



Australian Capital Territory and Other Legislation Amendment (Water Management) Bill 2009

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Contents

Purpose	2
Background	2
Sources of ACT water supply	3
Management of water in the ACT	5
Australian National Botanic Gardens	5
Basin Plan	6
Committee consideration	7
Financial implications	8
Main provisions	8
Schedule 1	8
Schedule 2	9
Schedule 3	10
Schedule 4	10
Schedule 5	11

Australian Capital Territory and Other Legislation Amendment (Water Management) Bill 2009

Date introduced: 19 November 2009

House: House of Representatives

Portfolio: Climate Change and Water

Commencement: Various dates as set out in the table in section 2 of the Bill.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The primary purpose of the Bill is to amend the *Australian Capital Territory (Planning and Land Management) Act 1988* (the PALM Act) so that water abstraction on National Land is managed by the Australian Capital Territory (ACT) Government under the relevant territory legislation rather than the Commonwealth.

The Bill also amends other Acts to improve governance of water within the Murray-Darling Basin.

Background

In 1901 a decision was made to develop a national capital. The move was as a direct result of the federation of colonies in Australia. However, it was not until 1908 that the location of the capital was decided. The *Seat of Government Acceptance Act 1909* (Seat of Government Acceptance Act) provided a statutory underpinning to an agreement between the Commonwealth and the State of New South Wales (NSW) that:

- NSW would surrender to the Commonwealth certain lands for the Territory which would be the seat of government, and
- the right of NSW and its residents to the use and control of the waters of the Queanbeyan and Molonglo Rivers and their tributaries to the east of the

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Goulburn to Cooma Railway would be subject to, and secondary to, the use and requirements of the Commonwealth which were declared to be paramount.¹

Sources of ACT water supply

At present, the ACT water supply is sourced from the Bendora, Corin, Cotter and Googong Dams. The Bendora, Corin and Cotter Dams are built on the Cotter River and are located in the ACT.

The Googong Dam was constructed in the 1970s on Commonwealth land on the Queanbeyan River which is located in NSW, although its water is reserved for use in the ACT. The ownership of the land on which the Googong Dam was built has been a source of debate since the ACT was granted self-government in 1989. The Commonwealth indicated at about that time, that it intended to retain ownership of the Googong Dam, stating:

The land in question obviously is owned by the Commonwealth, just as is the land in the ACT. So for the reason that it has obligations to New South Wales, it cannot abdicate its role in respect of the dam. However, the amendments to the Dam Act itself place the effective control and management of the area in the hands of the Australian Capital Territory executive.²

However the ACT felt that the Commonwealth had agreed to hand the land to the ACT but that the transfer was ‘ineffectually implemented by use of the wrong instrument’.³ In January 2007, John Stanhope, ACT Chief Minister said:

The legal position is set out the ‘Summary of Legal Responsibilities for Cross Border Water Supply between the ACT and NSW’ signed by the Commonwealth on 17 August 2006.

This Agreement, signed in August 2006 by the Minister for Territories, demonstrates beyond doubt the Commonwealth, ACT and NSW all had a clear and shared understanding that the land was to be transferred to the ACT.⁴

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1. Clauses 1 and 2 of the First Schedule of the *Seat of Government Acceptance Act 1909*, viewed 24 November 2009, [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/47C428C3C6B3B335CA256F71004FC767/\\$file/SeatGovAcc09.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/47C428C3C6B3B335CA256F71004FC767/$file/SeatGovAcc09.pdf) .
 2. G Richardson, In Committee: Australian Capital Territory (Self Government) Bill 1988, Senate, *Debates*, 24 November 1988, p. 2742, viewed 23 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1988-11-24%2F0097%22>
 3. J Stanhope (Chief Minister ACT) , *Commonwealth rewriting history on Googong Dam*, media release, 25 January 2007, viewed 23 November 2009, <http://www.chiefminister.act.gov.au/media.php?v=5213&s=28>

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The ACT Chief Minister's understanding was based on the following passage:

The ownership of the Googong Dam Area is currently in the process of transfer from the Commonwealth to the ACT Government (ACTEW). This transfer will mean that Googong Dam Area, and neighbouring Commonwealth freehold land will become freehold land owned by the ACT, rather than a Commonwealth place within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*. The Googong Dam Act will continue to govern the primary use of the Googong Dam Area waters, subject to some consequential changes.⁵

Questions about ownership and control of the Googong Dam and associated infrastructure continued. During the 2007 Federal election campaign, the then Member for Eden-Monaro, Gary Nairn, said that under a Coalition government Googong Dam would be given to the ACT on condition that Queanbeyan is given a secure water allocation.⁶

Negotiations over the Googong Dam between the ACT and the Commonwealth resumed after the 2007 election and agreement was reached, not for ownership, but for a long term lease of the Googong Dam to the ACT from the Commonwealth. On 4 September 2008, the ACT signed a 150 year lease which did not come into effect until a formal agreement was signed between the Australian, NSW and the ACT Governments to guarantee Queanbeyan water supply from ACT sources including the Googong Dam.⁷

At that time it was stated that:

We also intentionally drafted the document to ensure that, while the Commonwealth's interests in the land are fully protected, the ACT government will be able to acquit its responsibilities without us constantly looking over its shoulder ... what we aimed for was to allow the ACT government to get on and manage the dam on our behalf as set out in the Canberra Water Supply (Googong Dam) Act 1974.⁸

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4. J Stanhope (Chief Minister ACT), op. cit.
 5. Summary of Legal Responsibilities for Cross Border Water Supply between the ACT and NSW, 2006, viewed 24 November 2009, http://www.cmd.act.gov.au/_data/assets/pdf_file/0017/1619/ACTNSW_sum_legislative_rs_pnsbltes.pdf
 6. 'Liberals promise to give Googong Dam to ACT', *ABC News*, transcript, Australian Broadcasting Corporation (ABC), 30 October 2007, viewed 23 November 2009, <http://www.abc.net.au/news/stories/2007/10/30/2075178.htm?site=news>
 7. L Tanner, (Minister for Finance and Deregulation), 'Googong Dam', House of Representatives, *Debates*, 23 September 2008, p.8247, viewed 23 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2008-09-23%2F0042%22>
 8. *Ibid.*, p. 8247.

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The amendments in this Bill require that the water resources of the Googong Dam are included in the ACT water resource plan area identified in the Basin Plan being developed for the Murray-Darling Basin rather than in the water resource plan area for NSW and are consistent with the current lease agreement.

Management of water in the ACT

Within the ACT, water is managed by both the National Capital Authority (NCA) and the ACT Government.

The role of the NCA is supported by the PALM Act.⁹ Section 6 of the PALM Act provides that the NCA is to manage *'National Land'*.¹⁰ This is specific land, declared by the Minister to be land that is, or is intended to be, used by or on behalf of the Commonwealth.¹¹ All other land within the ACT is regulated by the ACT Government. Under the PALM Act the term *'land'* includes water.¹²

The NCA manages the taking of water on National Land which includes Lake Burley-Griffin. The amount of water managed is less than 1 Gigalitre (GL) per annum compared to 45–65 GL per annum of water consumed by the ACT and Queanbeyan which is managed by the ACT Government.¹³

Australian National Botanic Gardens

The Australian National Botanic Gardens (the Botanic Gardens) is presently using potable water¹⁴ from the Canberra water supply which has increased in cost by 250 per cent over the past ten years.¹⁵ As a result the Botanic Gardens has had to implement water conservation measures to allow the plant collection to go off this supply. Plant collections are being reviewed and the Botanic Gardens is using improved irrigation technologies,

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9. *Australian Capital Territory (Planning and Land Management) Act 1988*, viewed on 24 November 2009, [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/EF826714992D3974CA2572D80001C24F/\\$file/AusCapTerPlaLanManAct1988_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/EF826714992D3974CA2572D80001C24F/$file/AusCapTerPlaLanManAct1988_WD02.pdf)
 10. Section 27 *Australian Capital Territory (Planning and Land Management) Act 1988*.
 11. *Australian Capital Territory (Planning and Land Management) Act 1988*—Notification of Declaration of National Land, August 2007, viewed 24 November 2009, <http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/F8D5422FB D2F5508CA25736B00099467?OpenDocument>
 12. Section 4 *Australian Capital Territory (Planning and Land Management) Act 1988*.
 13. ACTEW, 'Water facts: Total annual consumption', ACTEW website, viewed 24 November 2009, <http://www.actewagl.com.au/water/facts/annualConsumption.aspx>
 14. That is, water that is suitable for human drinking and cooking.
 15. G Downie, 'Water charge hits Botanic Gardens', *Canberra Times*, 20 June 2006, p. 8.

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modifying landscaping to conserve water and reducing the number of cultivated beds. However, water restrictions imposed during the present drought has placed much of the collection under stress and resulted in some loss of plant specimens, contraction of planted areas and decline in some horticultural displays.

The NCA has been discussing with the Botanic Gardens about accessing water from Lake Burley-Griffin so they no longer have to use potable water to irrigate their plant collection.

The NCA was able to negotiate an increase in the amount of water available for abstraction from Lake Burley-Griffin with the ACT Government in order to grant a licence of 170 Megalitres (ML) per year to the Botanic Gardens.¹⁶ A temporary permit was granted by the NCA to the Botanic Gardens to extract this amount of water until December 2009. The Botanic Gardens has applied for another permit for one year enabling it to cover the period until the present Bill is passed and commences. The water for the Botanic Gardens will come from unused allocation under the cap of the ACT Government for water from Lake Burley-Griffin since the NCA did not have any room under its cap.

The new arrangement of transferring management of water on National Land from the NCA to the ACT Government:

will permit the ACT and Commonwealth to share its total cap, allowing the gardens to draw water from Lake Burley-Griffin, which is currently under Commonwealth control, without any increase in the overall water use within the catchment.¹⁷

Basin Plan

Located in the south-east of Australia, the Murray-Darling Basin covers over one million square kilometres, equivalent to 14 per cent of Australia's total area. The Murray-Darling Basin extends over three-quarters of NSW, more than half of Victoria, significant portions of Queensland and South Australia, and includes the whole of the ACT.¹⁸

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16. G Rake, Joint Standing Committee on the National Capital and External Territories, Hearings: National Capital Authority, pp.19-20, viewed 23 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committee%2Fcommjnt%2F12203%2F0001%22>
 17. M Kelly, 'Second reading speech: Australian Capital Territory and other Legislation Amendment (Water Management) Bill 2009, House of representatives, *Debates*, 19 November 2009, pp. 5-7, viewed 20 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-11-19%2F0029%22>
 18. A Martyn and P Pyburne, 'Water Bill 2007', *Bills Digest no. 30, 2007-08*, Parliamentary Library, Canberra, 14 August 2007, viewed 24 November 2009, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd030.pdf>

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Section 19 of the *Water Act 2007* (the Water Act) requires that there is a Basin Plan for the management of the Murray-Darling Basin water resources. Essentially the Basin Plan is to provide for limits on the quantity of water that may be taken from the Murray-Darling Basin water resources as a whole, and from the water resources of each water resource plan area.

The Basin Plan for the integrated and sustainable management of water resources in the Murray-Darling Basin is planned to commence in 2011.¹⁹ The mandatory content of the Basin Plan is listed in the Water Act as including, though not limited to:

- limits on the amount of water (both surface water and groundwater) that can be taken from Basin water resources on a sustainable basis
- identification of risks to Basin water resources, such as climate change, and strategies to manage those risks
- **requirements that state water resource plans will need to comply with if they are to be accredited under this Act**
- an environmental watering plan to optimise environmental outcomes for the Basin
- a water quality and salinity management plan
- rules about trading of water rights in relation to Basin water resources.²⁰

Under the water-sharing arrangements, when existing Basin states' 'water resource plans' cease, new plans will be prepared by Basin states and provided to the Commonwealth Minister for accreditation. Among the requirements for inclusion in a 'water resource plan' are matters such as the long-term annual diversion limit for the water resources of the water resource plan area; the regulation of interception activities with a significant impact on the water resources; planning for environmental flows; and water quality and salinity objectives for the water resource plan area.²¹

Committee consideration

The Bill has been considered by the Scrutiny of Bills Committee (the Committee) which noted the retrospective effect of certain proposed provisions.

The Committee stated:

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19. P Wong, (Minister for Climate Change and Water), *Transcript of doorstep interview: Ministerial Council of the Murray-Darling Basin Authority*, 12 June 2009, viewed 24 November 2009, <http://www.climatechange.gov.au/~media/Files/minister/wong/2009/transcripts/June/tr20090612.ashx>
 20. Murray-Darling Basin Authority, 'The Basin Plan', viewed 24 November 2009, http://www.mdba.gov.au/basin_plan
 21. Subsection 22(3) *Water Act 2007*.

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As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. Items 1 and 2 of Schedule 2 amend subsection 18B(9) of the *Water Act 2007*.

A note to item 2 explains that section 18B was inserted by the *Water Amendment Act 2008* which commenced on 15 December 2008. This means that the relevant provisions in this bill will be taken to have commenced immediately after the commencement of the amended section 18B.

The Committee also notes that the explanatory memorandum explains (at page 5) that the amendments in items 1 and 2 of Schedule 2 mirror equivalent provisions in relevant state laws which refer legislative power to the Commonwealth to enact the referred provisions of the Water Act.

*In the circumstances, the Committee makes no further comment on these provisions.*²²

Financial implications

According to the Explanatory Memorandum:

The cost associated with establishing entitlements to water used by Commonwealth agencies or private entities on Commonwealth land will be borne by the Commonwealth. The majority of on-going costs will also be borne by the Commonwealth. Two private entities will bear costs as a result of this Bill, with a total combined cost, at current prices, of under \$50,000 per annum.²³

Main provisions

Schedule 1

Schedule 1 amends the PALM Act. The purpose of these amendments is to ensure that the abstraction of water on National Land is no longer managed by the Australian Government. To achieve this:

- **item 1** inserts the term ‘take’ into existing section 4 so that it will have the same meaning in the PALM Act is as in section 11 of the *Water Resources Act 2007* (ACT), that is:

22. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest no. 15 of 2009*, 25 November 2009, p. 11.

23. Explanatory Memorandum, p. 3.

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- for surface water—to withdraw, pump, extract or use surface water; and to divert surface water for the purpose of using it; and do anything else that results in a reduction of flow of surface water in a waterway
- for ground water—to allow ground water to flow or be pumped from a bore.
- **item 4** inserts **proposed subsection 6(2)** which specifically excludes the management of the taking of water on National Land from the functions of the NCA
- **item 5** inserts **proposed paragraph 29(1)(c)** which gives responsibility for management of the taking of water on National Land to the ACT Government, and
- **item 6** inserts **proposed paragraph 30(2)(a)** so that liability for the management of the taking of water on National Land is assigned to the ACT Government.

Schedule 2

Schedule 2 of the Bill amends the Water Act.

Existing section 18B of the Water Act sets out the meaning of the term ‘*referring state*’. The requirement for such term arises because some of the Constitutional underpinning of the Water Act lies in the referral of certain powers by the States to the Commonwealth under section 51(xxxvii) of the Commonwealth of Australia Constitution Act. **Items 1–3** have the effect that where the Water Act uses the term ‘*referring state*’ it means the Basin states.

According to the Second Reading Speech, the Bill seeks to ensure that water used by the Department of Defence facilities and other Commonwealth agencies in the Murray-Darling Basin is taken into account when the Basin Plan is being prepared.²⁴ **Item 5** of the Bill inserts the phrase ‘including the Commonwealth’ in subparagraph 21(4)(c)(ii) so that this can be achieved.

A number of amendments are directed towards the inclusion of the resources of the Googong Dam Area in the water resource plan for the ACT rather than the water resource plan for NSW. These are contained in **items 7** and **11–13**. In particular **item 12** inserts **proposed section 63A** which specifically provides that the Googong Dam Area is to be treated as if it was located in the ACT. **Items 11** and **13–17** insert notes into various sections of the Water Act in identical terms that the surface water of the Googong Dam Area is to be treated as if it were located in the ACT. The effect of these amendments is to make reference in those sections to **proposed section 63A**.

Items 9 and **10** provide for amendments to existing sections 33 and 55 respectively. The effect of the amendments is that both the Basin Plan and a water resource plan may make provision about a matter that applies, adopts or incorporates any matter contained in an

24. M Kelly, op. cit.

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instrument or other writing which is in force from time to time. The purpose of the amendments is to ensure documents such as guidelines, models or standards can be incorporated as and when they are in force, rather than having to formally amend the Basin Plan or water resource plan.

Schedule 3

The purpose of the *Canberra Water Supply (Googong Dam) Act 1974* (Googong Dam Act) was to provide a legislative basis for the construction of a dam and other works for the storage of waters from the Queanbeyan River to ensure an adequate supply of water to the ACT. Existing section 4 of the Googong Dam Act sets out the functions of the ACT Government in relation to the Googong Dam area. Those functions are currently exercised on behalf of the Commonwealth.

Item 1 of Schedule 3 of the Bill amends section 4 to make clear that the ACT Government is to manage, protect and use the waters of Googong Dam in a way that is consistent with the objects of the *Water Resources Act 2007* (ACT). Those objects are set out in section 6 as follows:

- to ensure that management and use of the water resources of the Territory sustain the physical, economic and social wellbeing of the people of the ACT while protecting the ecosystems that depend on those resources
- to protect aquatic ecosystems and aquifers from damage and, where practicable, to reverse damage that has already happened, and
- to ensure that the water resources are able to meet the reasonably foreseeable needs of future generations.

It is not intended that this change will affect any agreements reached by the Commonwealth, NSW and ACT Governments on the supply of water to Queanbeyan.²⁵

Schedule 4

The *Water Amendment Act 2008* (Water Amendment Act) amended the Water Act to make changes to the cooperative water planning, management and regulatory regime in the Murray-Darling Basin. Those changes reflected agreement by the relevant States and the ACT to refer constitutional powers to the Commonwealth to broaden the Commonwealth's planning, management and regulatory powers.²⁶ Schedule 3 of the Water Amendment Act contained transitional provisions. **Item 1** of Schedule 4 of this Bill

25. M Kelly, op. cit.

26. A Martyn, J Tomaras and B McCormick, 'Water Amendment Bill 2008', *Bills Digest no. 45, 2008–09*, Parliamentary Library, Canberra, 14 October 2008, p. 3, viewed on 24 November 2009, <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd045.pdf>

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amends clause 4 of the Water Amendment Act to clarify, for the avoidance of doubt, that the Chief Executive Officer of the Murray-Darling Basin Authority has been appointed for four years from 15 December 2008—the date of commencement of the Water Amendment Act.

Schedule 5

Existing subsection 25(1) of *the Trade Practices Act 1974* (TPA) empowers the Australian Competition and Consumer Commission (ACCC), by resolution, to delegate to a single member, any of its powers under a number of Acts, including the Water Act. **Item 1** of Schedule 5 proposes to amend the subsection to include any rules made under the Water Act. The rationale for the amendment is that it is the rules made under the Water Act rather than the Water Act of itself, which contain the substantive functions of the ACCC.²⁷

27. See Water Market Rules 2009, viewed 24 November 2009, [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/3E06243C7D85EFE1CA2575DD007C22BE/\\$file/WaterMarketRules2009unsigned2.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/3E06243C7D85EFE1CA2575DD007C22BE/$file/WaterMarketRules2009unsigned2.pdf)

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