

IMPLEMENTING THE WATER MANAGEMENT ACT 2000

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September 2004

INTRODUCTION

The *Water Management Act 2000* (WM Act) was passed by the NSW Parliament in December 2000 to protect and manage the States' water sources. Some parts of the Act started operating on January 2001. On 1 July 2004 the new access licensing and approvals system commenced operating in the areas covered by 31 water sharing plans. These plans cater for 80% of water extraction in NSW. In areas not covered by water sharing plans, licensing continues under the *Water Act 1912* until plans are gazetted for these areas.

The parts of the WM Act that commenced on 1 January 2001 were the basic landholder rights provisions (rights to river water or groundwater for domestic and stock purposes, the harvestable right or "farm dams" policy, and the recognition of native title rights) and the provisions for developing water sharing plans.

The new licensing and approvals regime began a major new era in how water is licensed and administered in NSW.

THE NATIONAL CONTEXT

The new system evolved largely from Council of Australian Government (COAG) agreements on water made between the Commonwealth and the states. The most recent agreement, the National Water Initiative, was signed in June 2004. The results it seeks are:

- expansion of permanent trade in water to bring about more profitable use of water and more cost effective and flexible recovery of water to achieve environmental outcomes
- more confidence for those investing in the water industry due to more secure water access entitlements, better and more compatible registry arrangements, better monitoring, reporting and accounting of water use, and improved public access to information
- more sophisticated, transparent and comprehensive water planning that deals with key issues such as the major interception of water, the interaction between surface and groundwater systems, and the provision of water to meet specific environmental outcomes
- a commitment to addressing over allocated systems as quickly as possible, in consultation with affected stakeholders, addressing significant adjustment issues where appropriate; and
- better and more efficient management of water in urban environments, for example through the increased use of recycled water and stormwater.

The WM Act contains provisions that can enable all of these objectives to be achieved.

COMMENCEMENT OF NEW WATER SHARING ARRANGEMENTS

From 1 July 2004, the old *Water Act* licensing system was replaced by the new licensing system for those parts of the state covered by operational water sharing plans.

Thirty-one statutory water sharing plans have now commenced. The licences in these water sharing plan areas account for about 80% of the water extraction in NSW. They are ten year

plans that define the water sharing arrangements between the environment and water users, and between different categories of water users. The plans aim to provide for healthier rivers and aquifers and their dependent ecosystems. The plans also provide water users with clarity and certainty about their water access rights.

On 1 July 2004:

- The new water sharing rules set out in the plans took effect. These rules protect water identified as essential for the ecological needs of the water source and determine how the water available for extraction is shared between different categories of water access licence.
- Most *Water Act* licences that authorise the taking of water from a water sharing plan water source were converted to water access licences and approvals under the WM Act and are to be listed on public registers.
- Water access licences became separated from land. In the past, when a person bought land with a water licence, the licence came with the land automatically. Under the new system, a person buying land supplied by a water access licence needs to separately contract for the purchase of the licence.
- Water access licences can now be bought and sold more easily than in the past. However, changing the location where a licence is to be used is subject to rules designed to protect the water source and its dependent ecosystems.

The rest of the State will continue to be administered under the *Water Act 1912*, including areas covered by a further six water sharing plans developed for the major inland groundwater systems. These six plans have been deferred and are subject to further review. They will not commence operating before 1 July 2005.

HOW WATER LICENCES HAVE CHANGED

Under the WM Act:

- Licences continue without ever needing to be renewed (effectively perpetual).
- The water access licence is separate from land - the land aspects are dealt with in the works and use approvals.
- The water access licence defines a share in the water available in a specific water source. On most licences this is expressed as a unit share rather than as a volume per year.
- All access licences are to be listed on a public register.
- Anyone can own a water access licence and it is fully tradeable, subject to the rules in a water sharing plan.
- The access licence can be used as security for a loan.
- The management rules are fixed for 10 years in the statutory water sharing plans.

ACCESS LICENCES AND WATER SHARING PLANS

Water access licences and water sharing plans are intimately linked. This is why the new licensing system can only commence in those areas where water sharing plans are in place.

Water sharing plans:

- Establish environmental water provisions to protect water sources and dependent ecosystems. They include overall extraction limits for the water source plus specific environmental water rules. For regulated rivers, they include dam release rules, system flow targets, as well as volumes of water set aside for environmental contingencies. For unregulated rivers, they include prohibitions on extraction in low flows and limits on the daily extraction of water based on the different river flow classes from low to very high

flows. For aquifers, they include reservation of the storage component of the aquifer plus a proportion of the average annual recharge as well as specific local impact management rules.

- Provide the rules under which DIPNR makes available water determinations or what were previously known as annual allocation announcements in the regulated river systems (see Figure 1). These rules take account of the natural variability in water availability from year-to-year as a result of climate, as well as the environmental water rules and the requirements of persons exercising basic landholder water rights. Both basic landholder rights and water for the environment have priority over water access licences.
- Establish water account operation rules, such as limits on carryover of unused water allocations from one year to the next.
- Establish rules for water dealings (see below).

WHAT HAPPENS TO WATER ACT LICENCES ON CHANGE OVER TO THE NEW ACT?

Replacement with access licences and approvals

On 1 July 2004, *Water Act* licences in the water sources subject to the commenced water sharing plans (approximately 7,000 licences) were converted to the new system. These were automatically replaced by access licences and approvals under the WM Act at no cost to the licence holder.

The Department of Infrastructure, Planning and Natural Resources (DIPNR) has been contacting the licence holders to verify that the ownership and details of the licence were recorded correctly. Licence holders will receive a letter with details of their new licences and approvals in October/November 2004. Until this notification is received, the provisions and conditions of their current licence under the *Water Act* apply.

Licence holders will receive one or more ***water access licences*** under the new Act specifying rights to a share of the available water in a river or an aquifer. These water access licences do not need to be renewed, unless they are cancelled. Generally, cancellation will only occur if the licence holder breaches the terms and conditions of their licence.

Licence holders will also receive a separate ***approval*** for the works (pumps, dams etc) and for the use of water (eg irrigation). The new approvals stand for two years, or the remaining term of the old licence, whichever is longer. They can be extended for a further 10 years on application. Applications to amend the approvals, or for additional approvals, can be made at any time. These approvals remain with the land if the land is sold.

Registration of pre-existing mortgages

The WM Act provides that any existing interests in land to which a Water Act licence is attached becomes an equivalent interest in the water access licence on the change-over to the WM Act. Most commonly these interests will be mortgages.

The mortgagee has up to 2 years to register that mortgage on the access licence register, and in doing so to retain the priority it had before transition.

WHAT A WATER ACCESS LICENCE LOOKS LIKE

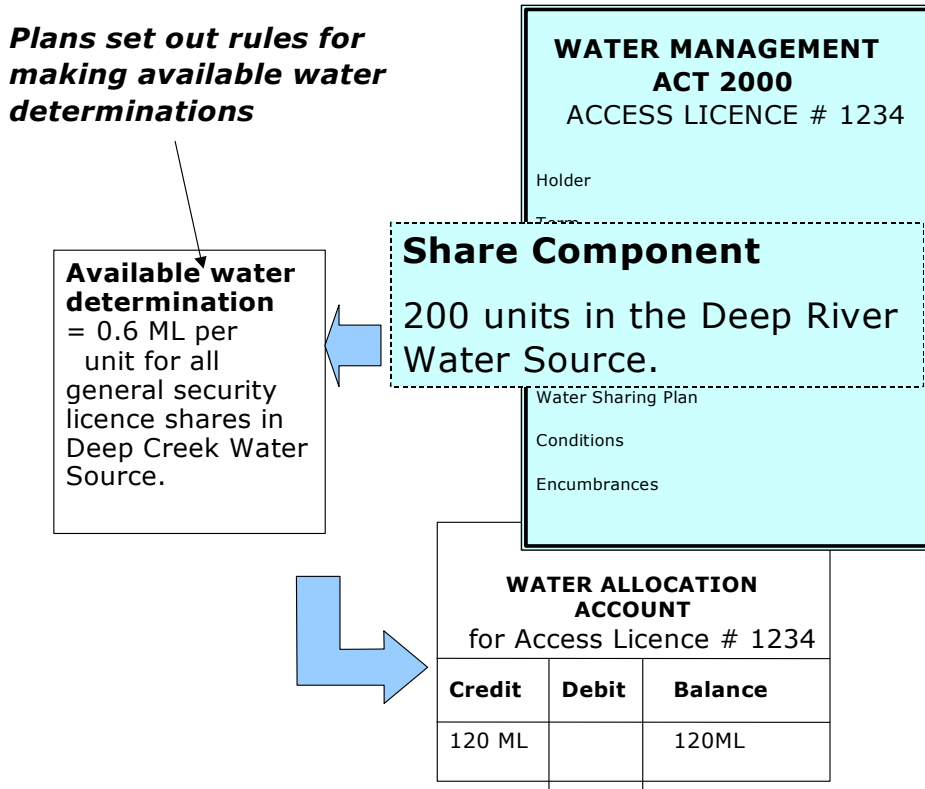
Water access licence certificates are issued by LPI. Like land title certificates, they have to be produced whenever a water access licence is transferred as evidence of ownership. The main features of a water access licence are:

- *Category*. There is a range of different categories of access licences including local water utility, unregulated river, aquifer, regulated river (high security), regulated river (general security), and supplementary water. Certain categories have priority over others in water sharing.

- *Holder.* This states the name/s of the person or company that holds the licence.
- *Share component.* This is the core of the licence. It specifies the licence holder's right to a share of the available water in a specified water source. The quantity of water available depends on the available water determination which, in turn, depends on climate and the rules set out in the relevant water sharing plan. Whenever an available water determination is made the licence holder's share of this is credited to their water account. An example is shown in Figure 1. This is a similar process to that which has been operating in the regulated rivers and major groundwater systems for a number of decades, but will be a new way of operating for licence holders on unregulated rivers and the smaller groundwater systems.
- *Extraction component.* This designates the location within the water source where the licence can be used. It may also specify limits on the times, rates or circumstances of extraction. In some cases these limits can be a right to a share of the available flow on a particular day (unregulated rivers), or a share of the delivery capacity in a channel (regulated rivers).
- *Nominated works.* This shows the works (pumps, bores etc) which may be used to take water under the licence. Water may only be taken under the licence via these nominated works. The nominated works are the linkage between the water access licence and the land where the water is used.
- *Conditions.* Initially these will not be explicitly stated on the licence certificate but issued separately by DIPNR.
- *Encumbrances, Notations.* Like land, water access licences can be used as security for loans.

Approvals for water supply works and water use on land will be issued but as separate documents to the water access licence. Unlike water access licences, approvals are not transferable.

Figure 1: Water available under access licences



WATER TRADING - DEALINGS

Temporary water trading (seasonal transfers) has been in place in NSW in the regulated rivers since the 1980s. Permanent transfers were introduced in 1989.

The new licensing system under the WM Act introduces a whole range of new water trading and other transactions, known collectively as water “dealings”. The water sharing plans specify the local rules applying to these dealings, while broad State principles have also been gazetted.

The effect of separation from land

The WM Act splits the right to the water (the water access licence) from the land title of the property, leaving only the water use and water supply works approvals remaining tied to the land. This makes it easier to trade licensed water access rights, as the licences are not encumbered with works and water use conditions. Licence holders can sell a part or all of their water access licence, while still retaining their works and use approvals. To start a new development requiring water, a water supply works and water use approval for the whole development can be obtained, then a water access licence can be bought.

What can be traded ?

Using water dealings, either the whole water access licence or parts of it can be bought and sold. In addition to dealings with licences as a whole, there are three things on an access licence which can be dealt with separately: shares of the available water in the share component of the licence, extraction rights (where present) in the extraction component and water allocations in the licence water allocation account. Each of these can be assigned (ie traded) from one licence to another through dealings.

It is possible for a licence to exist with a zero share in the share component. Such a licence can still have extraction rights in the extraction component and water allocations in the

account, but the latter would have to be purchased and assigned to the licence from another licence. (Note however that the value of such licences is significantly affected by the account rules in water sharing plans.)

Types of water dealings

Trading in access licences is undertaken through **water dealings**. Broadly, there are 5 main types of water dealings:

1. **Transfers**, involving changing the licence holder.

A transfer on its own will most commonly occur where a person sells their land and simultaneously sells their access licence so the purchaser can continue to operate the business. This dealing wasn't needed under the *Water Act* because the licence was attached to the land. In this case the current licence holder and the purchaser enter into a contract to transfer the licence. The vendor and purchaser settle and lodge the transfer form, together with the access licence certificate, with LPI for registration. The dealing takes effect when it is registered.

This process may also involve lending institutions where the licence is mortgaged.

2. **Changes** to an aspect of the licence.

Most common of these will be a change to the nominated work, enabling the licence to be used at a different location. In most cases this dealing will be associated with a transfer, where the licence is bought and modified so it can be used at a different location. This is the equivalent of a permanent transfer under the *Water Act*.

The process for a change is the same as the transfer on its own except that the licence holder must also seek the Minister's consent to change the licence.

3. **Assignments** of part of a licence or of water allocations from one access licence to another.

This allows a part of the share component to be moved from one access licence to another. If the licences nominate works on different properties this is also equivalent to a permanent transfer under the *Water Act*. Share component assignment dealings will not be available before late 2004. If urgently required, the same result can be achieved in the interim by subdivision and change of nominated works.

Assignment of water allocations from the account of one access licence to the account of another is equivalent to a temporary transfer under the *Water Act*. The process for assignment of water allocations is as follows. The vendor and purchaser lodge an application for the assignment, it is assessed against the dealing rules and if granted the accounts are adjusted accordingly. This transaction does not involve making any changes to the water access licence (WAL) register.

It is expected that, as in the past, this assignment of water allocations will continue to be by far the most common form of water trading.

4. **Subdivisions and consolidations**.

A licence holder will be able to subdivide the licence into two or more licences, or conversely to consolidate two or more licences into one.

5. **Registration of security interests**.

The licence can be used as security for a loan and this can be added to the register of security interests against the water access licence. This gives the loan priority over any later encumbrances, and also gives the lender the right to veto transfers and certain other dealings. There is no equivalent to this under the *Water Act*. As the licences were attached to land and included in its value it happened indirectly when taking a mortgage over the land. However there were only administrative rules to protect the lender from the licence holder permanently transferring the licence off the property without its consent.

The process for registering security interests is virtually identical to the process used for land transactions. The prescribed form is completed and lodged with LPI for registration. Provided the form is complete and all necessary information included it will be registered. No consent from the Minister is required. Forms are available on the LPI website (www.lpi.nsw.gov.au).

Separate information sheets on dealings and application forms are available from DIPNR offices or the DIPNR website (www.dipnr.nsw.gov.au).

Dealings during the initial few months post 1 July 2004

Not all converted licences are currently listed on the WAL register. A number are being held back for one of the following reasons:

- there is an outstanding or incomplete pre 1 July renewal on the old Water Act licence
- the old Water Act licence was subject to an incomplete permanent transfer
- the old Water Act licence was subject to an incomplete volumetric conversion
- verification of ownership of the licence is not complete because there was a late change in land ownership or old system title land was involved, or there was a lease of the land, or an unresolved dispute.

Issue of a water access licence certificate

After the water access licence is listed on the register, either the licence holder or the mortgagee is issued with the water access licence certificate. The process is as follows:

1. If there are no mortgages or similar encumbrances against the land to which the licence was attached, the Land and Property Information NSW (LPI) issues the water access licence certificate to the licence holder.
2. If there are mortgages or similar encumbrances against the land, then the certificate will not be issued until such time as either:
 - (a) the lender has (after consulting with the licence holder) registered the interest on the water access licence register, in which case the certificate is issued to the lender as in the case with mortgages over land (it is anticipated that major lenders will complete this within the next 6 months), or
 - (b) the licence holder obtains consent from the lender to have the certificate issued to them, or
 - (c) two years pass, after which the certificate will automatically issue to the licence holder.

Pending issue of the certificate, the licence holder is still able to order and take water and to undertake water allocation assignments (similar to temporary water transfers). However if they wish to transfer the water access licence they will need to contact their lenders and obtain their consent to get the licence certificate issued.

Fast track process

Some licence holders may wish to deal with their licence in the next few months. To assist in resolving any matters either preventing the licence being placed on the register or preventing the water access licence certificate being issued, DIPNR is offering a fast-track process.

This works as follows:

1. the licence holder fills out a simple form requesting the issue of the water access licence certificate (this "fast-track" form is available from DIPNR offices or the DIPNR website). This form is then faxed to DIPNR.
2. DIPNR responds to the applicant indicating what needs to be done. If it is something under DIPNR's control, action is initiated to manually fast track the process (this applies

to such things as completing processing renewals or rapidly assessing late changes in land ownership).

3. DIPNR assists the applicant as far as possible to resolve any other outstanding matters.

Water sharing plans and water dealings

Water sharing plans, together with the Minister's general dealing principles, stipulate the rules that apply to water dealings. When an application for a dealing is lodged it is assessed against these rules and is refused if it doesn't comply. Broadly there are two types of rules: administrative rules and natural resource rules.

Administrative rules include requirements that all fees on the licence have been paid and the proposed dealing is technically viable, eg consolidation of access licences is only allowed if the licences are of the same category and relate to the same water source.

Natural resource rules address the movement of the extraction of water from one place to another. They are designed to ensure that dealings don't result in increased stress on water sources or adversely impact on the ability of other water users to extract water.

Dealings are also affected by the water account rules in water sharing plans. Account rules specify limits on such things as:

- the balance that can be held in a water allocation account,
- how much water allocation can be carried over from one year to the next,
- how much water can be taken (withdrawn) from the account over a year.

In some cases these limits are tied to the shares in the share component, meaning the assessment of any proposed assignment of shares from one licence to another must consider the effect on the water accounts.

PUBLIC REGISTERS

All water access licences issued under the new system are currently in the process of being listed on a public register. The WAL register includes details such as the holder of the access licence, the essential terms, the share component, and any trading actions. It also notes the relevant water sharing plan.

It is similar to the Land Title Register and is maintained by LPI. It is accessible via the internet. The register enables interests to be recorded against access licences and the establishment of priorities between competing interests. The register assists water access licence holders to obtain loans. They can use their access licence as security, by allowing the lender's interest to be listed against the access licence on the register, in a similar manner to the way mortgages are recorded on land titles.

Approvals granted under the WM Act are also on a public register. This register is managed by DIPNR. It is also available on the internet.

WHERE TO FROM HERE?

While the new licences and approvals commenced on 1 July 2004, there will be a bedding down period while all the water users, banks and other stakeholders get used to the new arrangements. Not all types of water dealings provided for in the WM Act are available, but the most common dealings are. The others should be available by late 2004.

Future water sharing plans

It is proposed to continue phasing out the *Water Act* licensing system across the State over the next few years, so that eventually all licence holders in NSW will be covered by the new WM Act licensing and approval arrangements.

Development of water sharing plans for the remaining water sources in NSW is a prerequisite for this. The plans for the six inland groundwater systems are anticipated to commence mid

2005. There are expected to be a small number of individual plans for specific water sources. For the remainder of NSW, current thinking is to adopt a macro approach to plan-making. This approach will take into account the fact that some water sources are more stressed than others, so may need more specific water sharing rules.

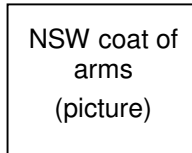
CONCLUSION

It is early days yet for the new planning, licensing and approval systems established under the WM Act. Until the Act is rolled out across the rest of the State two systems will operate – one for areas covered by water sharing plans and another for areas still administered under the *Water Act 1912*. For the areas where the WM Act now applies, covering 80% of water extraction in the State, there are statutory plans that define sharing rules and provide water for the environment, perpetual water rights and a flexible trading system.

APPENDIX: SAMPLE WATER ACCESS LICENCE CERTIFICATE

Water Access Licence Certificate

Water Management Act 2000



WALnnnnnnn
Edition No nn
Date dd mmmm yyyy.

Date of commencement: dd mm yyyy
Tenure Type: Continuing

Part A HOLDER

Bill Smith and Jill Smith as joint tenants <<registration number>>

Warning note: Information on this register is not at this stage guaranteed. There is a 2 year transitional period from the commencement of this licence during which a person should make such inquiries as they deem appropriate to verify the holders and security interests for this licence

Part B ENCUMBRANCES

Notes:

1. A search of the General Register of Deeds should also be made.
2. If an interest in an access licence, which has been preserved pursuant to clause 9A of schedule 9 of the *Water Management Act*, is registered against this licence within two years after the date of commencement of this licence, it
 - (a) ranks, with respect to any other such interest, in the same priority as it previously ranked under section 184G of the *Conveyancing Act 1919* or section 36 of the *Real Property Act 1900*, or under Part 2K.3 of the *Corporations Act 2001* of the Commonwealth, as the case may be, and
 - (b) ranks before any interest in the licence that arises after the appointed day, regardless of when that other interest is registered.

Term Transfers:

John Smith from ddmmyyyy to ddmmyyyy <<registration number>>

Registered transactions:

<<description of registration, eg, mortgage and name of party>> <<registration number>>

(this section to include security interests and caveats)

PART C NOTATIONS

Part D ACCESS LICENCE DETAILS

Category: << category [subcategory] >>

Share Component

This access licence entitles the holder to a share in the available water in the specified water source, where:

- (1) the share is <<nnn>> unit shares, and
- (2) the specified water source is the << water source name>> as defined in the Water Sharing Plan for the << water sharing plan name>> gazetted << plan gazettal date>> or as amended under that Plan or as defined in a subsequent plan for that water source, and
- (3) the available water is specified by the Minister in an available water determination made from time to time under section 59 of the Act, for access licences of the category of this access licence for the specified water source.

Under section 85 of the Act the water allocation account for this licence will be credited as a result of an available water determination as indicated at (3). The volume of water credited will be the same proportion of the available water as the number of shares on this licence is to the total number of shares on all access licences of the category of this access licence for the specified water source.

Extraction Component

The holder of this licence is entitled to take water at specified times, rates or circumstances, and in specified areas and locations, where:

- (1) the specified times, rates or circumstances are: << times/rates>>, and
- (2) the specified times, rates or circumstances are subject to any specific conditions which limit the times, rates or circumstances on this licence or on a water supply works approval which authorises a work nominated on this licence, and
- (3) the specified area or location is: any << water type>> in << Zone>> of the water source specified in the share component of this licence, and
- (4) works nominated on this licence may only take water from the specified area or location.

Nominated works

Water supply works which take water from the area or location specified in the extraction component of this licence that are authorised by the following approval(s) under the Act or otherwise, are nominated to take water under this licence: << work approval no.s>>

Conditions

Licence conditions form a part of this licence and affect the share and extraction components. The Access Licence Statement of Conditions is available from the Department of Infrastructure, Planning and Natural Resources.

NOTES:

1. Water Access licences with a “continuing” tenure provide the holder with a perpetual share in the relevant consumptive pool of a specified water resource. However, the introduction of a perpetual right, by itself, does not provide licence holders with a guaranteed access to a particular volume of water. This is because the amount of water made available depends upon a number of factors determined by:

- (a) the water sharing plans;
 - (b) provisions for extending or making replacement plans; and
 - (c) decisions on seasonal water allocations which are, in turn, largely influenced by climate.
2. Taking water under this access licence generally requires a current water supply works approval for the work. Use of water on land also generally requires a current water use approval. Contact the Department of Infrastructure, Planning and Natural Resources for details.
 3. Implementation of the water sharing plan for the <<name of water source>> will be relevant to this access licence; see www.dipnr.nsw.gov.au.
 4. For water account details and outstanding fees and charges for Regulated Rivers contact State Water Corporation. For water account details and outstanding fees and charges for Unregulated Rivers or Aquifers contact the Department of Infrastructure, Planning and Natural Resources.
 5. DIPNR reference number: 40AL70000
Previous Water Act licence number(s): 30SL7000