

WATER.

No. 63 of 1970.

AN ACT to amend the *Water Act 1957*. [23 December 1970.]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

1—(1) This Act may be cited as the *Water Act 1970*.

Short title
and citation.

(2) The *Water Act 1957*, as subsequently amended, is in this Act referred to as the Principal Act.

2 Section fourteen of the Principal Act is amended by omitting from subsection (5) the numerals “1936” and substituting therefor the numerals “1938”.

3 After section fourteen of the Principal Act the following section is inserted:—

“14A—(1) Officers appointed under section fourteen may be appointed by the Commission under its common seal as water bailiffs for the purposes of Division IIB of Part IV.”

Water
bailiffs.

“(2) Every officer so appointed a water bailiff shall, before performing any duty of that office, make oath or affirmation before a stipendiary magistrate that in the performance of those duties he will do equal justice to all men without fear, favour, affection, or ill will.”.

4 After section twenty-five of the Principal Act the following section is inserted in Part II:—

“25A—(1) The Governor may by order-in-council establish advisory committees, to be known as district advisory committees, and appoint and name districts in respect of which they shall act, and such committees shall be called by the name of their district and the words ‘district advisory committee’.

Advisory
committees.

“(2) The boundaries of districts appointed for the purposes of this section may be based on river catchments, municipal boundaries, or any other legal boundaries or natural features.

“(3) The powers of the Governor under subsection (1) of this section shall be exercised only upon the petition of—

- (a) an association representing more than fifty producers;
- (b) a municipality; or
- (c) ten persons owning land in the district to which the petition relates,

presented through the Minister.

“(4) On receipt of a petition under subsection (3) of this section the Minister shall advertise it in a newspaper circulating in the district to which the petition relates and wait till the expiration of twenty-eight days from the date of the advertisement before submitting the petition to the Governor.

“(5) If in that time the Minister has received a petition for an advisory committee for a different district comprising part of the district to which the first petition relates or a petition against the exercise of the Governor’s powers under this section in respect of the district to which the first petition relates the Governor may appoint such committees and districts as he thinks proper or none at all.

“(6) The boundaries of districts appointed for the purposes of this section shall be defined as the Minister may recommend.

“(7) If the Governor is of opinion that a proposed district is too large or too small for administrative convenience he may reject the petition therefor without prejudice to any fresh petition for a district that is smaller or larger, as the case requires.

“(8) District advisory committees shall consist of three persons appointed by the Minister from among such persons as are nominated to him by ten persons owning land in the district.

“(9) Each member of a district advisory committee shall hold office for three years from the date of his appointment, unless he dies, resigns, or is removed by the Governor, in any of which events a successor shall be appointed similarly by the Minister, who shall hold office for the unexpired period of his predecessor’s term of office.

“(10) When an appointment is to be made by the Minister under this section, he shall by advertisement in a newspaper call for nominations within a period of not less than fourteen days.

“(11) Each district advisory committee shall have a convenor chosen by the members.

“(12) At meetings of a district advisory committee—

- (a) two shall be the quorum;
- (b) the convenor shall have a deliberative vote only;
- (c) where there is an equal division of votes on a question, it shall pass in the negative; and
- (d) in other respects the committee may regulate its own procedure.

“(13) A district advisory committee may act notwithstanding one vacancy in its number.

“(14) The Commission shall keep a district advisory committee informed of—

- (a) all proposed and actual issues and renewals of, and refusals to renew, commissional water rights in or affecting its district;
- (b) all proposed and actual variations of water rights on such a renewal, whether under section ninety-four A or otherwise, or by order under that section; and
- (c) all proposed action under section one hundred κ within its district,

in reasonable time, not exceeding fourteen days, for the committee to make recommendations under paragraph (b) of subsection 15 of this section before the Commission acts.

“(15) A district advisory committee—

- (a) shall report on any matters connected with the administration of this Act referred to it by the Commission and
- (b) may make recommendations to the Commission on—
 - (i) the issue and renewal of commissional water rights; and
 - (ii) the carrying out of section one hundred κ.

“(16) For the purposes of sub-paragraph (ii) of paragraph (b) of subsection (15) of this section, water bailiffs shall maintain liaison with any relevant district advisory committee and give the convenor thereof such information as the latter desires and the former can give about directions given or proposed to be given under section one hundred κ, to the end that if the water bailiff and the committee disagree on the water bailiff’s policy the committee may forthwith make recommendations as provided in that subsection.

“(17) In an emergency the Commission may act under section one hundred κ without first complying with subsection (14) of this section, but if it does it shall at the first opportunity inform the district advisory committee concerned of what it has done and is doing and of its reasons for not so complying.

“(18) The Governor may revoke an order-in-council made under subsection (1) of this section.

“(19) In this section ‘producer’ means a person engaged in agriculture, animal husbandry, dairying, horticulture, orcharding, hop-growing, poultry-farming, or forestry for the purpose of selling the produce, as a landholder, share-farmer, or otherwise than as an employee or a contractor for work only or for works.”.

5 Section twenty-seven of the Principal Act is amended by omitting from subsection (5) the numerals “1906” and substituting therefor the numerals “1962”.

Flood prevention, inland navigation, and drainage.

Application
of the
Fisheries Act
1959.

6 Section sixty-nine of the Principal Act is amended by omitting the words “Salmon and Freshwater Fisheries Commissioners” and substituting therefor the words “Inland Fisheries Commission”.

7 After section seventy-five of the Principal Act the following sections are inserted:—

Protection
from private
works.

“75A—(1) Where the Commission is of opinion that any work being carried on or about to be carried on by a person, other than a public or local authority, in the bed of, on the banks of, or near a river or lake will or may cause damage to persons having rights, powers, or duties in, over, or in respect of the river or lake, it may by order under its common seal forbid, absolutely or conditionally, that person from carrying on or commencing those works and ordering him to restore anything thereby removed or affected or to mitigate the consequences thereof.

“(2) Where it appears to the Commission that any works being carried on or about to be carried on by a public or local authority in the bed of, on the banks of, or near, a river or lake are likely to cause damage to persons having rights, powers, or duties in, over, or in respect of the river or lake, it may investigate what the authority is doing and report thereon to the Minister.

“(3) In an investigation under subsection (2) of this section officers of the Commission thereunto authorized by the Commission under its common seal may enter on any land and inspect, take measurements and specimens, install and maintain gauges, inspect and copy plans and specifications of works, and question officers and servants of the authority concerned.

“(4) Upon a report under subsection (2) of this section the Governor may by order under the seal of the State forbid, absolutely or conditionally, the authority concerned from carrying on or commencing the works concerned and ordering it to restore anything thereby removed or affected or to mitigate the consequences thereof.

“(5) An order made under subsection (1) or subsection (4) of this section shall be—

(a) served on the person to be bound thereby; and

(b) if it is filed in the Supreme Court, enforced by the Court,

as if it were an injunction made by that Court.

“(6) Where works have been carried out which could at an earlier stage have been forbidden by an order under subsection (1) or subsection (4) of this section, the Commission or the Governor may make such an order under that subsection for restoration or mitigation as it might make if the works were still being carried out.

“(7) Except in an emergency the Commission shall not make an order under subsection (1) of this section until it has notified the person to be bound thereby of what sort of order it proposes to make and has considered any representations he may make to it within seven days after he is so notified.

“(8) In an emergency as mentioned in subsection (7) of this section, the Commission—

- (a) may make an order under subsection (1) of this section to last only twenty-four hours from the service thereof and may, so long as it is doing its part with due diligence, extend that order from day to day until either—
 - (i) it has complied with subsection (7) of this section and can therefore make a final order; or
 - (ii) it is satisfied that the person against whom the order is made is not presenting his case to it with reasonable diligence, in which case it can make a final order as if he did not wish to make any representations to it; and
- (b) where it could make an order under subsection (1) of this section to restore or mitigate, may by its officers, servants, and agents carry out such works as it might so order, using the powers set forth in paragraphs (a), (b), and (c) of subsection (1) of section sixty-five and recover its expenses of so doing from the person it could have ordered to carry out those works.

“75B—(1) A person against whom an order has been made by the Commission under section seventy-five A may appeal to the Supreme Court. Appeal.

“(2) On an appeal under this section, the Supreme Court may—

- (a) in addition to the appellant and the Commission, make any other interested person a party to the appeal;
- (b) determine the relevant facts by oral evidence, affidavit, inspection, or as provided in subsection (3) of this section;
- (c) quash, vary, or confirm the order;
- (d) award compensation, to be paid by the Commission, for any loss incurred by reason of the order by the appellant, wherever it is just to do so; and
- (e) provide for the costs of the appeal.

“(3) For the purposes of paragraph (b) of subsection (2) of this section the Court may empower any person to hear evidence and inspect and report to the Court, and may act on his report.

“(4) For the purposes of paragraph (c) of subsection (2) of this section, the Court shall act on the same principles as the Full Court acts on an appeal from an order for an injunction.

“(5) This section applies to orders made by the Governor under section seventy-five A with the substitution of the word ‘Attorney-General’ for the word ‘Commission’ in paragraph (a) of subsection (2) and of the word ‘Crown’ for the word ‘Commission’ in paragraph (d) of that subsection.”

Rivulets and ponds in cities and towns.

8 Section seventy-six of the Principal Act is amended by omitting the words "Part XIX of the *Hobart Corporation Act 1947*" and substituting therefor the words "Part XIV of the *Hobart Corporation Act 1963*".

Water rights of the Commission.

9 Section eighty-three of the Principal Act is amended by inserting in paragraph (e) of subsection (2), after the numerals "1906", the words ", Division XXIV of Part XVI of the *Local Government Act 1962*,".

Registration.

10—(1) Section one hundred D of the Principal Act is amended by adding at the end thereof the following subsections:—

"(3) On receipt of an application in accordance with subsection (2) of this section, the Commission shall consider it and the evidence in support of it, and may—

(a) by written notice to the applicant—

- (i) accept the application and register the right claimed; or
- (ii) reject the application, giving its reasons for so doing; and

(b) investigate the claim further, for which purpose it may—

- (i) inform the applicant of the matters on which he has failed to satisfy it;
- (ii) receive further evidence either orally, on oath or otherwise, or in writing, on affidavit, statutory declaration, or otherwise;
- (iii) appoint an advocate for the public interest and hear oral submissions from him, the applicant, and other persons concerned, or receive those submissions in writing; and
- (iv) where two or more applicants have conflicting interests or cannot both or all be right, deal with all their claims in the one investigation.

"(4) The Commission shall register a right under this section when, and to the extent that, it is satisfied by evidence of its existence.

"(5) Nothing contained in subsection (4) of this section bars proceedings by an applicant by way of action for a declaration, *mandamus*, or otherwise to establish his right to registration otherwise than as the Commission has acted or proposes to act under that subsection."

(2) This section shall be deemed to have commenced on the seventeenth day of December 1964.

11 After Division IIA of Part IV of the Principal Act the following Division is inserted:—

"*Division IIB—Registration and control of private water rights.*

"100H—(1) This section applies to the rights confirmed by section eighty-eight not being—

- (a) ordinary riparian rights;
- (b) rights to take water from a river or lake for irrigation; or

Compulsory registration of certain water rights:
Abolition of unregistered rights.

(c) rights to take or use water from or in any river or lake arising from any local or private Act.

“(2) After the thirty-first day of December 1971 the rights to which this section applies are abolished except in so far as they are registered under this Division.

“(3) Notwithstanding anything in subsection (2) of this section, where an application has been made under this section for the registration of a right that right may be exercised until that application is finally determined.

“(4) A person who holds or is entitled to hold a right to which this section applies may register that right in the office of the Commission free of charge.

“(5) An application for the registration of a right under this section shall be lodged with the Commission before the first day of January 1972 or within such further time as the Supreme Court or a judge in chambers at any time, whether before or after that date, may allow.

“(6) Subject to this section, subsections (2), (3), (4), and (5) of section one hundred D apply in respect of the registration of a right under this section as they apply in respect of the registration of a right under that section.

“(7) Nothing in this section affects the duty imposed and the rights created by section six of the *Loan (Hydro-Electric Commission) Act 1957*.

“100J—(1) For the purposes of this Division, ordinary riparian rights—

Ordinary
riparian
rights.

(a) are declared to be, so far as they relate to the taking of water from a river or lake, the right to take water for—

(i) drinking, cooking, and washing by persons living on the land; and

(ii) drinking by animals ordinarily on the land; and

(b) shall be deemed to include the right to take water for watering a domestic garden.

“(2) Ordinary riparian rights may be defined and quantified by regulations made under section one hundred and eighteen.

“(3) No regulations shall be made for the purposes of subsection (2) of this section until the expiration of three months after the publication of a notice in the *Gazette* of the intention to make them.

“(4) Where a notice published under subsection (3) of this section does not set out the regulations proposed to be made the Commission shall—

(a) during the three months following the publication of the notice, keep available at its office for public inspection copies of the regulations proposed to be made; and

(b) on payment of such charge (if any) as the Minister may fix, furnish such a copy to any person requesting it.

Shortage
of water.

“100K—(1) When, at any time on or after the thirty-first day of December 1970, there is not enough water in a river or lake to satisfy all rights in or over that river or lake and the requirements of persons having a liberty to take water therefrom a water bailiff may, subject to the orders of the Commission, direct all or any of the persons holding those rights or having those liberties at what times, in what manner, and in what quantity they may take water from that river or lake; but no directions shall be given under this section that would have the effect of restricting the exercise of any rights that, by subsection (2) of this section, are not subject to this section.

“(2) Except as otherwise provided by an order-in-council made under subsection (5) of this section, any such rights as are referred to in paragraph (b), paragraph (d), paragraph (e), paragraph (f), paragraph (g), or paragraph (h) of subsection (2) of section eighty-three or as are conferred by a local or private Act are not subject to this section.

“(3) In the exercise of their powers under subsection (1) of this section the Commission and water bailiffs shall strive to ensure—

- (a) in the first place, that by regulation of the taking of water all persons affected may obtain their reasonable requirements; and
- (b) that, if there is still not enough water, the loss of it is suffered fairly by all, and for that purpose may—
 - (i) discriminate between different kinds of use;
 - (ii) take account of individual hardship; and
 - (iii) allow nothing for unfair or unreasonable use.

“(4) In applying subsection (3) of this section, the Commission and water bailiffs shall—

- (a) have regard to—
 - (i) the length of time for which the person concerned has himself used the right to take water, without regard to use by any predecessor in title;
 - (ii) the degree of productivity achieved by that person's use of the right to take water; and
 - (iii) the efficiency of that person's use of water taken by him; and
- (b) give absolute preference to ordinary riparian rights (other than the right to water a domestic garden) over commissional water rights.

“(5) The Governor may, if it appears to him expedient, by order-in-council make subject to this section any rights referred to in subsection (2) of this section except rights arising under the *Mining Act* 1929, the *Macquarie Water Act* 1892, or the *Clyde Water Act* 1898.

“100L—(1) A water bailiff’s directions under section one hundred k may be given individually or to the public at large and in writing or orally and, if orally, face to face, by telephone or radio telephony (including television) and, if in writing, in a newspaper, by notices posted up in public places, or by letter. Enforcement of water bailiff’s directions.

“(2) A person who receives an oral direction shall be given the direction in writing forthwith.

“(3) Where a direction under section one hundred k has been advertised in a newspaper and by radio telephony so that it will have come to the notice of most persons in the area affected by the direction, it shall be deemed, in the absence of proof to the contrary, to have come to the notice of all.

“100M—(1) A person who is aggrieved by a water bailiff’s direction under section one hundred k may appeal to a magistrate by notice of appeal given to the Commission which, and not the water bailiff, shall be the respondent to the appeal, and to a designated clerk of petty sessions. Appeal against direction.

“(2) If the appellant shows the magistrate that—

- (a) the water bailiff had not power under subsection (1) of section one hundred k to give the relevant direction; or
- (b) in framing the relevant direction the water bailiff or the Commission acted so maliciously or regardlessly of subsection (3) or subsection (4) of that section that the direction ought not to have any effect,

the magistrate may quash the direction and may, whether he quashes the direction or not, order that fresh directions be given in the matter to which the appeal relates.

“(3) Where a magistrate orders that fresh directions be given in any matter and those directions, being directions approved by him, are not given within such time as he may allow, he may, after consultation with the district advisory committee for the district, if the matter arises wholly or partly in a district appointed under section twenty-five A, give such directions as he thinks fit and any directions so given have the like effect as directions given by a water bailiff under subsection (1) of section one hundred k.

“(4) References in subsection (2) of this section to the matter to which an appeal relates shall be construed as including references not only to the right or liability affected by the direction against which the appeal is brought but all other rights and liberties the exercise of which the magistrate is of the opinion were or should have been taken into consideration when the direction was made.

“(5) Before making any decision under this section on any appeal the magistrate shall give each person having an interest in the matter to which the appeal relates an opportunity of being heard by him; and for the purposes of affording any such person any such opportunity he may give such directions as he thinks fit.

“(6) Where a direction under subsection (5) of this section is a direction for the service of a notice on any person that notice may be served on that person by delivering to him personally or by sending it by certified mail addressed to him at his usual or last-known place of abode or business, or in such other manner as the magistrate may approve.

“(7) Where a person takes the opportunity to be heard as provided in subsection (5) of this section, the magistrate shall order him to be made a party to the appeal as an appellant or a respondent.

“(8) On an appeal under this section the magistrate shall sit in the county or municipality in which are situated the lands affected by the direction against which the appeal is brought.

“(9) On an appeal under this section the magistrate may—

- (a) may any inquiry or survey that appears to him necessary or expedient for the purposes of the appeal;
- (b) use his own knowledge however gained;
- (c) rely on, and adjourn proceedings to obtain, reports of tests of competent persons; and
- (d) if the expenses of a party to the appeal in respect of the appeal have in his opinion been caused or increased by unreasonable or improper conduct of another party to the appeal, order the latter to pay the former such sum by way of costs as he may fix.

“(10) The bringing of an appeal under this section shall not affect the operation or enforcement of a direction under section one hundred K.

“(11) Until rules are made for the same purpose under section one hundred and forty-four of the *Justices Act 1959*, the Attorney-General may make rules with respect to the procedure on appeals under this section, including rules requiring deposits to be made by appellants and making provision for the disposal of any such deposits.

“(12) The Governor may, by order, declare the districts the clerks of petty sessions of which are to be designated clerks of petty sessions for the purposes of this section, and the clerk of petty sessions for any district so declared is a designated clerk of petty sessions for the purposes of this section.

“(13) The function of a magistrate under this section may be performed by a stipendiary magistrate.

Extra
water.

“100N Any person may with the written permission of a water bailiff take from a river or lake water that he might not otherwise take, which permission the water bailiff may, subject to the orders of the Commission, give where he believes that that taking will be to no-one's detriment.

Defence
of water
bailiff's
directions.

“100P On and after the thirty-first day of December 1970 it is a defence to any action for the taking of water from a river or lake that the water was taken in accordance with the directions of a water bailiff in accordance with this Division.”

12 After section one hundred and fourteen of the Principal Act the following section is inserted in Part IV:—

“114A—(1) A person, including an officer of the Crown, and a statutory authority whose powers are referred to in section sixty-four, who wishes to carry out works in or on the bed or banks of a river that may muddy the waters thereof, may obtain a licence from the Commission under this section, which licence the Commission may grant or refuse at its discretion. Pollution
by works.

“(2) A licence under this section shall be under the common seal of the Commission and allow the licensee to do such works at such times and subject to such conditions as the Commission may specify therein.

“(3) Before issuing a licence under this section the Commission shall—

- (a) give such warning of the resultant pollution as it thinks fit by individual or public notice and in writing or orally and, if orally, face to face, by telephone, or by radio telephony (including television); and
- (b) consider any representation made to it by any person within seven days after the giving of such a notice.

“(4) A licence under this section is a defence to the licensee—

- (a) if sued by any person, as good as if it had been given him by that person; and
- (b) in any criminal proceedings for nuisance.

“(5) The Commission may grant licences under this section to its officers, servants, and agents to do work for its own purposes.

“(6) The Supreme Court may by injunction restrain the Commission from issuing a licence under this section where it appears that serious and unavoidable damage will be caused to the applicant for the injunction.

“(7) This section is for the benefit of such persons as choose to seek licences under it and does not make those licences conditions precedent to the exercise of any power or liberty.

“(8) A licence under this section does not authorize anything forbidden by subsection (2) of section eighty-nine of the *Mining Act 1929*.”.

13 Section one hundred and sixteen of the Principal Act is amended— Construction
of storage
works.

- (a) by inserting in subsection (4), after the word “Commission”, the words “or its officers”; and
- (b) by inserting in that subsection, after the word “it”, the words “or its officers”.

14 Section one hundred and seventeen of the Principal Act is amended— Offences.

- (a) by inserting in subsection (2), after the word “against”, the words “subsection (1) of”;

- (b) by omitting from that subsection the words "this section" (last occurring) and substituting therefor the words "that subsection"; and
- (c) by adding at the end of the section the following subsections:—

"(3) A person who—

- (a) obstructs a duly authorized officer of the Commission acting under subsection (3) of section seventy-five A;
- (b) refuses to produce to such an officer plans or specifications required by that officer for inspection or copying under that subsection; or
- (c) refuses to answer, or answers untruthfully, a question that—
 - (i) is asked of him under that subsection; and
 - (ii) might lawfully be asked of him in an action against the authority concerned in respect of the matter under investigation,

is liable to a penalty of five hundred dollars.

"(4) A person who disobeys a direction of a water bailiff given under section one hundred K is liable to a penalty of five hundred dollars and a daily penalty of one hundred dollars."

Procedure
and evidence.

15 Section one hundred and seventeen A of the Principal Act is amended by adding at the end thereof the following subsection:—

"(3) For the purposes of sections one hundred L and one hundred and fourteen A evidence by an officer of the Commission that he believed that a person to whom he spoke by telephone was a certain person is *prima facie* evidence that he did then speak to that person."