if it became law, would be needed in only extreme cases.

Although the Opposition supports amendment No 79 as it currently stands - undoubtedly it will be defeated in this House - we do not want the rejection of this amendment to kill the Bill when it is returned to the upper House. Many years of work have gone into this Bill. The minister and the Water and Rivers Commission have shown great sensitivity and allowed lots of consultation; they have adopted many of the recommendations from the committee's report. Furthermore, I have never been involved with a Bill on which I have received so many intensive briefings and had so many meetings concerning amendments. I am pleased that many of the things we wanted and put forward were either very sensibly discussed and then rejected or, more often, sensibly discussed and then accepted.

On this occasion we disagree with the minister, but in every other respect I thank him for the courtesy that he and the staff of the Water and Rivers Commission have extended to us in relation to the 79 amendments that have been dealt with by both Houses.

Question put and passed; the Council's amendment not agreed to.

The Council acquainted accordingly.