Acknowledgments

This policy position paper was prepared by
Anne Craven
Daniel Nevin
Derek Perez

For more information contact:
Legislative Reform Branch
Department of Water
PO Box K822
PERTH WA 6842
Telephone 6364 6826
Facsimile 6364 7601

www.water.wa.gov.au

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1. Preface

1.1. **Purpose of this draft report**

The Department of Water is undertaking a major reform of water service legislation. It is proposed that a bill (or possibly several bills) will be developed to consolidate and modernise the existing water service powers legislation together with the legislation that establishes government-owned water service providers and regulates the provision of water services.

To guide development of the new legislation, a range of matters need to be considered and clarified. This draft report identifies some of these issues and outlines options and proposals in each case.

The issues and proposals in this report have been developed following discussions in November 2006 with Water Corporation, Water Boards, the Department of Premier and Cabinet, the Department of Treasury and Finance, the Economic Regulation Authority (ERA), the Department of Industry Resources and other agencies.

Feedback provided on this report will be used by the Department of Water to finalise recommendations to Government on the structure and content of the new legislation.

This report has been prepared to prompt discussion and obtain input from stakeholders. It is not a statement of the policy positions of Government or the Department of Water.

1.2. **How to comment**

The Department of Water welcomes your comments on this draft report.

Submissions are required by 6 March 2007 and can be provided by mail or e-mail. Your written submission can be sent:

By e-mail to [daniel.nevin@water.wa.gov.au](mailto:daniel.nevin@water.wa.gov.au)

Or by mail to:

Legislative Reform Branch
Department of Water
PO Box K822
PERTH WA  6842
1.3. Guidelines for submissions

Submissions should:

- Include your name, address and telephone number.
- Provide feedback on the matters and proposals raised and provide any other comments you may wish to make.
- Indicate omissions or errors.
- Suggest alternative or additional concepts that should be considered.

It is planned to publish submissions in response to this draft report on the internet. If you do not wish this to happen, please mark your submission “confidential – not for public release”.

Department of Water
2. Summary

The Department of Water is undertaking a major reform of water service legislation. It is proposed that a new bill (or possibly several bills) will be developed to consolidate and modernise the existing water service powers legislation together with the legislation that establishes government-owned water service providers and regulates the provision of water services.

The reformed legislation will aim to encourage an industry that is efficient and delivers secure, high quality water services to customers.

To guide development of the new legislation, a range of matters need to be considered and clarified. This draft report identifies some of these and seeks comments to guide the finalisation of policy positions.

Comments are to be provided by 6 March 2007.

This paper is structured around the core water services issues of:

**Regulation** – the regulation of water service providers through price regulation, the establishment of codes and licensing.

**Powers** – the powers required by service providers to enable the construction of works and the efficient provision of water supply, sewerage, drainage and irrigation services.

**Governance** – the establishment and management of government-owned water service providers.

The following changes to existing legislative arrangements are proposed:

**Regulation**

**Recommendation 1**: That the Minister for Water Resources be given the capacity to regulate prices for all licensed service providers by an order published in the *Government Gazette*.

**Recommendation 2**: That headworks and minor works charges should be regulated by the Minister for Water Resources.

**Recommendation 3**: That the Minister for Water Resources have the capacity to implement codes, as currently exists for the energy sector.

**Recommendation 4**: That the following definition of a water service be adopted: A water service is the on-going (1) supply of water to; or (2) removal of sewage or drainage water from; a customer’s property for which a fee is paid, and by the means of conduits or channels. It does not include arrangements where water supply, sewerage or drainage is charged for by a property owner to a tenant as part of a lease arrangement.

**Recommendation 5**: That the legislation provide for the establishment of licence classes.
Recommendation 6: That the ERA be given the capacity to specify a water service provider that is to step in to provide services in the event of failure of the licensed service provider for an area.

Recommendation 7: That the capacity to exempt service providers from licensing be retained.

Recommendation 8: That the ERA be given the capacity to issue licences with on-going terms, subject to licence compliance.

Recommendation 9: That the provisions relating to establishment of controlled areas be repealed, with the requirement for service providers to be either licensed or exempted from the licence requirements to apply throughout the State.

Recommendation 10: That the ERA be given the capacity to appoint independent experts to conduct audits and asset management system reviews and recover the costs from licensees.

Recommendation 11: That a provision be included in the Bill that enables the ERA to ensure that the licensee keeps records that allow the ERA to determine the on-going financial position and technical capacity of the service provider.

Recommendation 12: That the Water Services Bill include provisions similar to Energy Coordination Act 1994 to support the performance of a water service ombudsman function. Initially, this function would continue to be supported by the Department of Water.

Powers

Recommendation 13: In regards to section 63 of the Water Agencies (Powers) Act, that the status quo be maintained, with existing compensation provisions retained.

Recommendation 14: The new legislation should provide that where any licensed service provider builds works, it retains ownership of and access to the works.

Recommendation 15: The bill should contain a provision similar to section 84 of the Water Agencies (Powers) Act to apply where a licensed service provider takes over works built by a body other than the Commission or the Corporation, the provider will own and have access to the water works.

Recommendation 16: That the legislation enable conditions of connection to be made binding on subsequent purchasers of a property.

Recommendation 17: That the legislation include provisions enabling a service provider to require the installation and maintenance of backflow devices.

Recommendation 18: That the legislation include provisions enabling a service provider to take pre-emptive action where contamination by backflow is likely to occur.
Recommendation 19: That the legislation enable service providers to have the capacity to give a “stop work” order to prevent damage to its works.

Recommendation 20: That the legislation provides that where a person breaks an asset they are deemed to have acted negligently unless they made reasonable enquiries of the service provider as to the location of the assets.

Governance

Recommendation 21: That the Water Boards Act 1904 be repealed and provisions of the Water Corporation Act 1995 be amended to cover the operations of the Boards.

Recommendation 22: That governance provisions for the government trading enterprises be the subject of a separate government water utilities bill.

Recommendation 23: That section 79 (Dividends) of the Water Corporation Act apply to the Water Boards.
3. Introduction

3.1. The Water Legislation Review Program

Western Australia is undertaking a two-phased approach to the reform of water and water-related statutes.

Phase I comprises the Water Resources Legislation Amendment Bill 2006 that was introduced by the Minister for Water Resources in Parliament in May 2006. This Bill is currently before the Legislative Council.

Phase II is now underway and consists of wide ranging legislative reform of water and water-related Acts that modernises and consolidates water resource management and water services statutes.

The main objects of Phase II of the legislative reform program are to:

- Implement the Government’s response to the water reform program, including its response to the Irrigation Review.
- Implement the National Water Initiative consistently within the Government’s reform program.
- Modernise water resource management and water service delivery law.
- Remove operational problems and inefficiencies that arise because of omissions in the legislation or changes in circumstances and practice.

In Phase II, bills will be developed dealing with water resource issues and water services issues.

For water services, the proposed legislation will consolidate and modernise the existing water service legislation, the legislation that establishes government-owned water service providers and regulates the provision of water services.

"Water Services" include:

- Water supply services.
- Irrigation services.
- Drainage services.
- Wastewater services.

Modernising the legislation will involve updating the style and language of the legislation and addressing changes that have occurred in the industry since the legislation was passed. This will make the legislation simpler and easier to use.

A number of policy issues need to be clarified in order for the legislation to be developed. This report identifies some of these and seeks comments on options. This report is structured around the core water service issues of:

**Regulation** – the regulation of water service providers, and the ability of the Minister for Water Resources to influence the policy direction of the water industry;
Powers – the powers required by service providers to enable the construction of works and the efficient provision of services; and

Governance – the establishment and management of government-owned water service providers.

It should be noted that this paper focuses on the areas needing change and improvement in existing legislation. It does not discuss the many areas of legislation working effectively where no change is required. As a general observation, it is considered that the Western Australian water industry provides high quality water services.

Some of the issues raised in this paper are matters of policy rather than legislation. Discussion of these matters is necessary as they are relevant to the operation of the water industry and may influence the form of the legislation.

3.2.  Legislation encompassed by the review

The following legislation will be covered by the review:

- Country Towns Sewerage Act 1948.
- Land Drainage Act 1925.
- Metropolitan Water Supply, Sewerage and Drainage Act 1909.
- Rights in Water and Irrigation Act 1914.
- Water Boards Act 1904.

For a brief description of the scope of this legislation, see Attachment 1. Copies of all Western Australian legislation are available from the State Law Publisher website at: www.slp.wa.gov.au.
4. Regulation

In Western Australia, the quality and price of water services are subject to regulatory arrangements established primarily under the Water Services Licensing Act 1995 and the Water Agencies (Powers) Act 1984. The licensing regime established under the Water Services Licensing Act 1995 is administered by the independent Economic Regulation Authority (ERA). Prices charged by water service providers are regulated by the Minister for Water Resources under the Water Agencies (Powers) Act 1984 and the Water Boards Act 1904.

The primary objective of the regulatory framework is to ensure the maintenance of safe and reliable water services and protection of the interests of customers. However, in aiming to achieve these objectives, Government must be cognisant of the impact of regulation on the ability of service providers to maintain their financial position and to plan for the future provision of services.

Current regulatory arrangements have limited Government’s ability to implement its policy agenda, as it relates to both the behaviour of water service providers and the economic regulation of those providers. The new legislation will aim to ensure that the Government has the ability, directly and unequivocally, to set the policy parameters that define the responsibilities of existing and new water service providers, and the means by which the independent economic regulator will regulate these providers.

To ensure obligations and conditions placed on water service providers are appropriate to the nature of the water service provider’s business, flexibility within the licensing regime is needed to ensure that these conditions can vary in accordance with the nature of the service provided. For example, a small non-potable water supplier with a small asset base and a small number of customers will have different conditions to an entity such as Water Corporation that supplies the majority of water services in Western Australia.

4.1. Price Setting for Water Service Providers

Water service providers have their prices set by the Government using a number of different pieces of legislation. The arrangements, imposed on service providers (and Government) by this legislation, are convoluted and anachronistic, having been primarily designed when water service provision was the sole responsibility of uncorporatised government instrumentalities, such as the Public Works Department, Metropolitan Water Supply Sewerage and Drainage Board (later Water Authority) and the Water Boards. Although the corporatisation of the Water Authority gave it a greater financial focus, the majority of its pricing activities are tied to underlying legislation that remains linked to past arrangements within the water services sector.

The Minister for Water Resources determines Water Corporation’s prices through powers under the Water Agencies (Powers) Act 1984, which allows the Minister to set charges by establishing, and then amending, by-laws (Water Agencies (Charges) By-laws 1987).
Water Corporation also has additional pricing powers, in which the prices are set by agreement, again under the Water Agencies (Powers) Act 1984. These include charges for headworks and minor works. In addition, Water Corporation can also enter into commercial agreements with large consumers.

The Minister for Water Resources’ powers to set prices for Aqwest and Busselton Water Boards are contained in the Water Boards Act 1904. This includes both the setting of tariffs and developer charges.

Finally, private sector and local government providers set prices that are not regulated. Powers exist under the Water Services Licensing Act 1995 (Schedule 2) to extend enactments to powers available under the Water Agencies (Powers) Act 1984, which allow the Minister for Water Resources to set prices in by-laws. However, this is a cumbersome process, which even if applied, is not supported by existing government regulatory arrangements.

An option for a simplified and streamlined price regulation process would be for the legislation to enable the Minister for Water Resources to regulate prices for all licensed service providers by an order published in the Government Gazette. The Minister for Water Resources would be able to regulate:

- The imposition of fees and charges by all licensees.
- The imposition of fees and charges between Water Corporation, Water Boards and any other licensee.

An example of this can be found in the previous Victorian Water Industry Act 1994 (VWIA), s. 21A, which allows the Governor in Council to regulate prices in any manner the Governor sees fit. In this case, the intention would be to give the Minister for Water this power. Similarly, s.131 and 132 of the Electricity Industry Act 2004 allows for the setting of fees and charges by regulation.

**Options:**

That the Minister for Water Resources be given the capacity to regulate prices for all licensed service providers by an order published in the Government Gazette; or

That the status quo be maintained, with prices regulated by the Minister for Water Resources through by-laws.

**Recommendation 1:** That the Minister for Water Resources be given the capacity to regulate prices for all licensed service providers by an order published in the Government Gazette.
4.2. Regulation of headworks charges

Standard headworks charges (SHCs) refer to charges by Water Corporation, which are used to recover 40 per cent of the costs of major works (including reservoirs, water treatment stations, pumping stations and water mains) from developers. The remaining 60 per cent of the cost of headworks are recovered through on-going rates and charges for the water, wastewater and drainage services, and the payment of Community Service Obligation subsidies.

The same charge is made per standard residential equivalent lot (SREs) throughout the State irrespective of the actual cost of development. That is, it is an average cost charge based on the modern equivalent asset valuation (MEAV) of Water Corporation’s stock of headworks assets, divided by the Corporation’s estimate of the total number of SREs it services in the State.

Both Aqwest and Busselton Water Board also have standard headworks charges (historically linked to those set by Water Corporation) which currently are less than those set by Water Corporation. The difference in the case of the Water Boards is that they recover 100 per cent of the cost of headworks.

Whereas the legislation governing the Water Boards requires Ministerial approval of the level and application of headworks charges, Water Corporation’s charges are not directly regulated by the Minister (the same is true for minor works charges). As a matter of consistency, and proper regulatory practice, the setting of headworks and minor works charges should be brought into the same regulatory scheme as other charges.

As with other tariffs and charges discussed above, headworks charges, which are currently charged under Part IV, s.67(8) of the Water Agencies (Powers) Act 1984, should be regulated by a Ministerial order published in the Government Gazette. As an example, Victoria allows for the Governor to do this via s.21A and s.27 of the Victorian Water Industry Act 2003.

The setting of standard charges can be viewed as an inhibitor to competition. This is because, where the charge is lower than the local cost of providing the headworks, it will undercut an entrant to the market, whereas where the charge is higher then the local cost of headworks it will disadvantage the incumbent (‘cherry picking’). Further, the cost base used to determine SHCs is that of Water Corporation, the cost base of other providers would be different and consequently any formula used to calculate a headworks charge would lead to a charge different form that of the Corporation’s. This again raises the question of what, in a more open market, is meant by a standard charge, and how it is to be set? To add to the confusion, headworks charges for non-frontal developments (special agreement areas) are not SHCs, and instead reflect the cost of bringing forward infrastructure expenditure.

One option available to level out the impact of the standard headworks charges would be to link headworks charges to local average costs (within a given operating area). Having done this, the Government’s Standard Headworks...
Charging Policy would be linked to the average cost of all provider headworks, as determined by the ERA. This could be used as the actual allowable charge, with the difference between actual cost and the allowable standard charge made up by a CSO.

Although this approach may be appropriate in the case of SHC being lower than the actual per unit cost of headworks, a problem remains where the reverse is true. In this case the service provider would be recovering greater than cost of headworks development, which is not a desirable outcome from a regulatory standpoint, unless there is a commensurate reduction in other charges. However, reducing consumption and or fixed charges payable by consumers would bring this approach into conflict with uniform pricing policy, in the case of potable scheme water.

**Options:**

That headworks and minor works charges be regulated by the Minister for Water Resources, as is the case for other water service charges; or

That the *status quo* be maintained, with headworks and minor works charges remaining unregulated.

**Recommendation 2:** That headworks and minor works charges should be regulated by the Minister for Water Resources.

### 4.3. Using codes to implement Government policy

Under current regulatory arrangements, the administrator of the licensing system (for service providers) is the ERA, which is, by virtue of its legislation, independent of Government. Consequently, there is no direct means by which Government can influence the conditions imposed on licence holders.

The Minister for Water Resources can influence the behaviour of Water Corporation and the Water Boards directly, by virtue of the Minister’s authority under the *Water Boards Act 1904* and the *Water Corporation Act 1995*. However, these powers do not extend to either existing non-government service providers, or possible new entrants (for example, United Utilities). This raises the question as to how the government would ensure that the public interest is protected under a scenario where a major new service provider enters some part of the market.

For example, should Government develop a policy on service disconnections, there would be no capacity to require the ERA or licensees (other than the previously mentioned examples) to recognise it.

Whatever approach is taken to enable the Minister to set policy for the water industry, care must be taken to ensure the independence of the ERA is not compromised.
Under the *Electricity Industry Act 2004* the Energy Minister (and the ERA) issue codes that set out standards and conditions that must be complied with by licensees. Examples of codes established under this Act include the *Code of Conduct (For the Supply of Electricity to Small Use Customers)*, and metering and access codes.

This model may be suitable for application to the water industry.

**Options:**

Giving the Minister the capacity to provide direct input to conditions in licences issued by the ERA; or

Enabling the Minister to issue water service licences, which are subsequently monitored and enforced by the ERA; or

Enabling the Minister and the ERA to issue codes.

**Recommendation 3:** That the Minister for Water Resources have the capacity to implement codes, as currently exists for the energy sector.

### 4.4. **Definition of a water service**

The *Water Services Licensing Act* requires all providers of water services within designated areas to hold a licence issued by the ERA (or alternately, an exemption granted by the Governor).

While the Act outlines types of water services (irrigation, drainage, sewerage and water supply) it does not define what a water service is. This has led to some uncertainty as to which activities require a licence. For example, it is not clear from reading the legislation whether water delivered by a water carting service is intended to be regulated by the Act.

The *Water Services Licensing Act* was introduced as part of a range of water legislation reforms arising from the National Competition Policy. The Act reflected a recognition of the strong natural monopoly characteristics of network-based industries. Such industries require price and service quality regulation as customers do not have the freedom to choose their service provider.

Based on this understanding, self supply arrangements would not require licensing, nor would bottled water sales or services provided by water carters. The proposed definition attempts to clarify this intent.
Options:
That a clearer definition of water service be provided; or
No change be made.

Recommendation 4: That the following definition of a water service be adopted:
A water service is the on-going (1) supply of water to; or (2) removal of sewage or drainage water from; a customer's property for which a fee is paid, and by the means of conduits or channels. It does not include arrangements where water supply, sewerage or drainage is charged for by a property owner to a tenant as part of a lease arrangement.

4.5. Licence classes

Water service providers in Western Australia range from Water Corporation, which provides services across the State, to small local governments running sewerage schemes with a few hundred connections. Conditions necessary to regulate a large organisation may be excessive if applied to a small provider, and equally conditions needed for small providers may be inappropriate for large organisations.

In addition, the obligations relevant to some types of service can vary significantly. For example, the conditions placed on a public drinking water supply are of necessity more stringent than those that should apply to a non-potable supply to an industrial customer.

In some cases, the licensing requirement may be a disincentive to the establishment of desirable water service schemes. This may lead to the cost of reporting and auditing outweighing the benefits of regulating service quality.

The capacity to create licence classes could provide the flexibility required for the diverse range of service providers operating in this State.

Options:
That the legislation provide for the establishment of licence classes; or
That the current arrangements are retained, without the capacity to designate classes of licences.

Recommendation 5: That the legislation provide for the establishment of licence classes.
4.6. Suppliers of last resort

Under the Electricity Industry Act and the Energy Coordination Act, the ERA may specify a service provider that is to step in to provide services in the event of failure of the licensed service provider for an area. Such an arrangement gives certainty to customers and Government that continuity of supply will be maintained.

Although such circumstances would be rare in the water industry, the difficulties experienced by the Nilgin Service Company may be seen as an example where such provisions would have been of assistance.

The Nilgin Service Company was a small (largely volunteer-run) service provider that had been providing water to customers near Gingin since the 1980s. With the creation of the water service licensing regime in 1996 the company became a licensed service provider.

Resignations and disharmony within the community led to a loss of skills and affected the company’s technical capacity to run the scheme. In 2003, the directors approached the Minister for Water Resources seeking to relinquish operation of the scheme. Although the Minister supported this request there was no mechanism or process that would facilitate the transfer of the scheme to another service provider. As a result it took over two years for the transfer to another service provider to be achieved.

Options:

That the status quo be maintained, with failure of service providers dealt with on a case by case basis; or

That the legislation provide arrangements for designating “suppliers of last resort”.

Recommendation 6: That the ERA be given the capacity to specify a water service provider that is to step in to provide services in the event of failure of the licensed service provider for an area.

4.7. Licensing and exemptions

The State Water Plan\(^1\) identified the aim of licensing of all water service providers as leading to the delivery of efficient and effective services to a high standard and protecting investment in water service infrastructure.

However, section 19 of the Water Services Licensing Act 1995 allows for the exemption of a person providing a water service from the need for an operating licence if this is determined to be in the public interest. Such exemptions are granted by the Governor in Council.

\(^1\) State Water Plan Draft Water Policy Framework p21.
Licensing can impose significant compliance costs on service providers, which in the case of small service providers could outweigh the benefits derived from imposing a licensing regime. For this reason, it may be desirable to retain the capacity to grant licence exemptions.

As at 15 January 2007, there were four licence exemptions in place, with a further four applications for exemptions under consideration.

**Options:**

- That the capacity for granting licence exemptions be removed; or
- That the capacity to exempt service providers from licensing be retained.

**Recommendation 7:** That the capacity to exempt service providers from licensing be retained.

### 4.8. On-going licence terms for water service licences

The *State Water Plan Draft Water Policy Framework* states: “subject to compliance licence tenure should be on-going”. Adopting this position would require amendments to the *Water Services Licensing Act*, which presently limits licence terms to maximum of 25 years.

Section 25 of the *Water Services Licensing Act* states: A licence may be granted or renewed for such period as the Authority thinks fit, but the period cannot exceed 25 years from the day of grant or renewal of the licence.

When water service licences were first issued in 1997, five-year terms were adopted, which were subsequently extended to the maximum 25 years. This was in response to a request by Water Corporation, which argued that five-year terms did not provide sufficient security for investment in long-lived assets.

The issue of licence terms was considered by the review of the *Water Services Coordination Act* conducted in 2003. The panel noted that:

> “Stakeholders have indicated that the 25-year terms for operating licences are of sufficient length to create a reasonable degree of certainty for providers in terms of a planning and investment horizon. However, as the licence approaches its expiry date and there is a need to plan/invest for periods beyond the licence expiry date, some certainty needs to be provided regarding renewal to ensure efficient and timely planning and investment.”

The panel recommended that Government establish a clearly enunciated policy for renewal of operating licences.

The argument in favour of on-going licence terms rests on the benefits of providing a more secure environment for investment in water service assets, which typically have lives of several decades. These benefits are offset by a reduction in flexibility of the regulatory options.
In Victoria, licence terms are on-going. In NSW water service licences last five years.

**Options:**
That the ERA be given the capacity to issue licences with on-going terms subject to licence compliance; or
That the 25-year restriction on the maximum term of licence be removed; or
That the *status quo* be maintained, with licences restricted to 25-year terms.

**Recommendation 8:** That the ERA be given the capacity to issue licences with on-going terms subject to licence compliance.

### 4.9. Abolition of controlled areas

Section 10 of the *Water Services Licensing Act 1995* provides for the establishment of controlled areas for water supply, sewerage, drainage and irrigation services. A controlled area is a defined area which has been approved by the Governor. Within such an area, service providers require a licence issued by the ERA under the Act to operate.

Each water service licence issued by the ERA applies to part of a controlled area, in effect a defined service territory. These are known as operating areas.

The 1999 NCP Legislation Review of the *Water Services Coordination Act* proposed a number of legislative amendments aimed at achieving both greater competitive neutrality (consistency of treatment of both public and private sector providers), and greater efficiencies in the administration of the *Water Services Coordination Act*.

One such recommendation was to remove the concept of controlled areas from the WSC Act (repealing Sections 10 to 14). In its place, the NCP Legislation Review recommended a requirement be placed within the WSC Act to require the Coordinator (now the ERA) to define the specific criteria to be used in determining whether a licence is needed. The definition and criteria were to be approved by the Water Resources Minister as policy within an appeals process for situations where a water services provider believes they do not meet the criteria for a licence, but are being required to obtain one.

The development of a water services bill provides an opportunity to implement this recommendation.

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2 *National Competition Policy Legislative Review of: Water Services Coordination Act 1995*
Options:
That the status quo be maintained, with the system of controlled areas retained; or
That the provisions relating to establishment of controlled areas be repealed, with the requirement for service providers to be either licensed or exempted from the licence requirements to apply throughout the State.

Recommendation 9: That the provisions relating to establishment of controlled areas be repealed, with the requirement for service providers to be either licensed or exempted from the licence requirements to apply throughout the State.

4.10. Appointment of water service licence auditors
Under the Water Services Licensing Act, every licensee is required to undergo regular audits of their licence compliance by “independent experts” hired by the licensee.

The 2003 review of the Water Services Coordination Act (as the Act was then named) recommended (recommendation 29) that the Water Services Coordination Act be amended to enable the ERA to appoint independent experts to conduct audits and asset management system reviews and for the Government or the ERA to be able to recover the costs from licensees.

Submissions to the Review Panel on the matter of auditors agreed that auditor independence was an essential element of effective regulation. Most submissions considered it appropriate that the auditor be appointed by the regulator, with costs recovered from licensees.

Independent audits of water services licence providers are an integral component of good water service licensing regimes. The audits establish the accuracy and reliability of information provided by licensees to regulators. Further, they provide regulators with independent information on the processes established to deliver the performance standards set in licences.

The audits and reviews have been valuable exercises in examining licensee processes. Each report has identified areas for improvement, which have been implemented by licensees, although in some cases modifications to auditor recommendations have been negotiated between the Coordinator and the licensee. In this way, the audits and reviews have helped to drive continuous improvement in the water services industry.

In responding to the review, the then Coordinator of Water Services raised concerns about provisions in the Water Services Coordination Act which require the independent experts to be engaged by the licensee and report to the licensee
(rather than the Coordinator for whom the review is conducted). This meant that the licensee is the contractor in the engagement of the independent expert. This has obvious potential conflicts and could be seen to give the licensee undue influence over the outcome of the audit.

In addition, there is some inevitable tension built into an appointment process where licensees could seek that audits be conducted as quickly and cheaply as possible, but where the regulator may require a different audit process. It should be noted that for most audits these problems have not occurred, and licensees and the regulator have readily agreed on a suitable auditor.

The Review Panel considered that the operational audit function and asset management review functions would be improved through the licensing regulator (the ERA) having the authority to appoint auditors and recover the costs from licensees. In addition to simplifying the appointment process, public confidence in the independence of the audit and review processes would be increased. This is common practice amongst regulators, including the New South Wales regulator, IPART, and the United Kingdom regulator, OFWAT.

The Review Panel recommended that the Water Services Coordination Act be amended to enable the ERA to appoint independent experts to conduct audits and asset management system reviews and Government or the ERA be able to recover the costs from licensees.

Water Service licensees are opposed to the ERA appointing auditors. Water Corporation considers that the professional obligations of auditors would ensure reports produced are based on an honest assessment. Harvey Water expressed concern that the company would have no control over the cost of the audit.

The provisions of the Water Services Licensing Act relating to the appointment of auditors and independent experts for review of asset management systems (Sections 36 (1) (c) and 37 (1)) would need to be amended to enable the ERA to appoint auditors and recover costs.

**Options:**

That the ERA be given the capacity to appoint independent experts to conduct audits and asset management system reviews and recover the costs from licensees; or

That the *status quo* be maintained, with auditors engaged by licensees.

**Recommendation 10:** That the ERA be given the capacity to appoint independent experts to conduct audits and asset management system reviews and recover the costs from licensees.
4.11. Monitoring financial viability and technical capacity

An objective of water service regulation is ensuring that service providers maintain their financial and technical capacity to provide a service.

Section 23 of the Water Services Licensing Act 1995 requires that the Regulator be satisfied, prior to the issuing of a licence, that the provider has, and is likely to continue to have, the financial and technical ability to provide the water service.

However, although the Regulator, under sections 36 and 37, has the ability to undertake operational audits to review the licensee’s technical position (insofar as this relates to quality and service standards included in the licence), there is no section within the Act that allows for the on-going monitoring of the service provider’s financial position.

Although this issue is generally not significant in the case of major service providers, it can create longer-term problems in the case of smaller service providers, for example where the loss of skilled staff means the organisation loses the technical capacity to provide the service.

The Water Services Bill should include an additional section, in support of section 23 of the Water Services Licensing Act 1995, to ensure that the licensee keeps records that allow the Regulator to determine the financial position of the service. This information should be provided on an annual basis or as determined by the Regulator.

Options:

That a provision be included in the Bill that enables the ERA to ensure that the licensee keeps records that allow the ERA to determine the on-going financial position and technical capacity of the service provider; or

That the status quo be maintained.

Recommendation 11: That a provision be included in the Bill that enables the ERA to ensure that the licensee keeps records that allow the ERA to determine the on-going financial position and technical capacity of the service provider.

4.12. Water Service Ombudsman

One of the features of an effective utility regulation regime is the capacity for customer complaints to be independently investigated and resolved. At present, such a function is performed by the Department of Water and licensees are required to provide information to assist in the resolution of complaints. However, the Department of Water does not have the ability to compel licensees to take any action to resolve a complaint.

By contrast, the Electricity Corporations Act provides for the establishment of an energy ombudsman scheme, approved by the ERA, which has the capacity to
investigate complaints by small use customers, and make binding recommendations. Adopting similar provisions in the Water Services Bill would enable the existing function within the Department of Water to be upgraded with the capacity to direct service providers in resolving disputes. Alternatively, a stand-alone function could be created, supported by the State Ombudsman, as currently is the case with the Energy Ombudsman WA.

Discussions have been held with the State Ombudsman and licensed water service providers on the establishment of a water service complaint investigation function under the auspices of the State Ombudsman. The issue was also the subject of public consultation during the review of the Water Services Licensing Act in 2003. The proposal to establish a water service ombudsman received considerable support and was endorsed by the review panel.

The establishment of the water service ombudsman is an issue that the National Water Commission has asked Western Australia to report on under the issue of Institutional Reform and Institutional Separation. The 2005 National Competition Assessment of Water Reform Progress considered Western Australia’s proposal to establish a water ombudsman had met its COAG commitments on this issue.³

The cost of moving to an ombudsman-type scheme will depend on the number of complaints received. Should the level of complaints remain at the current level of approximately 100 per year, the scheme can be expected to cost between $150,000 and $180,000 per annum.

Retaining the water ombudsman function within the Department of Water would not involve any legislative changes to continue in its current form. The current customer complaint investigation process run by the Department of Water is supported by one full time staff member at a cost of $60,000 per year. Notwithstanding this, legislative change could enable the Department to direct service providers in respect of complaint resolution. This could enable the Department to perform a function similar to the Energy Ombudsman.

The existing energy ombudsman scheme was established through amendments to the Energy Coordination Act 1994 and the Parliamentary Commissioner Act 1971. In addition, the Energy Coordination (Ombudsman Scheme) Regulations 2004 deal with the powers and functions of the ombudsman. Under this arrangement, a company has been established to perform the duties of the ombudsman, comprised of companies licensed to supply gas.

Water service providers differ from gas in that most are government-owned. There is some doubt due to legislative restrictions that some government service providers could join a company. Legal advice suggests that the best way to establish a water service ombudsman would be for a statutory officer or body to be established (incorporating appropriate industry advice/participation) that would administer the scheme and determine levies. The “scheme documents” guiding the operations of the scheme could set in regulations and proclamations.

Options:
That the Water Services Bill include provisions similar to Part 2D of the *Energy Coordination Act 1994* to enable the performance of a water service ombudsman function; or
That the *status quo* be maintained, with complaints investigated by the Department of Water, but without the capacity to make binding decisions.

**Recommendation 12:** That the Water Services Bill include provisions similar to *Energy Coordination Act 1994* to support the performance of a water service ombudsman function. Initially, this function would continue to be supported by the Department of Water.
5. Powers

In order to provide water services efficiently, water utilities have a range of powers and associated obligations to provide water supply, sewerage, drainage and irrigation services. At present, the powers and obligations are spread over several Acts. These Acts provide for similar services in the metropolitan and country areas, but in many instances there are differences between them which create inefficiencies and are confusing to customers.

The consolidation of these powers in a single Water Services Bill will streamline the provision of services throughout the State and also provide the opportunity to:

- Update the legislation underlying the provision of water services to cater for current circumstances.
- Discard old provisions which are no longer of use.
- Eliminate old-fashioned and unfamiliar words and cumbersome forms of expression in favor of clear, simple, familiar language.
- Remove unnecessary differences between provisions that apply under differing, but generally similar, circumstances.
- Remedy known inadequacies.

The more significant areas of powers and obligations relate to:

- The functioning of water supply systems including the conditions for connection and disconnection, meters, water restrictions and the provisions of fire hydrants.
- Construction and maintenance of sewerage systems, property connections, property sewers and industrial wastes.
- Provision of irrigation services, and conditions for the supply of water.
- Management and operation of drainage works in declared drainage areas.
- Agreements for the provision of services to developments and subdivisions of land, headworks charges and requirements to submit building plans.
- Setting of charges and fees for water services, rating records, valuations, objections and appeals against valuations and land classifications.
- Liability for water charges, recovery of charges and interest on overdue amounts.
- Entry onto land, the requirements for notice and provisions for entry in emergencies.
- Acquisition, use and disposal of land for water service purposes.
• Construction and maintenance of water service works, acquisition of works by agreement, property in works and compensation for damage caused.

• Preliminary to works procedures including notification to landowners and local governments affected and objections to works.

• Provisions for the protection of works, including facilities, pipes and meters.

• General offence provisions, penalties and infringement notices.

• By-law and regulation making powers.

5.1. **Compensation for damage caused by service providers**

Section 63 (1) of the *Water Agencies (Powers) Act 1984* provides that Water Corporation shall not be liable for any injury or damage other than damage of the kind referred to in section 62 occasioned in the exercise or purported exercise of a power conferred by this Act or any relevant Act and attributable to the Corporation unless negligence is established. Section 62 provides for liability for physical damage to land. A similar provision to section 63 (1) exists in section 121 of the *Energy Operators (Powers) Act 1979*.

During the course of the conduct of the National Competition Policy Legislation Reviews, the appropriateness of section 63 (1) applying to a corporatised entity was questioned. This provision dates from when such a provision applied to the Water Authority, the predecessor of Water Corporation, which was a statutory authority.

The outcome of the review was that section 63 (1) remained unchanged on condition that its appropriateness was examined again during the planned future legislation review of water services legislation.

Advice indicates that the section may have limited operation in terms of protecting the Corporation from claims for damages. It may have some operation in terms of trespass. It is not necessary for a plaintiff to establish negligence on the part of a defendant in such cases. It is arguable that section 63 (1) could still protect the Corporation from other claims for damages (such as economic loss) where trespass has been committed.

Should the section be repealed the Corporation would be subject to the ordinary legal principles that apply in damages cases.
Options:
That section 63 (1) of the Water Agencies (Powers) Act 1984 be repealed; or
That the status quo be maintained, with existing compensation provisions retained.

Recommendation 13: In regards to section 63 of the Water Agencies (Powers) Act, that the status quo be maintained, with existing compensation provisions retained.

5.2. Ownership of works built by service providers

Section 84 of the Water Agencies (Powers) Act 1984 provides that where the Water and Rivers Commission (now the Department of Water) or Water Corporation places or causes or permits any works or other things to be placed upon, in, over or under any land in the exercise of a power conferred by this Act or a relevant Act those works or other things shall be taken to have been lawfully so placed.

Subsection 2 provides that those works or other things shall at all times continue to be the property of the Commission or the Corporation and the Commission or the Corporation shall be deemed to have a right of access to the works for the purposes of this Act or any relevant Act.

Section 84 covers situations where the Corporation or the Commission has built works, problems have arisen when Water Corporation has acquired works that have been built by other entities. Because the works have been built by bodies other than the Commission or the Corporation, section 84 has not applied to make the works the property of the body building the works. As a result the works, once affixed to the land, have become fixtures and belong to the individual landowners concerned.

In some cases, such as the water works built at Kambalda by Western Mining Corporation (WMC), it has been necessary to pass legislation in order to enable Water Corporation to acquire ownership of the works of the service as all the works concerned belonged to all the landowners on whose land they had been built. The Kambalda Water and Wastewater Facilities (Transfer to Water Corporation) Act 2004 was needed in order to transfer the pipe infrastructure to Water Corporation from Western Mining.

The town of Kambalda was built by Western Mining in the late 1960s to accommodate company employees. Where Water Corporation has built water works, section 84 of the Water Agency (Powers) Act applies and maintains the ownership with the agency that constructed it. However, in the case of Kambalda, legislation was needed to confer ownership of the water and waste water mains on Water Corporation and provide for the application of the Water Agencies
(Powers) Act to the Kambalda water facilities in order to provide Water Corporation with on-going access to the pipe infrastructure for the purpose of operating and maintaining the systems.

Options:
That the new legislation should provide that where any licensed service provider builds works it retains ownership of and access to the works, and where a licensed service provider takes over works built by a body other than the Commission or the Corporation, the provider will own and have access to the water works; or
That the status quo be maintained, with cases that arise such as at Kambalda addressed by specific legislation on a case-by-case basis.

Recommendation 14: The new legislation should provide that where any licensed service provider builds works it retains ownership of and access to the works.

Recommendation 15: The bill should contain a provision similar to section 84 of the Water Agencies (Powers) Act apply where a licensed service provider takes over works built by a body other than the Commission or the Corporation, the provider will own and have access to the water works.

5.3. Conditions of connection binding on successors in title
In some cases, unusual methods are required to service land which is difficult to service. For example, under the infill sewerage program, Water Corporation has on occasion installed on customers’ properties a storage tank, grinder pump and pressure main to enable the property to be serviced, with power for the pump paid by the customer.

While current legislation enables these arrangements to be put in place through conditions of connection, there is a need for these arrangements to continue where the land is subsequently sold.

An option is to make the conditions of connection binding on subsequent purchasers of the property, with notices placed on property titles by the water service provider advising of the non-standard conditions of connection.

An example of such a provision is found in section 63 of the Victorian Water Industry Act.

Recommendation 16: That the legislation enable conditions of connection to be made binding on subsequent purchasers of a property.
5.4. **Backflow prevention devices /prevention of contamination**

In some circumstances, plumbing in industrial circumstances can pose a significant backflow risk, and thereby risk contamination of the water supply. It is proposed that provisions be included in the legislation that will enable a service provider to require the installation and maintenance of backflow devices.

It is also proposed that the current offence provisions be modified to make it clear that water service providers are able to take pre-emptive action where contamination by backflow is likely to occur.

**Recommendation 17:** That the legislation include provisions enabling a service provider to require the installation and maintenance of backflow devices.

**Recommendation 18:** That the legislation include provisions enabling a service provider to take pre-emptive action where contamination by backflow is likely to occur.

5.5. **Protection of works from damage**

Several provisions within existing legislation enable the works of service providers to be protected from damage.

However, there is currently no capacity for a service provider to give directions to persons undertaking excavations in dangerous circumstances (for example, near a high-pressure pipe). It is desirable for a service provider to have the capacity to give a “stop work” order to prevent damage to its works.

In the *Energy Operators (Powers) Act 1979*, where a person breaks an energy asset they are deemed to have acted negligently unless they made reasonable enquiries of the energy operator as to the location of the assets. A similar provision protecting water assets would be useful.

**Recommendation 19:** That the legislation enable service providers to have the capacity to give a “stop work” order to prevent damage to its works.

**Recommendation 20:** That the legislation provides that where a person breaks an asset they are deemed to have acted negligently unless they made reasonable enquiries of the service provider as to the location of the assets.
6. Governance


The Water Corporation Act 1995 is a modern government trading enterprise Act. It establishes Water Corporation as an entity with a significant degree of independence and sets it a commercial focus. Ministerial oversight of the operations of the Corporation is provided for through the Minister’s approval of Statements of Corporate Intent and Strategic Development Plans developed by Water Corporation.

It is proposed that the governance regime that applies to Water Corporation be extended to the Bunbury and Busselton Water Boards. These Boards currently provide services under the restrictive and outdated Water Boards Act 1904. This will provide an opportunity to update the Governance arrangements for Water Corporation and the Boards.

6.1. Reform of the Water Boards Act 1904

The Water Boards Act 1904 provides the legislative basis for the establishment and operation of the Busselton Water Board and Aqwest-Bunbury Water Board. The Act is outdated and hampers the delivery of services by the Boards. Modernisation of the legislation will remove undue restrictions and enable the Boards to provide water services more effectively to the people of Busselton and Bunbury.

The National Competition Policy Legislation Review of the Water Boards Act 1904 recommended that the Act be redrafted to allow the Boards to:

- Provide a full range of water services including sewerage, drainage and irrigation, and operate outside their Water Areas.
- Make a profit.
- Adopt a commercial approach to service provision consistent with the principles of competitive neutrality.
- Remunerate non-executive Board members in a manner consistent with other service providers in the water industry; (the Water Boards Act 1904 was amended in 2003 to allow this).
- Prepare capital investment programs on an annual basis for Ministerial approval rather than seek approval for each construction project.
- Receive CSO payments.
- Be accountable for its activity in the same way as private sector providers in the water industry and Water Corporation.
- Compulsorily acquire land consistently with other water service providers.
• Broaden its financial powers in relation to borrowing.
• Participate in third party access arrangements.
• Manage assets on behalf of other parties.

In addition to the above matters, the recommendations of the Bunbury and Busselton Water Boards’ Competitive Neutrality Reviews must be taken into account in drafting any new legislation. These reviews were conducted by the Boards themselves. As with the National Competition Policy Legislation Review of the Water Boards Act, these recommendations have also been endorsed by Government.

The recommendations of the Competitive Neutrality Reviews were that the Boards:

• Prepare annual statements of corporate intent and strategic development plans.
• Provide concessions to senior and pensioner customers.
• Pay dividends to government with dividend payments to be negotiated annually.
• Earn a return on assets with the rate to be negotiated annually.
• Remain exempt from local government rates and charges.

Drafting of the Water Services Bill could enable the establishment of the Boards as “water corporations” to which common provisions and powers could apply. The Water Boards Act 1904 and the Water Corporation Act 1995 would be repealed and provisions providing powers to provide water services incorporated in the Water Services Bill.

Alternatively, the Water Corporation Act could be retained as a separate Act, but amended to cover the operations of the Water Boards.

Options:
That the Water Boards Act 1904 be amended and modernised as a stand alone piece of legislation; or
That the Water Boards Act 1904 be repealed and provisions of the Water Corporation Act 1995 be amended to cover the operations of the Boards.

Recommendation 21: That the Water Boards Act 1904 be repealed and provisions of the Water Corporation Act 1995 be amended to cover the operations of the Boards.
6.2. **A separate governance bill**

There are the options of developing either:

- A single bill covering regulation, powers and governance provisions; or
- Producing two bills, with one covering regulation and powers and the other dealing with governance.

The key advantage of producing two bills would be that the provisions that are restricted to the Boards and Water Corporation (the Governance provisions) would be separated from those that will apply to all service providers.

### Options:

That water service regulation, powers and governance provisions be combined in a single bill; or

That governance provisions for the government trading enterprises (namely the Water Boards and Water Corporation) be the subject of a separate government water utilities bill.

**Recommendation 22:** That governance provisions for the government trading enterprises be the subject of a separate government water utilities bill.

6.3. **Dividends**

As a government business enterprise, Water Corporation makes dividend payments to the State Government, as the sole shareholder. This is provided for in the Water Corporation Act 1995. The Water Boards Act 1904 does not provide for the payment of dividends by the Bunbury and Busselton Water Boards.

Should the Water Boards Act 1904 be repealed and provisions of the Water Corporation Act 1995 be amended to cover the operations of the Boards, the Boards would be required to recommend a dividend to the Minister to be paid each financial year. Under the Act the Minister, with the concurrence of the Treasurer, may accept the recommended dividend or direct that another amount be paid.

As previously mentioned, the payment of dividends, as well as a raft of other reforms, were recommended by the 2002 competitive neutrality review of the Boards, and by the legislative review of the Water Boards Act 1904.

In August 2000, the then Minister for Water Resources advised the Boards that dividends would not be required on the Boards’ existing areas of operation. However, dividends would be required on new areas of operation.

This policy could continue should provisions similar to section 79 (Dividends) of the Water Corporation Act apply to the Boards.
Options:
That the Boards be excluded from application of section 79 (Dividends) of the *Water Corporation Act*; or
That section 79 (Dividends) of the *Water Corporation Act* apply to the Water Boards.

**Recommendation 23:** That section 79 (Dividends) of the *Water Corporation Act* apply to the Water Boards.
Attachment 1: Current water service legislation


*Metropolitan Water Supply, Sewerage and Drainage Act 1909*

This Act has the objective of:

- Defining the Metropolitan Water Supply, Sewerage and Drainage area;
- Setting up water reserves and catchments;
- Setting out the provisions for the functioning of the metropolitan water system and sewerage systems;
- Setting out provisions for recovery of metropolitan charges and
- Defining powers for making by-laws.

*Water Agencies (Powers) Act 1984*

This Act has the objective of:

- Prescribing the main by-law and regulation making powers for the provision and regulation of water services.
- Prescribing administration provisions for;
- Fixing charges;
- Making agreements for works;
- Access to land and entry onto land by Water Corporation; and
- Approvals and construction of works.

*Water Boards Act 1904*

The Act provides for the establishment of Water Boards.

It enables the construction, maintenance, and management of works for the storage and distribution of water.

*Water Corporation Act 1995*

The Act establishes Water Corporation with the function of providing water services, and with functions necessary for and related to that purpose, and for connected purposes.

It sets out processes for appointment of the Water Corporation Board.

It sets out reporting requirements including the Statement of Corporate Intent and Strategic Development Plan.

*Water Services Licensing Act 1995*

The Act establishes a scheme for the licensing of water services, to be administered by the Economic Regulation Authority.
It provides for regulations to be made extending provisions that apply to Water Corporation to water service licence holders.

**Country Areas Water Supply Act 1947**

The Act supports Water Corporation’s construction, maintenance and administration of reticulated supplies of water to country areas.

It includes provisions to safeguard water supplies.

**Country Town Sewerage Act 1948**

This Act has the objective of:

- Providing for the establishment of country sewerage areas;
- Making provision for:
  - The functioning of country sewerage systems;
  - Recovery of country water charges;
  - Making of by-laws.

**Land Drainage Act 1925**

This Act has the objective of providing for the constitution of country drainage areas; and making provision for:

- The functioning of country drainage systems;
- Recovery of country drainage charges;
- The making of by-laws.

**Rights in Water and Irrigation Act 1914**

This Act has the objective of:

- Setting out law regarding rights to water and waterways.
- Making provision for:
  - The functioning of irrigation systems;
  - Recovery of irrigation charges;
  - The making of by-laws.

**Health Act 1911**

Part IV of the *Health Act 1911* sets out provisions relating to the provision of sewerage and drainage services by local governments.

Division 7 of Part IV provides powers for local government and the Executive Director, Public Health, to close polluted drinking water supplies.

The *Health Act* is currently undergoing a major review.