



Office  
of Water

## Water Management Act 2000

### Reform of joint private works

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Discussion paper

## Contents

Executive Summary.....	1
1. Introduction.....	3
2. Overview of the reform proposal .....	3
A. Characteristics and constitution of the scheme .....	5
Simplification of the frameworks .....	5
Issues specific to Trusts.....	5
Amalgamation and extension of PWCs and ICs .....	6
Constitution of the decision making body.....	6
Membership of the scheme and voting rights .....	7
Appointment of an administrator and dissolution of the PWC.....	7
B. Powers of the decision making body.....	9
General powers and functions .....	9
Water management powers and functions.....	9
Compliance powers and offence provisions.....	9
Effect of transformation on voting rights.....	10
Calculating water shares .....	11
Sale and transfer of water entitlements.....	12
Water restrictions and wastage .....	12
Compensation and liability .....	13
C. Defining the land and works under management .....	14
Title to land or interests in land .....	14
Interests in land through lease or licence.....	14
Statutory powers to construct, maintain and operate works .....	14
D. Governance.....	16
Regulatory requirements .....	16
PWC Rules.....	16
Existing matters specified in the Act or Regulations .....	17
E. Fees, charges and finances .....	18
Setting of fees and charges .....	18
Recovery of fees and charges .....	19
Power to borrow and invest.....	19
Books of accounts .....	20

## Executive summary

The provisions of the *Water Management Act 2000* relating to shared water infrastructure have not been reviewed recently. Amendments are required to ensure that private water trusts and private irrigation districts can readily comply with new Commonwealth requirements in relation to the transformation of group entitlements into individual rights.

At the same time amendments are proposed to remove unnecessary regulation and give water users the flexibility they require to reconfigure their water delivery systems and invest in new infrastructure to reduce water losses.

Targeted consultation is being undertaken and if there is stakeholder support for the proposals it is hoped that amendments may be introduced into Parliament in late 2010.

Comments on the proposals are welcome. These should be provided to the Office of Water no later than 27 August 2010 by

**Email to:**

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The issues being addressed in this discussion paper are complex but it is hoped this will lead to the simplification of 140 sections of the *Water Management Act 2000* (WMA) and 57 clauses of the *Water Management Regulation 2004* (the Regulation). A summary of the key proposals are set out below. In order to fully understand what is proposed it is important to read the summary together with the more detailed discussion.

In summary the key proposals are:

1. Unnecessary amendments will be avoided. There will be minimal change to the provisions for Irrigation Corporations and none for co-held licences.
2. A consistent set of powers and functions will apply to private water corporations. Private water corporations will include existing private irrigation boards and private drainage boards. The same powers and functions will generally extend to the Trusts (which are not corporations).
3. The ability to create new "private water corporations" which have both water supply and drainage functions will be simplified.
4. The Trusts will continue to exist but a streamlined process will be created to enable them to become a private water corporation if they wish.
5. The process of amalgamating or extending the area of operation of private water corporations will be streamlined.
6. Private water corporations will have the ability to make Rules similar to the by-laws that can currently be made by private irrigation boards (PIBs).
7. The Rules will need to comply with the requirements of the WMA and the Regulations but will enable the private water corporations to create internal rules that reflect their needs.

8. The Rules will be able to address matters such as fees and charges, meeting processes, elections, decision making requirements, supply of water, amendment of the works plan, etc.
9. The Rules will determine the membership of the private water corporations. Transformed licence holders who retain delivery rights will continue to be members but will not be able to be part of decisions that may affect the untransformed licence.
10. The Minister will still be able to appoint an administrator to run the scheme in limited circumstances.
11. The schemes will have the broad functions of providing, maintaining and operating water supply systems or water drainage systems. This will include internal compliance powers.
12. The private water corporations will be required to notify a member of their water share if requested.
13. The Regulations may set out requirements for the form of the notice including, for example, setting out how the calculation was made, identifying conveyance losses, or separating out irrigation, stock or domestic components.
14. The private water corporations will be able to impose water restrictions but must do so fairly and equitably.
15. The private water corporations will have statutory powers to undertake works on private land where this is identified in their "Works Plan". For existing PIDs, Trusts and PDBs all works and land under their control and management at the time the amendments commence will be deemed to constitute the Works Plan.
16. There will be power to require security prior to allowing transformation and also power to recover fees.
17. There will be improved powers to borrow and invest but it is proposed that these will not extend to the Trusts.

# 1. Introduction

As water supply infrastructure is expensive to install, maintain and operate it is often shared by neighbouring landholders to avoid the need for duplicate infrastructure and allow the costs of maintenance and operation to be shared. This requires statutory provision for how the necessary revenue can be raised, who makes decisions in relation to the infrastructure, rights to go onto land to maintain and operate the infrastructure and provision for sharing of the available resource.

NSW legislation relating to private water infrastructure has evolved over the decades so that there are now a number of different frameworks for private infrastructure sharing:

- **Irrigation corporations (ICs):** There are five ICs with water entitlements ranging up to 1,420,00 ML<sup>1</sup> extracting water from the Lachlan, Murray and Murrumbidgee Rivers and from the Lower Murrumbidgee groundwater source.
- **Private irrigation boards (PIBs):** There are seven PIBs located on the Murray, Macquarie, Hunter and Murrumbidgee Rivers with water entitlements ranging up to 86,000 ML.
- **Private water trusts (Trusts):** There are nine Trusts using water primarily for irrigations purposes on the Murray River with water entitlements ranging up to 7,000 ML. There are also numerous “bore” Trusts extracting water from the Great Artesian Basin primarily for stock and domestic purposes.
- **Licence co-holders:** These are arrangements where more than one person is named on the water licence or works approval. These can be highly complex arrangements with in excess of 60 members and significant water entitlements.
- **Private drainage boards (PDBs):** Are bodies with the function of managing drainage infrastructure. As they are not supplying water they generally do not require water licences.

The category to which any particular body belongs is largely an artefact of history. While the irrigation corporations tend to be larger and the Trusts tend to be smaller, there is considerable overlap between the types of scheme in terms of water holdings, member numbers, activities and geographical location.

The purpose of the proposed reforms is to ensure the legislation provides the managers of joint water infrastructure in NSW with the flexibility and legislative certainty to enable them to adapt to changing circumstances by, for example, being able to:

- Reconfigure their water delivery systems to minimise losses.
- Invest in new infrastructure to reduce water losses.
- Comply with new Commonwealth market and charge rule requirements.

## 2. Overview of the reform proposal

The key elements of any joint water scheme are:

- A. Characteristics and constitution of the decision making body.
- B. Powers of the decision making body.
- C. Defining the land and works under management.
- D. Governance (ie relationship between the scheme and its members).
- E. Financial issues including imposition of fees and charges and raising of finance

<sup>1</sup> A megalitre (ML) is one million litres. A gigalitre (GL) is a thousand ML or a billion litres.

Proposed reforms in relation to each of these issues is set out below. The proposals are intended to:

- Ensure management powers are adequate.
- Increase accountability and transparency.
- Reduce legislative complexity and improve stakeholder ability to comply with the requirements
- Reduce red tape by removing unnecessarily prescriptive Government regulation of private businesses thereby reducing unnecessary management costs.
- Promote the long term viability of joint water schemes by giving them the flexibility they require to respond to changing circumstances.
- Balance the needs of the infrastructure manager and the rights of members.

There has been considerable change in the regulation of water recently and accordingly it is desired to avoid unnecessary reform. In particular it is proposed that the IC structure and governance arrangements will generally remain unchanged as the ability to impose regulatory requirements through the operating licence is adequate and the WMA does not create any barriers to compliance with the Commonwealth *Water Act 2007*. However some augmentation of the compliance framework in relation to IC works, and simplification of the process for adding land to the IC area of operations is proposed. Secondly, the co-held licence framework will remain unchanged. These will continue to rely on private arrangements between the members with virtually no government oversight of the relationship between members.

This means that the proposed reforms focus on the governance structures for private irrigation districts, private drainage boards and private water trusts. The reason for this is that the governance arrangements for these bodies are unnecessarily prescriptive, highly complex and inconsistent with the recent Commonwealth legislative reforms.

While the discussion below appears complex it is important to bear in mind that what is proposed is the simplification of 140 sections of the *Water Management Act 2000* and 57 clauses of the *Water Management Regulation 2004*. Much of the analysis is benchmarked against the South Australian *Irrigation Act 2009*. This legislation tackles many of the same historical configuration issues and current reform challenges that are faced by NSW and accordingly is of relevance to the NSW reforms. In addition some stakeholders have already recommended the South Australian framework be adapted for use in NSW.

A three tiered approach is proposed:

- The WMA will set the broad framework for the governance structure of the joint water schemes;
- The Regulations will enable the Minister to impose requirements where necessary to provide fundamental safeguards for members and customers of schemes; and
- Private water corporation (PWC) rules will define the relationship between the members and the PWC. The WMA and Regulations will set the requirements for matters that must be addressed in the Rules. However the Rules themselves will be under the control of the Scheme and its members and can be changed without needing amendments to the Regulations or proclamations by the Governor.

It is important to note that it is only the governance structure of the joint water schemes that is being reviewed. The requirement that schemes hold a water access licence (if they wish to take water), a water management works approval (if they wish to construct or use works), or a water use approval is not being changed.

## A. Characteristics and constitution of the scheme

### Simplification of the frameworks

It is proposed that with some exceptions in relation to Trusts, a single consistent management framework be applied to existing PIBs, PDBs, Trusts and all future joint private works. As the management structure will apply to both irrigation and drainage functions it is proposed that the organisations be referred to as private water corporations (PWCs).

Consistent with the current requirements no new Trusts will be able to be created however it is proposed that the process for creating a PWC will be simplified so that this can occur by:

- two or more landholders of properties that are being worked as separate holdings and agreeing to establish an entity to provide, manage and operate shared infrastructure for the collection and delivery of water or for the drainage of the land;
- those landholders applying to the Minister in the manner and form prescribed by the Minister, with the prescribed fee and providing any prescribed information (including the initial draft Rules and Works Plan setting out the works for which the PWC will be responsible and the land envelope in relation to which its powers will apply);
- the application specifying the title details of the land to which the application relates and in relation to land not owned by the applicants and demonstrating they have the appropriate permanent rights in relation to that land (eg an easement) or the option to acquire such rights should the application be approved;
- the Minister approving the application and establishing the PWC by notice published in the Gazette specifying the date of establishment and the name of the PWC.

The applicants will become the members and will be bound by the Rules provided to the Minister.

This will significantly streamline the process by removing the need for:

- the Governor's approval;
- public notice of the application prior to the Minister's approval being granted. It is considered that advertisement of the proposal is not necessary as the application may only be lodged with the consent of all the affected parties and the approval of the PWC does not itself authorise the construction or use of any works;
- unnecessary information to accompany the application (such as the current requirement for the petition to specify the "occupations of all the petitioners").

This is largely consistent with the mechanism for establishing Irrigation Trusts under the *Irrigation Act 2009* (SA).

PIBs and PDBs and all new PWCs will have corporate structures. However it is proposed that the non-corporate legal status of Trusts be continued but that the Trusts in general have the same functions and powers as the PWCs. Where the proposed functions available to Trusts differ from those available to PWCs this is specifically stated.

### Issues specific to Trusts

The non-corporate nature of Trusts complicates their ability to obtain interests in land, deal in real and personal property and hold water licences. It also means trust members could be individually prosecuted or sued for activities or actions of the trust and that former Trustees whose name still appears on the licence could still be prosecuted if they have not updated the details of who holds the licence. It is proposed that the WMA be amended to make it clear that the current Trustees only are jointly and severally liable for compliance with any licence held by the Trust whether or not the licence is in the name of former Trustees or in the name of the Trust.

To enable Trusts (particularly the larger irrigation Trusts) to obtain the benefits of the corporate PWC structure a more streamlined mechanism is proposed to enable this. It is proposed that the Trustees could apply to the Minister to become a PWC by applying to the Minister in the manner and form prescribed by the Minister, with the prescribed fee and providing any prescribed information (including the draft Rules and a resolution of ratepayers supporting the proposal and the draft rules). On approval the Trustees become the Board members, the ratepayers become the members and the Rules are adopted.

It is proposed that where a trust converts to a PWC, the PWC will be deemed to be a continuation of, and the same legal entity as, the former trust. This is intended to minimise the chances of tax implications occurring due to the restructure. It will be the responsibility of the Trusts to obtain their own financial advice before applying to the Minister to convert to a PWC.

## Amalgamation and extension of PWCs and ICs

Any two or more PWCs may apply to the Minister to amalgamate if the proposal has been supported at a meeting of members by at least two thirds of the votes. The application must be in the form approved by the Minister, and be accompanied by the prescribed fee and any information required by the Regulation. Creation of the new PWC is as described above. On creation, the applicant PWCs are dissolved and their property, rights and liabilities transfer to the new PWC.

An adjoining landholder and the PWC may apply to the Minister to extend the PWC's Works Plan to the adjoining landholding if the proposal has been supported at a meeting of members by at least two thirds of the votes of each PWC. The PWCs consent to such an extension may be subject to conditions determined by the PWC (eg requiring the adjoining landholder to meet the costs of expanding the works or requiring the landholder to contribute water to the PWC to cover any additional conveyance losses associated with the new works). The application must be in the form approved by the Minister, and be accompanied by the prescribed fee and any information required by the Regulation.

It is proposed that the ability to extend and reduce the area of operations of an IC be similarly streamlined.

In the case of an extension, there is no change to the existing legal structure of the PWC. The PWC Rules may specify the circumstances in which a new landholder will have voting rights and the nature of the rights. For example, if the addition of a person will result in additional conveyance losses the Rules could specify that the new landholder must cover the conveyance losses and does not obtain voting rights in the PWC as a result of merely contributing this water.

## Constitution of the decision making body

There are three elements to PWCs: the corporate entity, the Board (or decision making body) of the PWC and the members of the PWC. In general there is no proposed change to the current board requirements that apply to PIBs and PDBs. Where there is inconsistency between the PIB model and the PDB model the PIB model will be adopted. (For example PIBs may have up to ten Board members whereas PDBs may have up to seven.) In addition it is proposed that the members may appoint to the Board persons who are not members or landholders if this is authorised by the Rules.

As Trusts are not corporations, there are only two elements: the Trustees and ratepayers. In relation to Trusts the membership of the decision making entity are called the Trust members. To avoid confusion in this paper with the overall members of the scheme they are referred to as the Trustees. The Trustees are to remain unchanged with the exception that the current requirement for the Minister to nominate a member of the Trust who then acts as chair is to be removed. The identity of the Trustees and the arrangements for chairing meetings are to be internal matters for the Trust subject to the requirements of the WMA and Regulation in relation to matters such as voting and elections.

## Membership of the scheme and voting rights

Previously the members of the scheme were the landholders to whom the scheme supplied water in licences held by the scheme or from whom the scheme drained water. However the Commonwealth's market rules have been designed to enable members of schemes to convert a right or share within a group entitlement to an individual and separate water licence. This process is called transformation. Transformed licences can then be either sold out of the scheme or retained by the landholder with water supplied to the landholder under a delivery contract with the scheme.

This raises the question as to whether the holder of the transformed licence should continue to be a member of the scheme with the associated voting rights. It is considered that voting rights in the scheme should be available to:

- Untransformed members of the original scheme and transformed members of the original scheme who have retained delivery rights; and
- Persons to whom the scheme has been extended in circumstances set out in the Rules.

However transformed licence holders should not be able to influence decisions of the scheme that may affect the PWC's water entitlements and accordingly they will in general have no voting rights in relation to matters that may affect the group water entitlement if they entirely transform their entitlement to a personal licence. This is considered in more detail below under the heading "Transformation of water entitlements".

It is also possible that all of the entitlements of a scheme may be transformed or that a scheme is created as a management structure with the licences being retained by the members. The proposed flexibility in the voting arrangement will be able to address this.

PWCs will have the power to enter into contracts with people for the sale or delivery of water. A person will not obtain voting rights simply by virtue of such a contract.

## Appointment of an administrator and dissolution of the PWC

The WMA currently provides for the removal of Board members from office, the appointment of an administrator and the winding up of PIBs. These powers are currently vested in the Governor. It is proposed that these powers be amended to be vested in the Minister not the Governor.

The proposed amendments will give considerably more flexibility to PWCs as compared to the current Boards and Trusts. In order to ensure that, notwithstanding this increased flexibility, minority interests are not prejudiced, that the PWC acts in a fair and democratic manner and as a solution to deadlock, it is proposed that the Minister should have the power to remove the Board or Trustees and appoint an administrator if:

- (a) in the Minister's opinion the PWC:
  - (i) is unable to carry out its functions properly because of disagreements between its members; or
  - (ii) is not carrying out its functions properly for any other reason; or
  - (iii) is not properly maintaining its irrigation and drainage systems; or
- (b) the PWC is unable to pay its debts as they fall due; or
- (c) the PWC has failed to comply with the WMA; or
- (d) the Minister is of the opinion that it is just and equitable in the circumstances of the particular case.

Unless there are special circumstances, the Minister must not exercise these powers unless notice of the proposal has been placed in a local newspaper, the Board or Trustees have been notified in writing in accordance with the Regulations and given a minimum of 4 weeks to comment. The removal of the Board or Trustees and the appointment of the administrator are to occur by order of the Minister published in the Gazette. It will no longer be necessary for the Governor to remove the Board members and then appoint the administrator “by subsequent proclamation in the Gazette”.

These provisions are broadly similar to s15 of the *Irrigation Act 2009* (SA) with some important differences:

- The triggers lead to the appointment of an administrator, not dissolution of the PWC or Trust.
- The notice period is shorter, but under the South Australian legislation at the end of the 3 month period the Trust is automatically dissolved whereas under these proposals dissolution is not automatic.
- There is provision for immediate removal of the Board or Trustees if there are special circumstances. This could be the case where, for example the PWC is suspected of inappropriately dealing with the assets.

If an administrator is appointed, consistent with section 334 of the *Cooperatives Act 1992*:

- all contracts of employment with the co-operative are terminated, and
- all contracts for the provision of secretarial or administrative services for the co-operative are terminated, and
- the administrator may terminate any contract for providing other services to the co-operative.

The reasons for the failings that led to the appointment of the administrator may be highly variable. For example they may include failure to make decisions as a result of personality conflict or inappropriate rules, problems with, or disagreement about, the existing infrastructure or proposed infrastructure investment, insolvency or systematic failure to comply with the legislation (including the Rules). Accordingly it is proposed to amend the section to enable the period of appointment of the administrator to be at the discretion of the Minister. The period of administration will end when the Minister publishes an order in the Gazette appointing the members of the PWC elected by the Members in an election conducted by the administrator, or when the PWC is wound up.

It is proposed that the Administrator will not be required to comply with the PWC Rules. They will have the power to do anything necessary to resolve the issues that led to his or her appointment and maximise the chances that the PWC will be viable in the long term including (subject to any conditions imposed by the Minister in the instrument of appointment) amending the Works Plan to exclude works, amending the membership of the PWC, amending the Rules, and conducting elections. If the Administrator is of the view that the PWC is not viable in the long term (for financial, relationship or other issues) he or she may recommend to the Minister that the PWC be wound up.

The WMA currently allows the Governor to wind up the PWC if he or she “is satisfied that a private irrigation board has made a request to the Minister that it be wound up”. It is recommended that PWC initiated wind up only occur following a resolution at a meeting of PWC members that is supported by 75 per cent or more of the votes (including both transformed and non-transformed members). The Minister will only be able to wind up a PWC after having received and considered advice from an Administrator.

It is proposed that the Regulations continue to be able to make provision for or with respect to the winding up of a PWC and the distribution of the assets. This must be a broad discretion to ensure that the Minister has the power to, among other things, rectify any prejudice that occurred to a member prior to the appointment of the Administrator.

## B. Powers of the decision making body

The proposed powers and functions of PWCs described below do not remove the need to comply with other legislation, in particular any requirements to obtain water licences and approvals, pollution licences or development consent before undertaking an action.

### General powers and functions

The PWC is to be a body corporate, have perpetual succession and a common seal, can sue and be sued in its corporate name and have the functions and powers conferred on it by the WMA or any other Act. The PWC should be able to enter into contracts, employ persons and raise finance for the purposes of carrying out its functions.

### Water management powers and functions

The PWC would have the broad functions of providing, maintaining and operating water supply systems or water drainage systems and any other functions conferred by or under legislation. In order to carry out its functions the PWC may in accordance with the Works Plan and the PWC Rules:

- construct, install, maintain, operate and manage water management works or systems;
- inspect any works connected to or with the potential for unauthorised connection to the PWCs water management system;
- inspect, examine or survey land in connection with the planning, design or construction of a water management system and for that purpose:
  - fix posts, stakes or other markers on the land;
  - dig trenches or sink test holes on the land to determine the nature of the soil and underlying strata;
  - remove samples of any material from the land for analysis;
- extract and remove soil or minerals from any land after first consulting the owner and having regard to his or her views;
- enter or occupy land for the purpose of exercising its powers;
- exercise any other powers that are incidental to the PWCs powers or that are reasonably necessary for the carrying out of its functions.

The power to supply water would not be limited to irrigation purposes as many PWCs and Trusts currently supply water for stock and domestic purposes. However a PWC may not supply water for domestic purposes if a supply of water is available from a water utility.

In general the PWC will be responsible for the joint works and landholders will be responsible for the works from the off-take point. However in light of the PWCs expertise in water supply infrastructure it is desired that they also have the power to construct water management systems on any serviced property pursuant to an agreement with the landowner or occupier if this is authorised by its Rules.

### Compliance powers and offence provisions

In order for joint water infrastructure to be effective it is reliant on all parties taking no more than their share. As the water available to a PWC is a limited volume, if one party takes more than their share this will have direct impacts on the other parties. In the medium term, if there is a perception of widespread theft this can undermine the integrity of the system and potentially lead to increased rates of non-compliance.

In general the WMA does not require licences to take water out of artificial channels or approvals for secondary off take points. This means that the NSW Office of Water cannot readily regulate these

activities and the PWCs and ICs which have control and management of the works must be empowered to do so. The primary deterrence will be the risk of having water supply cut off or restricted. However in some circumstances this may not be appropriate (eg where water is used for domestic purposes) or the consequences (eg shutting down the business, loss of stock or permanent plantings) may be considered too harsh.

It is proposed to amend the WMA to enable PWCs and ICs to impose civil penalties for the unauthorised taking of water (eg in breach of the Rules, orders of the Scheme or contractual delivery arrangements) or interference with the works of the Scheme. This will broadly be consistent with section 60G of the WMA which gives the Minister power to impose civil penalties if the Minister is satisfied on the balance of probabilities that a person has taken water from a water source illegally. These are significant powers and feedback will be sought from stakeholders as to whether these powers are appropriate and what safeguards are required to protect members. Safeguards may include:

- Appeal rights to the Land and Environment Court;
- A requirement that the powers may only be exercised if authorised by the PWC Rules, the IC Operating Licence or the regulations. This would enable the Minister to remove the powers if misused.
- Creation of an offence of misusing the powers.

If authorised by the Regulations and their Rules it is proposed that schemes be able to appoint authorised officers with power to investigate potential breaches as set out in section 339B(1) and (2)(a) – (g) of the WMA. Responsibility for authorised officers appointed by a Scheme will reside entirely with the Scheme. The circumstances in which a Scheme may be required to pay compensation are set out under the heading “Compensation and Liability” below.

Schemes will continue to be liable for offences under the WMA for example where they illegally take water from a water source, construct or use a water supply work without an approval or use water without a water use approval. However the ability to transform water entitlements means that it is necessary to re-examine who should be liable for water use approvals where these are held by the Scheme on behalf of its members. The intended outcome is that:

- Approvals for the use of water on land will still be required (subject to any exemptions in the regulations) for land covered by the scheme.
- Members of the scheme will not be required to individually hold such approvals unless they also use water on land not covered by the scheme;
- Both the Scheme and the landholder will be jointly and severally liable for compliance with the use approval requirements.
- Other unrelated members of the scheme will not be liable.

This may require amendment of s91A(4) and s106 of the WMA.

## Effect of transformation on voting rights

The Commonwealth market rules under the *Water Act 2007 (Cth)* impose obligations on Irrigation Infrastructure Operators (as defined in the Commonwealth Act) to facilitate transformation of group water entitlements to personally held water entitlements. As this is a matter that is regulated by Commonwealth legislation it is not considered necessary for the State to impose requirements on transformation. However the proposed amendments will ensure that State law does not hinder schemes that are also Irrigation Infrastructure Operators from complying with Commonwealth requirements.

If a person has transformed their group entitlement into an individual entitlement they should not be involved in decisions that may affect the remaining group entitlement. Transformation should not

affect the ability of the PWC to operate the infrastructure for the benefit of other members (whether or not they have transformed). Accordingly it is proposed that:

- If a person entirely transforms they will no longer have voting rights or the right to make decisions as a board member in relation to any matter that might affect the group water entitlement. Where a person sells their transformed licence and does not hold a delivery contract with the scheme, the person will cease to be a member of the scheme.
- If a person partially transforms, their voting rights in relation to matters affecting the group water entitlement will be reduced accordingly. If a Board member or Trustee partially transforms, that person will still be able to vote on board decisions relating to the group water entitlement.
- As matters affecting the group water entitlement can only be voted on by members who have not transformed, provision will need to be made to adjust the quorum or the required percentage of votes accordingly.
- Transformation (either entirely or partially) will not affect the rights of the PWC in relation to the Works Plan as it applies to that members land.

## Calculating water shares

Section 176 of the WMA requires PIBs to, as soon as practicable after the election of the first board, determine the quantity of water, if any, to be allocated for irrigation to each holding. This quantitative allocation is not consistent with the concept of having a share in the available resource that exists under the WMA. Nor does it require PIBs to specify the water allocated for stock purposes or domestic purposes. In addition there may inconsistent treatment of water losses associated with conveying water.

Trusts were not required by the WMA to specify the volume or share of water available to each ratepayer. However in practice this generally occurred or consistent volumes were provided each year (subject to water availability).

To address these issues it is proposed that, if requested by a member or required to do so by the market rules the PWC must provide the member with a statement of their share in the consumptive component of the PWC's water entitlement (the members share). The consumptive component of the PWCs water entitlement is the total entitlement minus the PWCs reasonable assessment of conveyance losses.

An alternative would be to require all PWCs to fix shares within a specified period. Dealing with all entitlements at the same time is potentially fairer however this could be quite onerous for groups where only a small number of members wish to transform and accordingly it is not proposed that this be required. As this approach could be implemented voluntarily by PWCs it is not proposed to require it.

In calculating the shares it is proposed that the PWC must:

- act consistently with past decisions specifying water shares,
- where water shares have not previously been specified have regard to the nature or type of crops growing on the land or the activities for which water is currently provided;
- have regard to any other matters it considers relevant; and
- act in a fair and equitable manner.

The right to transform under the Commonwealth market rules only applies to the irrigation component of a group entitlement ("the irrigation right"). It is proposed that the irrigation right set out in the notice (or the determination of a Court on appeal) will be binding on the PWC in any future transformation or internal transfer proposal. If a person has rights to water that are for a purpose other than irrigation,

for example stock or domestic purposes, the total right to water must be specified however the notice may specify the irrigation right component.

If the member disagrees with the irrigation right specified by the PWC he or she may appeal to the Land and Environment Court within 28 days of receiving notice of the decision. This right of appeal is consistent with s55 of the *Irrigation Act 2009 (SA)*.

This notice must comply with any requirements of the regulation. For example it may be desired to require the notice to:

- split the total share into separate domestic, stock or irrigation components;
- specify the means by which the share was calculated;
- specify the PWCs assessment of total conveyance losses.

## Sale and transfer of water entitlements

In addition to transformation it is intended that members of the scheme should be able to permanently transfer their members share to another member. Transfers of this type do not reduce the overall rate base of the PWC, therefore do not create a risk of stranded infrastructure and accordingly termination fees should not apply. This would be an internal matter and would not require application to be made to the Minister.

If conveyance losses vary significantly throughout the system the PWC may identify the conveyance losses associated with different parts of the system (but must still identify the total losses). The PWC may apply to the Minister for the conveyance part of its licence to be subdivided and held as a licence that is separate to the consumptive pool.

As PIBs and Trusts were previously constrained in relation to dealings in water some may not have provision for the circumstances in which the group entitlement may be dealt with. Accordingly while the PWC will have no restriction in relation to the sale of water allocations (annual volumes) in accordance with any requirements set out in its Rules the following actions may only occur if positively authorised by its Rules:

- use its licences as security for loans; and
- sell part or all of the group entitlement.

## Water restrictions and wastage

It is proposed that a PWC will be authorised to restrict or suspend the supply or delivery of water (to non-members) or reduce or suspend the amount of water available to members if:

- the water available to the PWC cannot meet the demand;
- the water available to the PWC is unsuitable for the purpose for which it is to be supplied;
- the PWC is unable to provide sufficient conveyance water in connection with the operation of the system;
- the PWC cannot lawfully supply or deliver the water (eg water restrictions have been imposed under the WMA or other statutory orders have been imposed preventing use of a water supply work until preconditions have been met);
- the owner or occupier of the land in respect of which the action is taken has:
  - failed to pay charges or interest in charges;
  - contravened or failed to comply with a term or condition on which the PWC supplies or delivers water to, or drains water from, the land;
  - contravened or failed to comply with a provision of the WMA, any requirement imposed under the WMA or with a direction of the PWC.

- failure of PWC works has made supply or delivery of water impractical, the failure was not reasonably foreseeable and the PWC is taking action to repair the works within a reasonable period of time;
- the PWC is unable to dispose of water draining into its drainage system because of the degraded quality of the water.

Restrictions must be imposed fairly and equitably and must not discriminate between PWC members and non-members. However restrictions may be applied differently having regard to, for example, variations in conveyance losses across the system or the purpose for which the water is supplied (eg water to crops may be restricted before domestic water supplies). If these requirements are met the PWC will incur no civil liability in relation to the action taken.

## Compensation and liability

No compensation will be payable in relation to activities (including activities by authorised officers) undertaken consistent with the Rules on land identified in the Works Plan unless the damage has arisen from the PWC's negligence.

A Scheme's obligation to pay compensation for damage or loss caused by the activities of authorised officers outside of the envelope of the Work Plan will be the same as the liability for authorised officers appointed by the Minister under section 339G of the WMA. Specifically, the Scheme must compensate all interested parties for any damage caused by the authorised officer in exercising a power of entering premises (but not any damage caused by the exercise of any other power), unless the occupier obstructed or hindered the authorised officer in the exercise of the power of entry.

A PWC, IC or Trust (or its officers) will not be liable for loss or damage caused by or resulting from:

- Rises or falls in the water source from which it takes water or in the water source into which it drains water if the taking or draining was lawful.
- The escape of water from its water supply or drainage systems except where the Scheme knew or should have known that water was escaping or was likely to escape and failed, without reasonable excuse, to prevent the escape.
- The scheme failed to supply or drain water in accordance with its Rules or contractual obligations except where the scheme had lawfully suspended or restricted supply.

These provisions are consistent with section 59 of the *Irrigation Act 2009* (SA).

## C. Defining the land and works under management

There are three mechanisms by which a PWC may have access to land:

- by obtaining title to the land or a relevant interest in the land (eg an easement);
- pursuant to a lease or licence with the agreement of the landholder; or
- pursuant to the statutory powers under the WMA.

### Title to land or interests in land

As a corporate body PWCs are able to deal in land in the same way as any other person.

Trusts however are not corporate entities and accordingly many property dealings have been undertaken in the name of Trustees. To enable these issues to be addressed it is proposed to amend the WMA to:

- Make it clear that if property has been purchased using Scheme funds and for the purpose of the Scheme the person in whom it is vested must provide all assistance to transfer that property to the Scheme.
- Specify that in relation to Trusts, the Trustees do not have a personal interest in property held by the Trust.
- The Scheme is responsible for any costs associated with transferring title to the property.

The existence of Scheme property on land owned by a public authority without an easement or a current licence or lease does not give the Scheme the right to have that property vested in it. However if the property was purchased for the purposes of the Scheme then consideration must be given as to how to regularise the arrangements in accordance with current legislation (including the *Crown Lands Act*) and government policy and procedures regarding the sale of land.

It is not proposed to give PWCs power to compulsorily acquire land.

### Interests in land through lease or licence

The PWC may obtain an interest in land by way of a lease or licence. Such arrangements are not permanent and accordingly it is envisaged that this will primarily relate to the incidental activities of the PWC. Beyond making it clear that the PWC has powers to enter into contracts for these purposes no amendments are proposed.

### Statutory powers to construct, maintain and operate works

The primary role of the PWC is to construct maintain and operate joint water management works. The PWC does not need to own the land or have an easement over the land to rely on these powers. This impacts on private landowners and accordingly it is important that the works to which these powers apply are clearly identified and described. Further there will generally be an interface between the shared works for which the PWC is responsible and the private works for which the landholder is responsible and accordingly it is important that the demarcation is clear.

In order to enable the PWC to respond to reduced water supplies, changed land use, changed delivery requirements (eg as a result of trade or piping of channels), changes to land titles (eg subdivisions) and changed member needs it is essential that the PWC be able to redefine the works and land under its management.

The current framework for identifying “authorised sites”, applying to take over works, advertising the application, the Governor determining whether to authorise the taking over of the work and the taking over of the work by notice served on the landholder is unnecessarily cumbersome.

Instead it is proposed that the PWCs statutory powers apply to works and an identified envelope of land (whether or not this is associated with specified works) that are set out on each PWCs' Works Plan. In relation to new PWCs a proposed Works Plan must accompany the application. On creation of the PWC this becomes the PWC's Works Plan. The Regulations may specify requirements about the content and format of the Works Plan.

The PWC will be required to ensure that the current Works Plan and all previous amendments and versions are available to all members at the PWC's head office. For existing PWCs all works and land under the control and management of the PWC at the time the amendments commence will be deemed to constitute the Works Plan. If there is not a document or documents that clearly identifies the **current** works and land under the control of the PWC, if a request is made by a member this must be produced in relation to the members land and provided to the member within 2 months.

The existence of the Works Plan and the associated statutory powers has implications for private land ownership. However rights over private land exist under the current legislation and cannot be discontinued without affecting the viability of current PIBs and Trusts. To provide some protection for purchasers of land it is proposed that the existence of a PWC Works Plan applying to the land be identified in the schedule 3 of the *Conveyancing (Sale of Land) Regulation* as an adverse affectation. The alternative is to require a notation to be made on the titles of land which are part of a PWC Works Plan. Even if a reasonable transition period was provided it is considered that this would be an unreasonable burden on the PWCs.

It is proposed that the Works Plan may be amended in the following circumstances:

- with the consent of the affected landholder; or
- in accordance with the PWCs Rules in relation to members land; or
- the works as varied do not extend beyond the works envelope specified in the Works Plan and the variations do not have a net negative impact. It is proposed that the regulations be able to specify matters that must be considered when evaluating the overall environmental impact of the proposal. (For example replacing a channel with a pipe will reduce water wastage and have a positive impact.)

Currently, the WMA enables a member of a PIB to apply to the Land and Environment Court to excise their land from the PIB. It is necessary to repeal this provision, as the intention is that only the PWC be able to amend the Works Plan in accordance with the PWCs Rules. If a transformed member could prevent the PWC from using works that cross their land by removing their land from the Works Plan this could affect the viability of the entire scheme.

Where the PWC is no longer exercising functions in relation to works it is proposed that the PWC may amend the Works Plan in an appropriate way without a resolution of members. For example it may be the case that certain works are removed from the Works Plan but the envelope of land defined in the Works Plan is unaffected.

Where a PWC requires access to land which is outside the envelope of land set out on the its Works Plan, provision will be made for a PWC or any person authorised by it to enter any land for the purpose of constructing, maintaining and effecting extensions and alterations to the works and for any other purpose in the exercise of its powers and duties. This is consistent with section 203 of the WMA.

## D. Governance

### Regulatory requirements

Currently the regulatory requirements for Irrigations Corporations are set out in their operating licence. It is not proposed to change this framework, although as discussed above amendments may be required to the operating licence if the ICs wish to adopt expanded compliance powers.

There is no operating licence framework for PIBs or Trusts. For both PIBs and Trusts the WMA and the Regulations contain highly prescriptive requirements in relation to meeting procedures, notice, voting requirements, elections, raising of finance, extension of the works (including in the event of sub-division of land).

PIBs may, with the approval of the Governor, create “by-laws” that bind it and its members. Trusts do not currently have this ability.

The management of water supply works and the sharing of water after it has been taken from the river does not affect environmental flows in the river or other downstream users and accordingly it is considered that this is primarily an internal matter to be agreed between the users of the infrastructure. This is particularly the case as the taking of the water, the use of the water and the construction and use of the works will still be subject to the approval requirements of the WMA.

Accordingly it is not proposed to impose on PWCs an operating licence framework similar to that applying to Irrigation Corporations. It is also considered that the process of making by-laws with the approval of the Governor is unnecessarily cumbersome.

### PWC Rules

The streamlined approach proposed is to empower the PWC to create their own Rules relating to any matter that is necessary or convenient for the carrying out of the functions of the PWC and to address any matter prescribed under the WMA. The Rule making power would be expressed in general terms. It would be as broad as the power that currently exists under s196 without listing in detail the wide variety of matters that can be addressed. This approach is consistent with the approach taken in s6 of the *Irrigation Act 2009 (SA)*.

The actual Rules that would be made by any PWC would be determined by a range of matters including the number of members, the complexity of the infrastructure, historical relationships, the complexity of the water rights and the volume and value of the water. Some PWCs may have extremely limited Rules whereas others may be highly detailed and prescriptive.

It is proposed that among other things the rules may address matters such as:

- the setting of fees and charges,
- meeting processes such as notice and quorum for both Board and member meetings,
- election processes and voting qualification,
- decision making requirements (such as specifying decisions that may only be made by a resolution of members and the nature of the resolution required),
- matters relating to the supply of water,
- requirements for connecting to PWC works (such as metering),
- requirements to prevent waste of water,
- financial controls and requirements,
- the making of payments to employees or Board members,
- forms of notices,
- dealings with water including trades, transformation and sale;

- amendment of the Works Plan, and
- transparency (including member access to Board decisions).

The rules will be required to be consistent with the WMA and Regulations. Unless the WMA, Regulations or Rules state otherwise the Rules could be made or amended by ordinary resolution. It is proposed that special resolutions would be required in relation to winding up the Trust and amalgamation of PWCs. In some instances the Regulations or Rules may provide that action may be taken by a smaller number of votes. For example it may be appropriate to enable a smaller percentage of ratepayers to call a special general meeting.

The rules would bind the PWC and its members. Unless otherwise specified in the resolution the alteration to the Rules comes into effect at the time the alteration is made. The Rules would be required to be updated at each general meeting to address any new or changed requirements in the Regulation. In general the Regulations would not have separate effect, ie the new requirements would only take effect following the alteration of the Rules at the next General Meeting. However there may be some matters of such significance that immediate Regulation is required and this would still be possible if the Regulation specified that it was immediately binding on the PWC and its members. While it will not be necessary to update the Rules until the next General Meeting immediate compliance with such a Regulation would be required.

Unlike by-laws the Rules would not be able to create an offence. The by-laws may impose a maximum penalty of 0.5 penalty units or \$55. This is a trivial disincentive compared to the potential withholding of water or imposition of penalties (including potentially debiting of water credits) if the Rules are breached.

If a PIB has existing by-laws these would immediately take effect as Rules of the PWC. The Minister will not have direct oversight of these rules. However to enable the Minister to oversight the PWC he may direct the PWC to provide him with an up to date copy of the rules within a specified time. Failure to comply with such a direction will be an offence with a maximum penalty of 100 penalty units (\$11,000).

## Existing matters specified in the Act or Regulations

The WMA currently has detailed provisions relating to the supply of water and additional works required as a result of subdivisions. It is proposed that these provisions be repealed and this matter left to the Rules. Unless specified in the Rules:

- the PWC is under no obligation to extend its water supply or drainage systems to a new allotment.
- a new allotment cannot be connected to the water supply or drainage systems without the PWC's approval;
- the division will not effect any existing irrigation right (unless the holder of such a right applies for it to be readjusted)
- the right of the PWC to exercise its powers in relation to the land is unaffected by the subdivision.

The Regulation currently contains detailed provisions relating to matters such as elections, internal procedures (such as meeting quorums) and finance. If the WMA amendments occur it is proposed that much of this detail will be transferred from the Regulations to PWC Rules to give PWCs greater flexibility as to how they run their businesses. This more streamlined, less prescriptive, user driven approach is consistent with the reforms in the *Irrigation Act 2009* (SA).

## E. Fees, charges and finances

### Setting of fees and charges

The WMA is currently highly prescriptive as to the rates that may be levied and the purposes for which they may be levied. There is a real risk that the existing provisions are not adequate to enable a PIB or Trust to impose termination or delivery fees in relation to transformed licence holders.

It is proposed that the existing provisions be repealed. Instead it is proposed that a PWC be able to impose charges in order:

- to recover its costs of providing the water supply or drainage service;
- to meet any liabilities;
- provide for maintenance of existing water supply works and other assets;
- to recover its costs of planning and implementing changes to the works (such as expansion, or efficiency improvements such as channel lining or piping).

Rather than prescribe quantitative or area based rating systems it is proposed that the PWC be able to impose fees based on one or a combination of the following:

- the fact that land is connected to a PWC water supply or drainage system;
- the volume of water supplied or delivered during the charging period;
- the share in the consumptive pool;
- any other factors determined by the PWC for example the area of land drained by a drainage scheme.

The charges may vary in respect of different areas; depending on the purpose for which the water is supplied, depending on the quality of water supplied or delivered; or on the quantity of water delivered. The charging framework may vary from year to year. The charges may be declared by any of the following methods:

- publication in a local paper;
- notice in writing to all PWC members and persons with whom the PWC has delivery agreements; or
- notice published and maintained on the PWCs internet site.

The process of setting the charges will be a matter for the PWC rules. However the Regulation will require that notice must be given to members of any proposed change. In the absence of any provision in the rules and changes to the charging framework must be adopted by resolution at a meeting of PWC members for which 21 days notice was given.

Where the basis for charging is per area the area of land shall be rounded up to the next half hectare. (Currently the WMA refers to rounding up to the nearest hectare. In contrast the *Irrigation Act 2009* (SA) requires rounding up or down to the nearest one tenth of a hectare.)

It is proposed to remove provision for when rates become payable (s172(2)). Instead this will be a matter for the PWC rules. It is proposed that the PWC may declare a rate of interest that will be payable if a charge is not paid within a specified time following service of notice that the charge is payable. The regulations:

- may cap the interest rate that may be charged; and
- may specify the period from which interest will be payable.

## Recovery of fees and charges

Currently outstanding fees are a charge on the land. It is not proposed to change this provision or the joint and several liability of the owners, however it is proposed to clarify that this joint and several liability extends to the occupier of land.

As transformation of licences occurs the asset base of the PWC will be reduced and it is therefore increasingly important that the PWC be able to recover outstanding fees. However if water is transformed and sold the value of the land may be reduced to the extent that it is inadequate to cover the debt. Accordingly it is proposed that the PWC be able to:

- require security prior to transformation in accordance with any Commonwealth requirements;
- take action to sell the secured property or the untransformed water share if fees have been unpaid for a year or more.

Before this occurs the PWC must serve notice on the owner of the property and if the property is real property, the occupier of the land:

- stating the period for which the charges or interest have been in arrears;
- stating the amount of the total liability for charges and interest presently outstanding in relation to the land;
- stating that if that amount is not paid in full within 1 month of service of the notice (or such longer period as the PWC allows) the PWC intends to sell the property.

A copy of the notice must also be served on any registered interest holder. It is proposed that if the amount is not paid in full in the period specified the PWC may proceed to sell the property. The sale must be by auction (unless it is Crown land) notice of which has been provided on at least two occasions in a paper circulating throughout the State. If the amount is paid before the date of the auction the PWC must withdraw the land from auction. If the auction fails the PWC may sell the property by private contract.

Any proceeds from the sale are to be applied in the following priority order:

1. in paying the costs of the sale and any other costs of proceeding with the forced sale;
2. in discharging the liability for charges and interest to the PWC
3. in discharging any liability to the Crown for rates, charges or taxes;
4. in discharging any liabilities secured by registered mortgages, encumbrances and charges;
5. in discharging any other mortgages, encumbrances and charges of which the PWC has notice;
6. in payment to the owner of the property.

The above provisions are consistent with 50 to 52 of the *Irrigation Act 2009* (SA).

## Power to borrow and invest

The WMA is currently highly prescriptive about the PIBs' power to borrow. Specifically under sections 189 and 190:

- All money must be paid into a bank or authorised deposit taking institution.
- Every payment of \$2 or more must be by cheque.
- "Payments of less than \$2 may be made of a petty cash fund replenished from time to time by cheque drawn and countersigned as prescribed by the regulations".
- The Board "may obtain advances by way of overdraft on current account in any one or more banks... [the amount] must be limited to one half of the income of the [Board] as shown by the last audited accounts".

It is proposed that PWCs be given express power to borrow money or take advantage of any other form of financial accommodation. As security the PWC may charge the whole or any part of its property (including its revenue stream) by debenture, mortgage, bill of sale or in any other manner. This is consistent with s54 of the *Irrigation Act 2009* (SA). The PWCs will only be able to use their licence as security if this is authorised by the Rules.

The WMA does not currently include a power for PIB's or Trusts to invest. It is proposed to include a general power for PWCs to invest funds if authorised by the PWCs rules. The new borrowing and investing powers will not apply to Trusts.

## Books of accounts

Currently the WMA requires books of account to be kept and audited at least annually with a copy of the books and certificate of audit provided to the Minister. It is proposed to repeal these provisions and introduce greater flexibility and transparency by:

- Requiring the PWC to cause proper accounts to be kept of its financial affairs.
- Enabling the audit to be conducted by a registered company auditor, a firm of registered company auditors, a chartered accountant, certified practising accountant or a member of the National Institute of Accountants;
- Specifying that a member of the PWC must not be appointed as the auditor.
- Giving the auditor statutory right of access to all the records of the PWC and empowering them to require information and explanations required for the purposes of the audit. The maximum penalty for refusing or failing to allow access, refusing or failing to give any information or explanation when required by the auditor otherwise hindering, obstructing or delaying the auditor is to be punishable by a maximum fine of 50 penalty units (\$5,500). This penalty will apply in relation to any officer, employee or member of the PWC.
- Lay before the AGM a copy of the audited financial statements, a copy of the auditors report, and a report on the operations of the PWC for the preceding year.

There will be no obligation to automatically provide accounts and audits to the Minister however the PWC must do so if requested. The above provisions are consistent with ss19-21 of the *Irrigation Act 2009* (SA).

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