Individual
Public submissions to Securing Western Australia’s water future: Position paper
We are self-supply water users in agriculture and aquaculture in the Warren and Donnelly River catchments and object to the plans of the Department of Water in its Position Paper to apply water markets that will increase the cost of water as an input to agriculture and aquaculture, and consequently reduce the competitiveness of our produce. We request an increase in the allocation of water to agriculture and other uses to prevent the introduction of costly water markets and associated ‘red tape’.

Jardee Glen is an aquaculture business based on non-intensive cultivation of marron in ‘farm dams’, both licensed under the Rights in Water and Irrigation Act 1914 and unlicensed. In addition to our direct commercial interests in water for marron aquaculture, indirectly the value of our property is related to the viability of agriculture in the Manjimup and Pemberton area, which is vitally dependent on access to fresh water for irrigation.

1. Water requirements for Marron Aquaculture.

Marron aquaculture is conducted in the Manjimup and Pemberton area as both a primary source of income for landowners and as a secondary income based on harvest from ‘farm dams’ which are both licensed under the Rights in Water and Irrigation Act 1914 and unlicensed because either the water is for stock and domestic use or is water regarded as a property right. Commercial use of water for aquaculture or other purposes shouldn’t be used to either disqualify stock and domestic use status or remove property rights to water. The Position Paper (page 26) states:

“Basic water is for essential purposes including water for stock and the water we need to survive. This applies to every person, irrespective of whether they are a property owner or not. This does not apply for water that is used for commercial purposes.”

and in regard to use of ‘basic water’:

“The crop grown must not be commercially traded.”

The Rights in Water and Irrigation Act 1914 makes no reference to ‘basic’ and only one reference to ‘commercial’ in definitions for possible ‘use and development’ of water (s4(2)). The Rights in Water and Irrigation Regulations 2000 make no mention of ‘basic’ and only one mention of ‘commercial’, in Schedule 3 being the form for application for a licence to use water under the Act, in the context of asking “if the use is commercial or non commercial”.

There is no apparent statutory force for use of the terms ‘basic’ or ‘commercial’ in determining how water should be managed by the Department of Water, and any move to regulate water use on the basis of ‘commercial’ or ‘non-commercial’ is opposed. If any water that was used for non-intensive marron aquaculture was treated differently because there was a commercial use of the water, and thus perhaps then required a licence for use of the water, that would be a major disincentive for landowners to harvest marron as a secondary income base. The negative effect would be particularly strong where landowners are from a background where English is not their first language because they are particularly averse to Government ‘red tape’. Marron aquaculture is a valuable and environmentally benign use of farm dams and should not be discouraged by changes to water resource management legislation.
2. The Department of Water has restricted the water available to agriculture in the ‘food bowl of the South West’ to force ‘water markets’ policy onto water users.

Over 90% of the water in the Warren and Donnelly River catchments is water for the environment flowing into the Southern Ocean. Two thirds of this area is forest where all of the water is for the environment. In the third that is cleared for agriculture only 40% of the water has been allocated to agriculture and other uses and 60% is allocated to the environment. The Department of Water forced this imbalance onto agriculture in 2012 through their Warren Donnelly Surface Water Allocation Plan (2012). By restricting water available for agriculture to 40%, most areas are now fully allocated or nearing fully allocated. Thus the Department of Water is forcing agriculture into ‘water markets’ to pay for water by auctions, tenders and trades. This will enable the Department of Water to ‘tick a box’ for compliance with the dogma of the National Water Initiative. At our expense! Managing water markets and the associated increased ‘red tape’ will also assist the Department of Water to justify its $83 million budget and 452 staff. At our expense!

3. More water must be allocated to agriculture in the ‘food bowl of the South West’ by revising the Warren Donnelly Water Allocation Plan.

Our area is designated ‘Priority Agriculture’ by the State Planning Commission and water for agriculture should have priority over the environment. We request the Warren Donnelly Surface Water Allocation Plan (2012) be revised to provide 60% of water for agriculture and other uses and 40% for the environment. This will provide sufficient water for growth of agriculture and maintenance of property values. There would then be no justification for imposing initial purchase of water allocations from the State by auction and tender, restrictive consumptive pools requiring purchase of water from other licence holders, separation of water licence from land title with uncertain outcomes, and mandatory metering, all of which the Position Paper advocates.

4. The Warren Donnelly Surface Water Allocation Plan must be a statutory Plan to provide security of water access for agriculture.

The Department of Water ignored repeated requests that the Warren Donnelly Surface Water Allocation Plan (2012) be a statutory plan prepared in accordance with the provisions of the Rights in Water and Irrigation Act. Water licence holders demanded the security for water entitlements that can only be provided by a statutory Plan. The Department has now done a ‘backflip’ on this admitting in the Position Paper (page 17) that “Administrative allocation plans provide less security to licence holders as the plans may be changed with administrative, rather than legislative due process. Decisions made based on an administrative plan are not as certain as those based on a statutory plan, and there may be additional costs to water users and the government if those administratively based decisions are appealed.”. The Warren Donnelly Surface Water Allocation Plan must be converted to a statutory Plan under the Rights in Water and Irrigation Act, without delay in 2014.

5. The Minister for Water must publish a draft ‘green’ Water Resources Management Bill for public comment.

The proposed legislation covers separation of water licence from land title, consumptive pools for periodic determination of how much water can be taken from private dams, water auctions and tenders, mandatory metering, and what types of dams are to be included, affecting property rights. These and many other provisions will require detailed consideration by water users affected in the ‘food bowl of the South West’. With controversial legislation, the ‘devil is in the detail’; thus it is vital the Minister for Water issue a draft ‘Green Bill’ for public comment. The draft Water Resources Management Bill should be accompanied by a cost-benefit analysis of the proposed changes.

Yours sincerely

Neil Bartholomaeus

Elizabeth Bartholomaeus
Submission on Water Resource Management Reform Position Paper
Michael Bennett

Introduction

1. This submission draws from research I have undertaken, together with Associate Professor Alex Gardner, for the project ‘A Regulatory Framework for Groundwater Management in a Drying South-West Climate’.  

2. As the Position Paper notes, rainfall in the south-west has reduced by around 15 per cent since the mid-1970s. This reduction in rainfall has had a dramatic impact on the south-west’s surface water resources, with streamflow to the major water supply reservoirs in the south-west declining by more than 50 per cent.  

3. Rainfall reductions have also had significant impacts on groundwater, both directly through reduced recharge and indirectly through increased demand for groundwater.  

4. Further reductions in rainfall are expected in the future due to anthropogenic climate change. This will, in combination with increasing population and water demand, place increasing pressure on the south-west’s water resources.  

5. Our work to date supports the view that the drying south-west climate has important policy implications for water resource management – including for groundwater management, which is the focus of our research. The challenges posed by a drying climate include:

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1 Michael Bennett is a Research Assistant Professor at the UWA Law Faculty, engaged on a one year research contract to work on the project ‘A Regulatory Framework for Groundwater Management in a Drying South-West Climate’.  
3 Since the mid-1970s streamflow into the major water supply reservoirs in the south-west have declined by more than 50 per cent: R P Silberstein et al, ‘Climate change and runoff in south-western Australia’ (2012) 475 Journal of Hydrology 441.  
4 For example, it has been estimated that reduced rainfall between 1979 and 2005 was responsible for falls of up to 4 metres in the Gnangara superficial aquifer: Cahit Yesertner, ‘Assessment of the declining groundwater levels in the Gnangara Groundwater Mound’ (Department of Water, 2008), p v. See also Riasat Ali et al, ‘Potential climate change impacts on groundwater resources of south-western Australia’ (2012) 475 Journal of Hydrology 456, p459 (Fig 3).  
6 Indian Ocean Climate Initiative, 'Indian Ocean Climate Initiative Stage 3: Summary for Policymakers' (CSIRO and BoM, 2012), 26.  
7 See generally CSIRO, 'Water yields and demands in south-west Western Australia: A report to the Australian Government from the CSIRO South-West Western Australia Sustainable Yields Project.' (CSIRO, 2009).
ensuring that future climate scenarios are addressed in water resource planning;
dealing with existing over-allocation caused by reduced water yields;
avoiding future over-allocation that may come with further rainfall reductions;
promoting the productive and efficient use of scarce water resources; and
promoting and managing the augmentation of water resources (e.g. through
injection of treated wastewater into aquifers).

4. This submission is built around these five challenges. It considers how well the existing
regulatory framework meets these challenges and whether the proposals in the Position
Paper would help it do so more effectively. In some cases we recommend alternative
approaches. While the submission doesn't follow the structure of the Position Paper,
page references identify the sections that we are referring to.

Climate change and water resource planning

5. We support the proposal (pp18-19) that statutory water allocation plans “describe the
effects or potential effects of climate variability or change on the water resources and
identify the policy programmes that are included in the plan for managing these effects.”

6. The Water Act 2007 (Cth) has a requirement of this kind, which may provide a good
model. It states that the Basin Plan must include “an identification of the risks to the
condition, or continued availability, of the Basin water resources” and that:

The risks dealt with must include the risks to the availability of Basin water resources that
arise from the following:
(a) the taking and use of water (including through interception activities);
(b) the effects of climate change;
(c) changes to land use;
(d) the limitations on the state of knowledge on the basis of which estimates about matters
relating to Basin water resources are made.9

8 Water Act 2007 (Cth) s22, item 3.
9 Ibid (emphasis added). Note also that ‘water resource’ is defined broadly to include “all aspects of
the water resource (including water, organisms and other components and ecosystems that contribute
to the physical state and environmental value of the water resource)”: Water Act 2007 (Cth) s 4.
Dealing with existing over-allocation

Capacity of statutory plans to address over-allocation

7. A resource is over-allocated when the total volume of water able to be extracted by entitlement holders at a given time exceeds the environmentally sustainable level of extraction for that system.\(^\text{10}\) As the Position Paper notes, reduced rainfall in a drying climate can lead to a resource becoming over-allocated (p23). We understand that some management sub-areas covered by the 2009 Gnangara Groundwater Areas Allocation Plan were classified as over-allocated when that plan reduced allocation limits to reflect reductions in average groundwater recharge.\(^\text{11}\)

8. The Position Paper states that “a process for returning over-allocated systems to the allocation limit needs to be included in the legislation” (p24). It indicates that “the specific methodology” to do this would be developed “through a consultative process in the development of statutory water allocation plans and statutory allocation limits for each resource” (p24). We support this set of proposals, which is consistent with Western Australia’s commitment under the National Water Initiative to address over-allocation issues, in consultation with stakeholders, through the water planning process.\(^\text{12}\)

9. In drafting the new Act, care will need to be taken to ensure that statutory plans can address over-allocation in an administratively efficient way. At present the Minister (or departmental delegate) must individually consult license holders on proposed amendments to their licences and invite submissions.\(^\text{13}\) Licence holders also have a right to appeal to the State Administrative Appeals Tribunal from amendments to their licence.\(^\text{14}\) These rights of submission and appeal on individual licence amendments should not be able to be used to revisit issues that have already been settled, following public consultation, in a statutory water plan.

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\(^{11}\) In 2005 allocation limits across the Gnangara system, as recorded in the Department of Water’s Water Resource Licensing Database, added up to 337 GL. In 2009 allocation limits were revised in order to better reflect recharge from rainfall. Total allocation limits were reduced to 304GL and 21 management sub-areas were classified as over-allocated. In 2013 allocation limits were reduced further, but no additional sub-areas were classified as over-allocated as a result: pers comm Department of Water, 14 August 2013; Gnangara Groundwater Management Plan (2009), 37.

\(^{12}\) NWI para 43.

\(^{13}\) Rights in Water and Irrigation Act 1914 (WA) sch 1, cl 26

\(^{14}\) Ibid s 26GG(e)
10. Statutory water plans, together where necessary with other provisions in the new Act, should be able to take a range of approaches to addressing over-allocation. Techniques used in other Australian jurisdictions have included:

- conversion from fixed-term licences to permanent shares of the sustainable yield of a water resource;\(^{15}\)
- the use of supplementary water licences, which are phased out over the life of a plan, to ease the transition to a lower allocation limit;\(^{16}\)
- formulae in water plans for phased reductions in entitlements, which may include pro rata reductions or more complex approaches that take into account history of water use;\(^ {17}\)
- recouping a percentage of each water trade.\(^ {18}\)

**Compensation for reductions in water entitlements**

11. The return of an over-allocated system to an allocation limit may involve reductions in entitlements under water licences. If this is the case, should compensation be payable? This is a significant and difficult question that we consider in some detail below. We approach this question by considering the current compensation provisions in the *Rights in Water and Irrigation Act 1914* (WA) ("RIWI Act"), relevant provisions of the *Intergovernmental Agreement on a National Water Initiative* ("NWI") and the most recent proposals in the Position Paper. We then put forward an alternative proposal for consideration.

**Current provisions in the RIWI Act**

12. Under the RIWI Act a licence may be granted to authorise the taking of water, subject to the terms and conditions on that licence.\(^ {19}\) In practice, a licence identifies an “annual water entitlement” and contains a condition that the licensee must not take more than that amount each year.

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\( ^{16} \) Ibid, 19; *Water Act 2000* (NSW) s 70.

\( ^{17} \) Alex Gardner, Richard Bartlett and Janice Gray, *Water Resources Law* (Lexis Nexis Butterworths, 2009), 391.

\( ^{18} \) Sinclair Knight Mertz, above n 15, 36 (“In the North Adelaide Plains plan there is a rule that when trade occurs, the State will recoup 20% of the traded volume. This has partly worked, insofar that water has been returned to the State. However, the rate of return is so slow that this mechanism could never be seriously considered as the main plank in an entitlement reduction program”) See also para 42 below.

\( ^{19} \) *Rights in Water and Irrigation Act 1914* (WA) s 5C, sch 1, cl 2.
13. There are a number of ways in which a licence-holder may be prevented from taking the full amount of the annual water entitlement originally specified in a licence:

a. Conditions on a licence, or conditions imposed under other laws, may restrict the taking of water. For example, a condition on a licence may provide that no water may be taken from a well where salinity exceeds a specified concentration, or conditions imposed under the *Environmental Protection Act 1986 (WA)* may require pumping to be modified if water levels in a wetland fall below a specified level.  

b. The Minister (or departmental delegate) may, by notice in writing, give a direction to a person restricting the amount of water the person may take from a water resource. Such a direction may be issued where the Minister has determined that the quantity of water in a water resource is, or is likely to be, insufficient to meet demand, including any demand made by the needs of the environment; or the Minister has made, and published in the *Gazette*, an order declaring that a water shortage exists in the area in which the water resource is situated.

c. The licence may be amended to reduce the annual water entitlement. Under the *RIWI Act* the Minister (or departmental delegate) may vary any term, condition or restriction in a licence on a broad range of grounds, including to protect the water resource or the associated environment from unacceptable damage, or to prevent a serious inconsistency arising with a water plan approved under the Act.

14. It is only under the last of these three scenarios that compensation may be payable. Under amendments inserted in the RIWI Act in 2001, a person may have a right to compensation where they suffer damage as a result of a licence amendment, suspension or cancellation (but not as a result of a refusal to renew a licence). Before looking at how these provisions work, it is worth briefly considering how they came about.

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20 For an example of the latter, see the conditions that originally applied to the Water Authority on its proposal to abstract water from the Jandakot Mound: Minister for the Environment, *Statement that a Proposal May be Implemented (Pursuant to the Provisions of the Environmental Protection Act 1986)* (Ministerial Statement 253, 29 April 1992), Condition 1 and Summary of Environmental Management Commitments.

21 *Rights in Water and Irrigation Act 1914 (WA)* s 26GD.

22 Ibid sch 1, cl 34. In practice this power has not been exercised on these broad grounds; its use has been confined to cases in which licence holders have consistently failed to use their full water entitlement.
15. Prior to 2001 there were no provisions in the RIWI Act for compensation for licence amendments, suspensions or cancellations. Amendments to introduce such provisions were introduced by the Rights in Water and Irrigation Act Amendment Bill 1999. As originally proposed under that Bill, compensation would only be payable where a licence was amended, suspended or cancelled in the public interest and the water use that was lost as a result was consistent with objects of the Act (including objects of sustainable use and protection of water-dependent ecosystems). This compensation provision was intended to apply in a narrow range of circumstances, such as where water was resumed for a town water supply. It was not intended to apply to “changes that are necessary to reduce excessive use to sustainable levels”.

16. The Rights in Water and Irrigation Act Amendment Bill 1999 was referred to the Legislative Council’s Standing Committee on Legislation in March 2000. The Committee received a number of submissions on the compensation question, which it summarised in its final report as follows:

The West Australian Water Users Coalition and Pastoralists and Graziers Association suggest that, whenever a water licence is removed or reduced, including for environmental purposes, compensation should be paid. The West Australian Water Users Coalition specifies that compensation should be provided whenever the Commission amends or cancels a licence. Both, however, state compensation is not necessary where there is a ‘pro-rata’ reduction to all users for environmental purposes.

17. A majority of the Standing Committee recommended that:

[T]he payment of compensation be mandatory wherever a legitimate existing use, whether licensed or unlicensed, is reduced or removed, the scope of exemptions from such compensation to be decided by Parliament.
18. Consistent with this recommendation, the Bill was amended to extend the compensation provisions. Also consistent with this recommendation, a number of exemptions were also included. The result was the current, complex compensation provisions in Schedule 1, clause 29 of the RIWI Act.

19. It is clear that under these provisions compensation is not available where a licence is amended to recoup unused water entitlements and that compensation may be available in most other cases, such as where a water entitlement is reduced to protect the water resource or the associated environment, or for consistency with an approved water resource management plan. However, the right to compensation is so heavily qualified as to have very little operation. There are two important exemptions:

   a. In all cases, compensation is only available if the licence holder’s use of water is consistent with the objects of the Act. This arguably means that no compensation is payable where entitlements are reduced to return water use to sustainable levels, given that one of the objects of the Act is sustainable water use. This would be consistent with the statement in the Second Reading speech for the Amendment Bill, highlighted above, that no compensation is payable for “changes that are necessary to reduce excessive use to sustainable levels.”

   b. In most cases compensation will not be available unless “the Minister is of the opinion that the effect of the exercise of the power on the person is not fair and reasonable having regard to the exercise of the power in respect of other licence holders in the surrounding area”. This appears to pick up on the suggestion by West Australian Water Users Coalition and Pastoralists and Graziers Association, as noted by the Standing Committee on Legislation, that “compensation is not necessary where there is a ‘pro-rata’ reduction to all users for environmental purposes.”

28 Western Australia, Parliamentary Debates, Legislative Assembly, 19 October 2000, 11-14.
29 Ibid.
30 Rights in Water and Irrigation Act 1914 (WA) cl 39(1) does not refer to cl 24(2)(d), which empowers the Minister (or delegate) to amend a licence where the quantity of water that may be taken under the licence has consistently not been taken.
31 Ibid cl 39(1), 24(2), 25(2).
32 Ibid s 4.
33 See para 16 above.
34 Ibid sch 1, cl 39(5)(b).
35 See para 15 above.
20. A licence holder may request compensation under the provisions outlined above, and may appeal to the State Administrative Appeals Tribunal from the refusal of such a request.36

21. As the Position Paper notes (p24), the compensation provisions are untested. Successive governments have been reluctant to address over-allocation by reducing entitlements. The complexity of the compensation provisions, and spectre of multiple appeals from compensation decisions, may have contributed to that reluctance.

Risk assignment under the NWI

22. The NWI contains risk assignment rules that are relevant to whether compensation should be paid for reductions in water entitlements (see extract at Attachment A).37 Essentially the rules turn on the reason for the reduction: entitlement holders bear the risk of reductions from climate-related and natural causes; government is responsible for reductions associated with changes in government policy; and changes due to improvements in knowledge of water systems are shared between entitlement-holders and governments.

23. The Commonwealth, New South Wales and Queensland Parliaments have incorporated the NWI risk assignment rules into their water resource management legislation (albeit with some variations).38 To the best of our knowledge the provisions have only been applied on one occasion: by the Murray-Darling Basin Authority in its Guide to the Proposed Basin Plan, and subsequently by the Commonwealth Environment Minister in making the final plan.39 The difficulty the Authority experienced is instructive. When faced with quantifying reductions due to new knowledge it said:

In order to quantify the effect of a change in knowledge about the environmentally sustainable level of take for a particular water resource...and hence calculate the improvements in knowledge component, it is necessary to identify the baseline knowledge upon which the Basin state water resource plans were prepared and to compare this with the information

36 Ibid sch 1 cl 39, s26GH.
37 The framework is primarily intended to apply to future reductions in the availability of water for consumptive use that are additional to those identified for the purpose of addressing known over-allocation issues. However, the NWI provides that they may also be considered as one factor in determining whether adjustment assistance should be provided to entitlement holders affected by measures to address known over-allocation: see NWI para 46, 97(1)(d).
38 Water Management Act 2000 (NSW) ss 46, 87AA; Water Act 2000 (Qld) Part 3; Water Act 2007 (Cth) s75.
used for preparing the Basin Plan. The Authority has examined the information on current Basin state plans that is available to it, and found it is not possible to make a valid comparison.40

24. The practical difficulties with the risk assignment rules have been recognised by academic commentators41, the Productivity Commission42 and the National Water Commission.43 Indeed, the National Water Commission – the statutory body responsible for overseeing the implementation of the NWI – has suggested that parties to the NWI should review the risk assignment rules.44

25. Given that most jurisdictions have not implemented the risk assignment rules,45 and that extensive doubts have been expressed about their practicality, there is considerable uncertainty about the future place of these rules in the NWI.

Position Paper proposals on compensation

26. The Position Paper proposes a set of rules that mix the risk assignment rules from the NWI with the existing compensation provisions of the RIWI Act. The Position Paper states (pp24-25) that:

New risk assignment provisions will be included in the legislation specifying that the risk of permanent cuts to the entitlement is borne by the water user rather than the government if the cut is due to climate or natural events alone. If the cuts are not due to climate or natural events alone, the risks could be shared between the government and the water users.

40 Murray Darling Basin Authority, above n39, p156. The Authority ended up recommending that 100% of the reduction in diversion limits be attributed to a change in Australian Government Policy, which was reflected in the final Basin Plan: see p155 of the Guide to the Proposed Basin Plan and Basin Plan 2012 (Cth) cl 6.13
45 The NWI rules have not been adopted in South Australia, Victoria, Tasmania, the Northern Territory or the Australian Capital Territory. It is important to appreciate that the NWI itself provides flexibility to depart from the rules: see NWI para 51.
Where the government bears the risk, for example, through a change in government policy, compensation is payable unless cuts to water entitlements are fair and reasonable. This means that cuts have to be equitable, but not necessarily equal.

Compensation is not payable for the recouping of unused entitlements, or for temporary allocation announcements.

27. There are some advantages in the proposed approach. For example, clarification that “the risk of permanent cuts to the entitlement is borne by the water user rather than the government if the cut is due to climate or natural events alone” would presumably make it easier for the department to align groundwater abstraction with reductions in average recharge in over-allocated areas of the Gnangara Mound. However, we are concerned that the proposed compensation provisions would be very complex and may import some of the practical problems with the NWI risk assignment provisions noted above.

An alternative approach to compensation

28. The issue of compensation is part of the larger question of how best to balance the security of water entitlements with the need to adaptively manage water resources. At one extreme is a system in which water users have perpetual rights that cannot be reduced, or can only be reduced with full compensation. This maximises security of water entitlements, but makes adaptive management of the water resource very difficult. At the other extreme is a system in which the water manager can adjust licence volumes at the stroke of a pen, with no obligation to pay compensation. This gives a great deal of flexibility to the water manager, but undermines the security that entitlement holders need to make investment decisions.

29. As these examples illustrate, compensation is not the whole story: consideration needs to be given to the circumstances in which water entitlements can be varied as well as the circumstances in which compensation must be paid. In the table below we summarise the current legal position on these issues, and put forward an alternative proposal.

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<thead>
<tr>
<th>Issue</th>
<th>Current system</th>
<th>Our proposal</th>
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<tbody>
<tr>
<td>Circumstances in which water entitlement may be reduced</td>
<td>The Minister (or departmental delegate) may, by amending a licence, reduce an annual water entitlement at any time.</td>
<td>Once a statutory water plan is in place, the Minister may only reduce an entitlement where authorised to do so by that plan.</td>
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Rules for determining whether compensation is payable | No compensation is payable if the water use is inconsistent with the objects of the Act, or the Minister is of the opinion that the reduction is fair and reasonable having regard to reductions to other licences in the surrounding area. | Once a statutory water plan is in place, compensation is only payable in the circumstances identified in the plan.

30. There are two parts to our proposal. The first is that a statutory water plan must provide for reductions in licensed entitlements before this can take place. This would ensure that affected water users have been consulted, and avoid the risk of ad hoc approaches. This reform would increase security for water entitlement holders.

31. The second part of the proposal is that any compensation rules should be set out in the plan. This would ensure that these rules are specific and tailored to local issues. The history of the RIW Act, the unsatisfactory nature of the NWI provisions and the variety of approaches adopted throughout Australia\(^\text{46}\) demonstrate the difficulty of coming up with practical, universally-applicable compensation rules. A local approach that considers the proposed reductions and their likely impacts, developed with the benefit of public consultation, is likely to be more successful.

32. To the extent that state-wide (or national) policy guidance on compensation is developed, it could be applied through statutory water plans. There may also be some capacity to insert guiding principles in the Act – e.g. the principle that reductions due to climatic changes are not compensable is well accepted and does not have the practical problems associated with the “new knowledge” risk assignment rule.

33. The value of a plan-specific approach is clear when one considers the range of possible approaches to addressing over-allocation, and the difficulty of setting general rules that could cater for all those situations. We provide a few hypothetical examples and possible approaches below.

<table>
<thead>
<tr>
<th>Example of entitlement reduction</th>
<th>Possible response in statutory plan</th>
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<tbody>
<tr>
<td>Modest, staged reductions in entitlements under water licences to realign allocations with average groundwater recharge.</td>
<td>No compensation.</td>
</tr>
<tr>
<td>Reductions in entitlements to a level that is equivalent to each entitlement-holder’s historical use.</td>
<td>No compensation.</td>
</tr>
</tbody>
</table>

A more substantial reduction in water entitlements, achieved by converting existing, temporary licences to perpetual water access entitlements. | No compensation if the value to water users of having a permanent entitlement outweighs the cost of the reduction in water access.\(^{47}\)

| Reductions in entitlements to reserve more water for public water supply. | Compensation provisions in the plan and/or buy-back of entitlements. |

**Avoiding future over-allocation**

34. The Department currently grants licences for periods of up to 10 years. The Position Paper notes that this practice

has been adopted to accommodate uncertainties about the water resource, thus allowing the department to have sufficient flexibility to adapt to changing circumstances, such as a drying climate and increased resource information.\(^{48}\)

35. The Position Paper proposes that in the future licences will (as a matter of practice) be granted for up to 40 years.\(^{49}\) Perpetual water access entitlements will also be introduced in some areas. These reforms are intended to provide greater security to water users.

36. On the face of it, these changes are a risk in a drying climate: longer-term rights can reduce flexibility to adaptively manage water resources and may lead to over-allocation in a drying south-west. However, there are two important related reforms. The first is the introduction of a new provision that would make it easier to vary existing licence entitlements “in order to match water use with water availability” (p13) and the second is the specification of water access entitlements as a share in a variable consumptive pool (pp14-16).

37. Do the reforms outlined in the preceding two paragraphs, taken together, strike the right balance between security for water users and maintaining flexibility for sustainable management of water resources? This will depend in large part on how the Act and

\(^{47}\) Sinclair Knight Mertz, above n 15, 20 (In NSW “[b]ecause the replacement licences have a greater security than the old licences, and in addition are tradeable whereas the old licences were not, it transpired in many cases that the asset value of the new licences could equal or exceed that of the old licences”). No other State or Territory’s water management legislation provides for compensation for reductions in water volumes associated with the conversion of licences to water access entitlements: Gardner et al, *Water Resources Law* (LexisNexis Butterworths, 2009) 398. Adjustment assistance was provided in New South Wales where the conversion involved large cuts to entitlements.

\(^{48}\) Position Paper, 12.

\(^{49}\) As a matter of law, the licence may be for any specified fixed period or for an indefinite duration: *Rights in Water and Irrigation Act 1914* (WA), sch 1, cl 12.
related instruments define (a) the circumstances in which licence entitlements or the consumptive pool may be varied, and (b) any compensation requirements that apply to these variations. If these issues are substantially governed by statutory water plans, developed with the benefit of sound research and full consultation, this will maximise the opportunity to get the balance right.

Promoting the productive and efficient use of water resources

38. There is evidence that water markets can promote efficient and productive water use. Signatories to the NWI have agreed to facilitate water trading and the release of unallocated water through market-based mechanisms.

Release of unallocated water

39. The Position Paper proposes that the new legislation allow for unallocated water to be released under a range of mechanisms, including “first-in first-served”, competitive submission according to specified criteria, market mechanisms or other means. We support this proposal, as we recognise different approaches may be appropriate in different circumstances.

40. There is already a provision in the RIWI Act that could, with supporting regulations, provide the basis for the sale of licences, but a more comprehensive provision will be needed to implement the proposal in the Position Paper. One approach that has been used in other jurisdictions is to empower the Minister to declare that the right to apply for a licence in a specified area is to be acquired by an auction, tender or other means.

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51 NWI paras 58, 72.


53 Sch 1 cl 40; see also Rights in Water and Irrigation Act 1914 Clause Notes, p106.

54 Water Management Act 2000 (NSW), s 65(1); for an example of a Ministerial Order see Government Gazette (NSW), 31 May 2013, Controlled Allocation Order (Various Groundwater Sources) (No 1) 2013. See also Water Act 2000 (Qld) ss 46(2)(g), 98(2)(g) and Water Regulation 2002 Div 2; Natural Resource Management Act 2004 (SA) s147.
Water trading

41. The RIW Act already provides for trading in water. However, the Position Paper proposes to remove or modify current barriers to trade.

42. We support in principle the proposals (p12) to:
   - simplify the assessment process for trades and transfers (as long as this is not at the expense of adequately addressing environmental impacts\(^{55}\));
   - include generic, state-wide trading rules in the new legislation and capacity for more specific rules in statutory water plans; and
   - make traded volumes and prices publicly available.\(^{56}\)

43. The new Act should create a broad power to establish trading rules in statutory water plans. The Position Paper gives the example of conditions on trades that are close to endangered wetlands or existing locations of abstraction (p12). Other rules could include, for example, “exchange rates” for trades in over-allocated areas as a method of reducing over-allocation (e.g. the purchaser gets 90% of the water and the balance is used to reduce the level of over-allocation).\(^{57}\)

44. We submit that consideration should also be given to removing what could be called the “landholder eligibility requirement”. At present a water entitlement may only be transferred to a person who holds, or is eligible to hold, a licence.\(^{58}\) This will ordinarily mean that the person who wants to purchase the water entitlement must own or occupy land from which the water will be taken (there is an exception for public utilities such as the Water Corporation).\(^{59}\) This restriction was included to avoid speculative acquisition of water entitlements,\(^{60}\) but has the collateral effect of excluding other prospective water purchasers, such as businesses that wish to

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\(^{56}\) See Skurray, Pandit and Pannell, above n 50.


\(^{58}\) Rights in Water and Irrigation Act 1914 cl 29(1).

\(^{59}\) Ibid sch 1 cl 3. There are some other relevant grounds on which a person may be eligible, such as where the person is a public utility with powers under a written law in relation to water on or under any land, but these will not be available to most prospective purchasers.

\(^{60}\) Clause Notes to the Rights in Water and Irrigation Act 1914 (WA), p79 (‘The list of people eligible to hold licenses has been carefully drafted to avoid speculation in licences once trading has been introduced’).
acquire a water entitlement before acquiring land title\textsuperscript{61} or non-government “water trusts” that wish to purchase water to maintain environmental values.\textsuperscript{62}

\textit{Unlicensed interceptions}

45. It is not clear from the Position Paper whether the Act will provide the power to regulate significant interceptions, including interceptions of water by plantations (p\textsuperscript{29}). We submit that it should do so. Regulation of significant interceptions would be consistent with commitments Western Australia has given under the NWI.\textsuperscript{63} It would also help promote productive and efficient water use. There is a risk in a drying climate that unregulated water use, such as significant interceptions from plantations, will make up an increasing proportion of water use, crowding out more productive water uses.\textsuperscript{64} By regulating interceptions and including them within sustainable allocation limits this risk can be minimised.

46. We make the following suggestions concerning the framing of provisions on water interceptions:

\begin{itemize}
\item[a.] The provisions should be capable of applying to all significant water interceptions, not just plantations.\textsuperscript{65}
\item[b.] At a minimum, the provisions should provide the basis to:
\begin{itemize}
\item[i.] define the regulated water interception;\textsuperscript{66}
\item[ii.] oblige the manager of the regulated water interception to obtain (by release of unallocated water or private trade) a licence or water access entitlement;\textsuperscript{67} and
\end{itemize}
\end{itemize}

\textsuperscript{61} James H. Skurray, Ram Pandit and David J. Pannell, 'Institutional impediments to groundwater trading: the case of the Gnangara groundwater system of Western Australia' (2013) 56(7) \textit{Journal of Environmental Planning and Management} 1, p13.

\textsuperscript{62} Water trusts have a long history in the Western United States: Mary Ann King, ‘Getting Our Feet Wet: An Introduction to Water Trusts’ (2004) 28 \textit{Harvard Environmental Law Journal} 495. In Australia, the Environmental Water Trust has been established ‘as a national independent non-government charitable organisation to facilitate investment in the long term environmental health of Australia’s rivers and wetlands’: \url{http://environmentalwatertrust.org.au}.

\textsuperscript{63} NWI para 55.


\textsuperscript{65} NWI para 55.

\textsuperscript{66} e.g. in South Australia “commercial forest” in a “declared forestry areas” is regulated, unless excluded by a water allocation plan: \textit{Natural Resource Management Act 2004} (SA) s 169B. See also Exposure Draft of the Water Bill 2004 (Vic) (available at \url{http://www.depi.vic.gov.au/water/governing-water-resources/water-law-review}) cl 61.
iii. identify the quantity of water that must be obtained under that water licence or entitlement. 

Promoting and managing the augmentation of water resources

47. The Position Paper suggests that the new Act may provide the basis to more effectively regulate “injection of water or fluids into or through aquifers/underground water resources” (p28).

48. The kind of activities that may be regulated under these provisions could include managed aquifer recharge projects such as:
   - injection of treated wastewater to supplement public drinking water supplies,
   - prevent saline intrusion or maintain wetlands and caves;
   - injection of winter surface water flows for use in summer irrigation;
   - storage of water from desalination plants (which are most efficient when operated at a steady rate) for use in periods of peak demand.

49. As the Environmental Protection Authority has recognised, managed aquifer recharge has the potential to play an important role in the sustainable management of Western Australia’s water resources, particularly given the decline in rainfall experienced in recent decades and the large reliance on groundwater resources. At the same time, there are environmental and public health issues that may need to be addressed for some aquifer recharge proposals. The challenge, therefore, is put in place a regulatory system that promotes managed aquifer recharge (e.g. by providing secure rights to access injected water) while ensuring that environmental and health issues are properly addressed.

67 e.g. in South Australia, the “forest manager”, defined as the person with effective control over the forest vegetation, must ensure that the forest is the subject of a forest water licence: ibid ss 169B(3), 169A, 169L. The draft Water Bill 2014 (Vic) takes a similar approach: see cl 61.
68 e.g. in South Australia the water allocation must provide for a quantity of water that is at least equal to the water required to fully offset the impact of the forest on the relevant water resource: s169D. This quantity is calculated by reference to the hydrological values in the relevant water allocation plan: ibid and South East Natural Resources Management Board, Water Allocation Plan For The Lower Limestone Coast Prescribed Wells Area (November 2013) p111 (method for calculating the amount of recharge interception and direct draw of commercial forests based on location, depth to water table and forest type).
69 SKM and CSIRO, Progress in Managed Aquifer Recharge in Australia (Waterlines Report Series No 73, March 2012), 20; Environmental Protection Authority, Strategic Advice on Managed Aquifer Recharge using Treated Wastewater on the Swan Coastal Plain (Bulletin 1199), October 2005, i; Department of Water, ‘Operational Policy 1.01: Managed aquifer recharge in Western Australia’ (2011) 31.
70 Environmental Protection Authority, Strategic Advice on Managed Aquifer Recharge using Treated Wastewater on the Swan Coastal Plain (Bulletin 1199), October 2005, i.
71 Ibid.
50. The Water Corporation’s 3-year groundwater replenishment trial at Beenyup provides a useful case study of how the current regulatory framework can be used to regulate managed aquifer recharge. The trial, which ended in December 2012, involved the injection of recycled wastewater, treated to drinking water standards, into the Leederville and Yarragadee aquifers. When fully operational, the Department of Water will authorise the abstraction of an amount of water equivalent to the amount of water injected into the aquifer.

51. The current regulatory framework for the approval and ongoing regulation of the Water Corporation’s groundwater replenishment scheme, and how it was applied to the groundwater replenishment trial, is summarised in the table below.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Approval</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injection</td>
<td>Works approval under Environmental Protection Act 1986 (WA)</td>
<td>Works approvals regulate commencement of activities that represent a pollution risk. Required for “prescribed premises” listed in the Environmental Protection Regulations 1987. Works approval required for the trial on the basis that the water recycling plant and injection bore fall within the prescribed premises category of “sewage facilities”.</td>
</tr>
<tr>
<td>Licence under Environmental Protection Act 1986 (WA)</td>
<td>Licenses regulate ongoing operation of activities that represent a pollution risk. Required for “emissions” (defined to include “discharge of waste”) from prescribed premises. Licence granted for the trial, notwithstanding DEC view that injection of drinking water quality water is not a “waste” or “emission” for the purposes of the Environmental Protection Act 1986 (WA).</td>
<td></td>
</tr>
<tr>
<td>Bore construction licence under RIWI Act</td>
<td>Regulates construction or alteration of artesian wells and non-artesian wells in proclaimed areas.</td>
<td></td>
</tr>
<tr>
<td>Approval under Health Act 1911 (WA)</td>
<td>Regulates construction or installation of “apparatus for the treatment of sewage.”</td>
<td></td>
</tr>
</tbody>
</table>

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73 Information in the table has been drawn from relevant legislation and Groundwater Replenishment Trial Interagency Working Group, ‘Groundwater Replenishment Regulatory Framework’ (2012). See also Water Corporation, above n 67.
74 Environmental Protection Act 1986 (WA) s 52.
75 Environmental Protection Regulations 1987 (WA), sch 1, item 54.
76 Environmental Protection Act 1986 (WA) ss 56, 3.
78 Rights in Water and Irrigation Act 1914 (WA), ss 26A, 26B. See also s26D.
The Department of Health considered the water recycling plant to be an “apparatus for the treatment of sewage.”

| Extraction | Licence to take water under RIW1 Act | Regulates the taking of artesian groundwater and non-artesian groundwater in proclaimed areas. Intended that the Department of Water will issue new licences to authorise abstraction of a volume of groundwater equivalent to the amount of recharged groundwater |

52. This combination of regulatory mechanisms, supplemented by the memorandum of understanding entered into between the Water Corporation and relevant departments, is likely to be sufficient to govern the Beenyup groundwater replenishment scheme. However, these arrangements would not be adequate as a general regulatory scheme to regulate all managed aquifer recharge operations.

53. The Position Paper states (p29) that “At this point, there is nothing preventing someone from injecting (non-contaminated) water into the ground, even if this affects the quantity or quality of the water resource, other water users or the environment.” While it might be more legally accurate to say that there is nothing preventing someone from injecting non-contaminated water from premises other than the classes of prescribed premises described in Schedule 1 of the Environmental Protection Regulations 1987 (WA), the central point made by the Position Paper is sound: there is a regulatory gap concerning groundwater recharge that needs to be filled.

54. The question then becomes how to best regulate the kinds of activities referred to in paragraph 47 above. One option would be the minimalist approach of simply establishing a new “recharge licence” requirement. This would have the advantage of filling the regulatory gap concerning recharge while not disrupting existing regulatory arrangements.

55. Another option would be to have one comprehensive licence that would involve an assessment of all impacts and would authorise all aspects of managed aquifer recharge.

79 Health Act 1911 (WA) s 107; Health (Treatment of Sewage and Disposal of Effluent and Liquid Waste) Regulations 1974.
80 Groundwater Replenishment Trial Interagency Working Group, above n 60, 12-13.
81 Rights in Water and Irrigation Act 1914 (WA), s5C.
82 We think the better view is that a discharge of water from prescribed premises does need to be licenced, even if that water is of drinking water quality: see Environmental Protection Act 1986 (WA), s 56, s 3 (definition of “waste” includes “matter...whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment”); compare Groundwater Replenishment Trial Interagency Working Group, above n 72.
83 See Water Act 2007 (ACT) ss47-51 for example of recharge licence provisions.
schemes, including well construction, injection and withdrawal of groundwater. If this approach were taken the Act should provide that a licence could only be granted with the concurrence of the Ministers responsible for the administration of the *Environmental Protection Act 1986* (WA) and *Health Act 1911* (WA) (or authorised delegates of the Ministers). This would ensure that health and environmental issues are fully addressed in the licence assessment and condition-setting process.\(^{84}\)

56. Under either approach, it may be prudent to amend the definition of “groundwater” in the RIWI Act to ensure that it is possible to regulate the extraction of water from managed aquifer recharge schemes. It is arguable that water that has been injected for later recovery is not presently covered by the RIWI Act.\(^{85}\) It is interesting to note in this regard that three Australian jurisdictions have taken the precaution of expressly defining groundwater to include water that has been pumped or diverted into a well for storage purposes.\(^{86}\) At present the RIWI Act does not do this.

57. Finally, we flag two issues that we have not yet had an opportunity to consider in any detail, but which we suggest the Department should consider in the development of the Act:

   a. How should how recharge operations that benefit groundwater users (e.g. by preventing saline intrusion) be paid for? In southern California, levies on groundwater use have been imposed to pay for managed aquifer recharge operations that protected a coastal basin suffering from saline intrusion.\(^{87}\) Should powers to impose similar levies, where they are supported by affected water users, be available in Western Australia?

   b. Should the Act have the capacity to allocate rights to take stormwater, and perhaps even wastewater? This issue was raised in 1996 by a COAG taskforce considering wastewater and stormwater management, which recommended that “comprehensive systems of water allocations and entitlements, developed and implemented by jurisdictions under COAG water reform framework, address the

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\(^{85}\) Katie Pope and Alex Gardner, ‘Managed aquifer recharge using alternative water sources in Western Australia: a property rights approach’ (draft), 21-22.

\(^{86}\) *Water Act 2007* (Cth) s 4; *Natural Resource Management Act 2004* (SA) s 3; *Water Management Act 1999* (Tas) s 3.

allocation of and entitlements to urban stormwater and the wastewater stream, particularly the impact of their use on the rights of others, including the environment.”

We note that recently-released exposure draft of the Water Bill 2014 (Vic) provides for the vesting of stormwater in local governments and the Victorian Water Corporation, and the licensing of stormwater use in targeted areas.

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88 Taskforce on COAG Water Reform, A National Framework for Improved Wastewater Reuse and Stormwater Management in Australia (1996), 13 (recommendation 3).
Assigning Risks for Changes in Allocation

46. The following risk assignment framework is intended to apply to any future reductions in the availability of water for consumptive use, that are additional to those identified for the purpose of addressing known overallocation and/or overuse in accordance with pathways agreed under the provisions in paragraphs 41 to 45 above.

47. The Parties agree that an effective risk assignment framework occurs in the context that: the new share-based water access entitlements framework has been established; water plans have been transparently developed to determine water allocation for the entitlements; regular reporting of progress with implementing plans is occurring; and a pathway for dealing with known overallocation and/or overuse has been agreed.

48. Water access entitlement holders are to bear the risks of any reduction or less reliable water allocation, under their water access entitlements, arising from reductions to the consumptive pool as a result of:
   (i) seasonal or long-term changes in climate; and
   (ii) periodic natural events such as bushfires and drought.

49. The risks of any reduction or less reliable water allocation under a water access entitlement, arising as a result of bona fide improvements in the knowledge of water systems’ capacity to sustain particular extraction levels are to be borne by users up to 2014. Risks arising under comprehensive water plans commencing or renewed after 2014 are to be shared over each ten year period in the following way:
   i) water access entitlement holders to bear the first 3% reduction in water allocation under a water access entitlement;
   ii) State/Territory governments and the Commonwealth Government to share one-third and two-thirds respectively reductions in water allocation under water access entitlements of between 3% and 6%; and
   iii) State/Territory and Commonwealth governments to equally share reductions in water allocation under water access entitlements greater than 6%.

50. Governments are to bear the risks of any reduction or less reliable water allocation that is not previously provided for, arising from changes in government policy (for example,
new environmental objectives). In such cases, governments may recover this water in accordance with the principles for assessing the most efficient and cost effective measures for water recovery (paragraph 79 (ii) (a) refers).

51. Alternatively, the Parties agree that where affected parties, including water access entitlement holders, environmental stakeholders and the relevant government agree, on a voluntary basis, to a different risk sharing formula to that proposed in paragraphs 48 - 50 above, that this will be an acceptable approach.
Comment on Government of Western Australia Department of Water securing Western Australia’s water future position paper - reforming water resource management (September 2013) Submission by Natalie Brown, PhD candidate, Law School UWA

1. Introduction
My interest in water law reform is specifically focussed on the mining and unconventional gas resource industries (resource industries) impacts upon groundwater resources. The cumulative impacts of the iron ore mining industry on the Pilbara region, particularly on the Fortescue Marsh are important issues for Western Australian water reform to address.\(^1\) The comments I make below are specifically in regard to the regulation of the resources industries, with particular focus on the iron ore mining industry in the Pilbara region.

2. Background
The Western Australian (WA) iron ore mining industry, which is largely situated in the Pilbara region, currently produces around 450 mega tonnes (mt) of iron ore per annum, production is projected to double (900mt) over the next ten years.\(^2\) In real terms this represents yellow mining ore trucks, which carry 300 tonnes (t) lined up nose to tail circumnavigating Australia three times every year.

Clustered mining projects, such as those around the Fortescue Marsh, exacerbate the impacts of this level of production because the issues associated with mining below the water table and closure issues regarding mining voids accumulate (cumulative impacts).

3. Licensing allocations
I note the Securing Western Australia’s water future Position paper-reforming water resource management (SWAWFPP) allows water entitlements for measured water resources subject to an allocation plan, and licenses when the water resources are not measured and allocated. The Pilbara region is subject to the Pilbara Groundwater Allocation Plan (PWAP).\(^3\) The fractured rock aquifers in

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\(^1\) Government of Western Australia, Department of Water, Pilbara groundwater allocation plan (Water resource allocation and planning report series, report no 55 October 2013) 34; Government of Western Australia Environmental Protection Authority, Environmental and water assessments relating to mining and mining-related activities in the Fortescue Marsh management area (Report 1484, July 2013).

\(^2\) Government of Western Australia Department of Water, Pilbara regional water plan 2010—2030 Supporting detail (June 2010) ix; For example, see Government of Western Australia Department of State Development, ‘Western Australia Economic Profile’ (2013) 11.

\(^3\) Pilbara groundwater allocation plan (Report 55), above n 1.
the Fortescue March cumulative impact area (FMCIA) do not set allocation limits, presumably because the aquifers are not yet quantified, therefore proponents are not subject to dewatering limitations set by an allocation and projected sustainable yield of the water resource.

My questions are:

1. Given the current and projected rate of production, what timeframe is proposed to set allocation limits for fractured rock water resources in the Pilbara region that are being impacted upon, and subsequently impact on the Fortescue Marsh?
2. Who (the proponent or the State Government) will bear the responsibility for quantifying, mapping, and modelling the aquifers so allocation limits can be set?
3. If quantifying fractured rock aquifers in the Pilbara is not possible or practical what values will be used to set allocation or license limits on abstraction and discharge?
4. How the water law reform proposes to address allocation and sustainable yield issues when information to set allocation limits becomes available regarding the fractured rock aquifers, if, as the SWAWFPP proposes licenses are granted for up to 40 years (SWAWFPP [3.1.3])?
5. I note the current method of licensing is a ‘case by case’ basis, does the reform legislation intend to continue with this method for fractured rock aquifers in the Pilbara region, and if so how will this method address cumulative impacts? (See submission on cumulative impacts below).
6. Will the proposed reform license provisions distinguish aquifer water qualities? While a majority of fractured rock aquifers range from low to high saline, some groundwater obtained through dewatering is potable and useful for general purposes such as domestic, commercial or agricultural use. In this regard, some fractured rock water resources have potentially a higher resource value than others.
7. I note SWAWFPP at page 16 states licences may be ‘retained for dewatering purposes’ and I would like what that means clarified.

4. Relationship between Environmental Protection Authority and Department of Water

It is my understanding that the current arrangement requires the Department of Water (DOW) not to issue a 5C water license pursuant to the Rights in Water and Irrigation Act 1914 (WA) (RIWI) until the proponent has received an environmental impact approval from the Environmental Protection Authority (EPA). The DOW advises the EPA on appropriate water license conditions to address dewatering, and reviews the proponents water management plan (WMP) and ensures the license reflects the Environmental Impact Assessment (EIA) approval conditions. I understand the discharge of excess dewatering is managed under the Environmental Protection Act 1986 (WA) (EP Act) pt 5 by the Department of Environmental Regulation (DER). This arrangement addresses the State Agreement issues that may require the DOW to issue the proponent with a water license, and the fact that a RIWI 5C license only refers to abstraction and not to release. However, it would appear a more streamlined and efficient approach to provide for the water license provision to apply all necessary conditions and for the EPA to grant final approval.

4.1. Relationship between new reforms and State Agreements

Furthermore, it would appear pertinent in this regard that the new water legislation prevail over future and past State Agreements as does the EP Act, this would allow clarity around water resource licensing and entitlements in the resource industry. Many State Agreements allow for the proponent to have priority rights over third parties and/or seek alternative water sources if the current water resource used by the proponent is appropriated by government. It is my understanding that currently the difficulties between the rights in State Agreements and the prevalence of the agreement over the RIWI (if the RIWI is inconsistent with the agreement)

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4 Ibid, 18 Table 3. NB the Hamersley-Fortescue aquifer is set at 1000 000 kl pa but this is not a fractured rock aquifer.
5 Ibid.
6 Ibid, 34.
is managed by the EP Act prevailing over the State Agreement and the applying conditions to the proponents water management plan and RIWI SC license. However, it would appear a more efficient method would be for both the EP Act and the water reform legislation to prevail over State Agreements. The National Water Initiative (NWI) would give good grounds for this,7 as a COAG agreement that the State’s legislation must reflect the agreement, as required by the implementation plan.8 Despite the fact that the NWI agreement acknowledges that the resource industry may be subject to special circumstances that ‘require specific management arrangements’ (NWI cl 34), WA is still obligated by the agreement to implement consistent policies to the resource industry, as cl 34 also states:

‘In this context, the Parties note that specific project proposals will be assessed according to environmental, economic and social considerations, and that factors specific to resource development projects, such as isolation, relatively short project duration, water quality issues, and obligations to remediate and offset impacts,’ [emphasis added].

My questions are:
1. Will the reform legislation prevail over State Agreements?
2. Does the reform intend to streamline the current process by providing the water license applies to abstraction, water release, aquifer recharge, and other issues as determined by best practice?

5. Cumulative Impacts
I understand the EPA is currently reviewing EIA conditions relating to groundwater in the FMCIA to address cumulative impact issues in that area. It would seem appropriate in light of the issues addressed under the heading ‘Cumulative Impacts’ that a more streamlined approach should be taken, conferring all water management responsibility to the DOW or preferred independent agency, while retaining final approval by the EPA. In this way data and expertise in groundwater management could be combined and centralised.

5.1. Water Management Plan Consistency
I have been informed that there is no consistent groundwater modelling methodology that has to be applied to a water management plan (WMP). WMP’s often use different modelling techniques for the same issue, however different models are not always comparable with each other. In addition, some models are not suitable to some circumstances, and the reliability of the groundwater modelling software will vary. Furthermore, there is no requirement for a groundwater modeller developing a WMP to have a particular level of expertise. Expertise may vary between a three day course to 25 years’ experience and multiple degrees in engineering, geology, hydrogeology, and computer sciences. The lack of consistent modelling in WMP’s is problematic. Difficulties arise in legal analysis because the inconsistency makes it difficult for a non-scientist to distinguish between a groundwater model that does sufficiently analyse risk to groundwater resources and one that does not.9 Additionally, proponents who need to develop groundwater cumulative impact management

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9 Compare for example, Barrington -Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure (2012) 194 LGERA 113; [2012] NSWLEC 197, SHCAG Pty Ltd v Minister for Planning and Infrastructure and Boral Cement Ltd [2013] NSWLEC 1032. The contrasting cases illustrate the lack of consistency in relation judicial interpretation of approved modelling techniques in WMPs. Predictive WMP’s are complex and demonstrate the knowledge gap between science, legislation, and judicial interpretation.
plans by sharing data will not always have comparable models. Reform to address consistency in WMP’s could occur through the water law reform, or amendment to the EP Act, however I suggest that the water law reform and DOW are ideally situated and suited for this task. A universal groundwater model would need to have statutory force and not merely be a policy or guideline. Furthermore, the universal model would also have to reflect current best practice and therefore be adaptable as best practice evolves. Reforming legislation needs to allow the DOW (or preferred agency) to develop, apply and enforce a universal model. Additionally the reform would need to allow for adaptation of the universal model on a periodic basis to reflect best practice.

My questions are:
1. Will the water law reform provide for an agency to create a consistent groundwater analysis methodology that reflects best practice in groundwater modelling that has statutory force and thus requires resource industry compliance? I note the National Water Commission (NWC) provides a groundwater modelling guideline.\(^{10}\)

5.2. Data sharing, cumulative impacts and closure plan management
The DOW Pilbara groundwater allocation plan (PGAP) identifies the data sharing issue, and has developed ‘multi-agency guidance’ but is still ‘working towards a data sharing process’.\(^{11}\) Data sharing by proponents to manage cumulative impacts poses a particularly difficult problem for proponents due to the possible confidential nature of the information and possible liability under the Competition and Consumer Act 2010 (Cth), for example s 44ZZRD which limits the type of arrangements and information that can be shared by competitor companies. The State is unable to provide legislative protection under the water reform legislation because the State legislation will not prevail over the Commonwealth legislation. Data sharing is necessary to manage cumulative impacts that affect the area currently, such as discharge of dewatering, and also to properly prepare closure plans where multiple mine voids will impact on the one area.\(^{12}\)

The SWAWFPP does not propose the reform will allow the DOW or other agency to maintain a database, or require necessary information from proponents to inform such a database. Good groundwater management requires an extensive database and the DOW is well positioned to provide or house such an agency. The maintaining of an accessible database by the DOW or independent agency would alleviate many of the problems faced by the proponents in managing cumulative impacts. I refer to the database reforms in the Water Act 2000 (Qd) ch 3A, which provides extensive powers to acquire data from, and require the proponent to produce particular data,\(^{13}\) for the purpose of maintaining a comprehensive groundwater database. Maintenance and development of the database is provided for by an industry levy.

Furthermore, an independent agency (either as part of the DOW or housed within the DOW or other department) could manage the FMCIA. The Queensland Office of Groundwater Impact Assessment (OGIA) is an independent statutory agency. The Water Act 2000 (Qd) provides that when a cumulative impact area (CMA) is declared the OGIA develops the groundwater impact assessment (underground water impact report (UWIR)), the UWIR is forwarded to the Department of Environment and Heritage Protection (EHP) the equivalent of the WA EPA, for final approval. An UWIR has statutory force and the proponent must comply with the UWIR and penalties apply for


\(^{11}\) Pilbara Groundwater Allocation Plan (Report no 55), above n 1, 34.

\(^{12}\) For importance of risks re cumulative impact and closure issues see Pilbara Groundwater Allocation Plan supporting detail, above n 2, 36.

\(^{13}\) Water Act 2000 (Qd) ss 456-460.
non-compliance.\textsuperscript{14} Enforcement and compliance is administered by the EHP. The OGIA is funded by the Resources Industry on a user pays basis. I have been anecdotally informed that the Resources Industry was not resistant to this model and has responded positively to the reform. I was also informed, it is the independent nature of the OGIA (industry funded rather than government funded and therefore providing a service to industry) that has promoted industry confidence and engagement with the reform. This is supported by the legislation giving statutory force to the OGIA’s data collection powers and UWIR. An independent agency that is responsible for managing cumulative impacts, maintaining a data base, consolidates expertise, ensures that all proponents are applying with best practice procedures, promotes transparency and accountability,\textsuperscript{15} and thus ensures public confidence. While the OGIA has only been fully operational for a relatively short term, similar independent statutory agency models based on industry levies with a purpose of ensuring consistent industry best practice, have proved successful over a longer term for example NOPSEMA.\textsuperscript{16} This type of reform, involves independent science directly in the regulatory process, synthesising the institutes of law and hydrogeology, this maybe a necessity if law reform is to provide adequate controls that keep pace with the expanding Resources Industries. The OGIA may provide a suitable model for managing resource industries’ impacts on groundwater and in particular the iron ore industries’ cumulative impacts on the Fortescue Marsh.

My questions are:

1. Will the water law reform provide for the establishment of a government or independent statutory agency to manage cumulative impact areas, and/or all groundwater management associated with the resource industries? Such an agency would alleviate the current problems managing cumulative impacts and WMP/groundwater modelling inconsistencies.
   a. If not, what is the proposed alternative for management of cumulative impacts?

2. Does the water law reform propose to provide for a comprehensive database of groundwater use and management? A database is central to facilitating resource industry data sharing and providing for transparency and accountability to engender public confidence.

6. Dewatering discharge and aquifer recharge
My understanding is that currently aquifer recharge is not regulated as the EP Act only pertains to injection of contaminated fluid (SWAWFP [3.4.9] page 29). My understanding is the new reform regulation will be triggered if the risk is identified.

My questions are:

3. How are the risks identified? For example in fractured rock aquifers what values will determine risk of connectivity is indeterminate. Considering the slow movement of groundwater how will long term impacts be evaluated, for example the merging of different water qualities?

4. Who will identify the risks?

5. Will the new reforms manage aquifer recharge by the resource industry (particularly in the Pilbara) by requiring recharge in specific areas to minimise cumulative impacts and maximise remediation benefits?

7. Shale, tight, and coal seam gas


\textsuperscript{15} For support of these principles see Pilbara regional water plan supporting detail, above n 2, 26-27.

\textsuperscript{16} The National Oil and Petroleum Safety and Environmental Management Authority is a Commonwealth authority established on 1 January 2012 in response to the report on the Montara oil spill. <www.nopsema.gov.au/> For information on levy system and database see <http://www.nopsema.gov.au/resources/presentations/>
I note the reform ‘does not cover water injection activities outside of a water resource which are regulated by other legislation’ (SWAWFPP [3.4.9] page 29). If WA intends to develop the Canning Basin shale gas deposit,\textsuperscript{17} (unconventional gas) it would seem inefficient to leave this area of groundwater legislation to be regulated by the Environment Protection and Biodiversity Act 1999 (Cth),\textsuperscript{18} if the State intends to regulate groundwater impacts of other resource industries. It would seem logical to provide for the reform to provide some measure of regulation of the industry. Should the proposed reform adopt a similar model to Queensland for the Pilbara region iron ore industry, this same agency could easily adapt to providing a similar service and regulation of the unconventional gas industry in the future.

8. Closure plans
Legacy issues are a key problem for the resources industry, groundwater is particularly vulnerable to inconsistent or insufficient closure planning because the full impacts may not be realised for hundreds of years. The SWAWFPP is silent on this issue. I suggest as above an independent agency could provide for consistent closure plans that take into account cumulative impacts.

My questions are:
1. Will the water law reform provide some protection for legacy issues such as ‘make good’ compensation and/or remediation provisions?

9. Enforcement
1. I understand that separate authorities enforce separate acts. I note the SWAWFPP [3.4.2] intends to consolidate current rules on water quality. I suggest that rules regarding enforcement are also consolidated. I have been informed anecdotally that currently the Department of Mines and Petroleum (DMP) conducts most inspections but can only issue notices of infringement under the legislation administered by that department. It would seem cost effective and efficient if the DMP agents (or other department inspectors) could issue notices of breach for other legislation. For example a DMP inspector could issue infringements under legislation administered by the EPA, DOW or Department of Environmental Regulation, such as EIA or water license breaches. I understand there are a number of memorandums of understanding (MOU) between departments both current and pending; however it is my opinion delegation for enforcement (ie issue of notices of infringement) would require statutory provision.

My questions are:
2. Will the new reforms consolidate enforcement procedures by providing for delegation between departments for enforcement provisions? And/or consolidate enforcement inspections and issue of infringements for all legislation through a single agency?

Thank you for your time and consideration
Natalie Brown (University of Western Australia, PhD candidate)

\textsuperscript{17} Natural Gas (Canning Basin Joint Venture) Agreement Bill 2013 (WA).
\textsuperscript{18} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 131AB, 505C.
We wish to comment on the Water reforms. With the current water licence we were advised that if we did not use all our water allocation in the year you could lose that amount that has not been used. With seasonal conditions it does not warrant using all your water allocated. Some years you might require more if it comes in very dry. We believe that if you have been granted a water allocation, that it should remain the same wether you use it or not. Some years you need it and some years you don’t.

Regards,

Richard & Fran Brown
Yaringa Station
Carnarvon

(08) 9942 5952
We are self-supply water users in agriculture in the Warren and Donnelly River catchments and object to the plans of the Department of Water in its Position Paper to apply water markets that will increase the cost of water as an input to agriculture and reduce the competitiveness of our produce. We request an increase in the allocation of water to agriculture to prevent the introduction of costly water markets and associated ‘red tape’.

1. The Department of Water has restricted the water available to agriculture in the ‘food bowl of the South West’ to force ‘water markets’ policy onto water users.

Over 90% of the water in the Warren and Donnelly River catchments is water for the environment flowing into the Southern Ocean. Two thirds of this area is forest where all of the water is for the environment. In the third that is cleared for agriculture only 40% of the water has been allocated to agriculture and other uses and 60% is allocated to the environment. The Department of Water forced this imbalance onto agriculture in 2012 through their Warren Donnelly Surface Water Allocation Plan (2012). By restricting water available for agriculture to 40%, most areas are now fully allocated or nearing fully allocated. Thus the Department of Water is forcing agriculture into ‘water markets’ to pay for water by auctions, tenders and trades. This will enable the Department of Water to ‘tick a box’ for compliance with the dogma of the National Water Initiative. At our expense! Managing water markets and the associated increased ‘red tape’ will also assist the Department of Water to justify its $83 million budget and 452 staff. At our expense!

2. More water must be allocated to agriculture in the ‘food bowl of the South West’ by revising the Warren Donnelly Water Allocation Plan.

Our area is designated ‘Priority Agriculture’ by the State Planning Commission and water for agriculture should have priority over the environment. We request the Warren Donnelly Surface Water Allocation Plan (2012) be revisited to provide 60% of water for agriculture and other uses and 40% for the environment. This will provide sufficient water for growth of agriculture and maintenance of property values. There would then be no justification for imposing initial purchase of water allocations from the State by auction and tender, restrictive consumptive pools requiring purchase of water from other licence holders, separation of water licence from land title with uncertain outcomes, and mandatory metering, all of which the Position Paper advocates.

3. The Warren Donnelly Surface Water Allocation Plan must be a statutory Plan to provide security of water access for agriculture.

The Department of Water ignored repeated requests that the Warren Donnelly Surface Water Allocation Plan (2012) be a statutory plan prepared in accordance with the provisions of the Rights in Water and Irrigation Act. Water licence holders demanded the security for water entitlements that can only be provided by a statutory Plan. The Department has now done a ‘backflip’ on this admitting in the Position Paper (page 17) that “Administrative allocation plans provide less security to licence holders as the plans may be changed with administrative, rather than legislative due process. Decisions made based on an administrative plan are not as certain as those based on a statutory plan, and there may be additional costs to water users and the government if those administratively based decisions are appealed.”. The Warren Donnelly Surface Water Allocation Plan must be converted to a statutory Plan under the Rights in Water and Irrigation Act, without delay in 2014.


The proposed legislation covers separation of water licence from land title, consumptive pools for periodic determination of how much water can be taken from private dams, water auctions and tenders, mandatory metering, and what types of dams are to be included, affecting property rights. These and many other provisions will require detailed consideration by water users affected in the ‘food bowl of the South West’. With controversial legislation, the ‘devil is in the detail’; thus it is vital the Minister for Water issue a draft ‘Green Bill’ for public comment.

Yours sincerely

Donnette Edwards
Tellarup Brook Farms
SUBMISSION BY ALEX GARDNER, UWA LAW SCHOOL
ON THE WATER RESOURCE MANAGEMENT REFORM
POSITION PAPER

INTRODUCTION
We thank the Department of Water for the opportunity to comment on the Position Paper. This submission and the accompanying submissions by:

Michael Bennett,
Madeleine Hartley and
Natalie Brown
together comprise the selective outputs of the water resources law research team at the University of Western Australia Law School. Each of us has prepared submissions that draw upon our research work, which has been supported by the National Centre for Groundwater Research and Training. Michael’s submission has also drawn on research undertaken by Katie Pope, PhD candidate in the first half of 2013 with the Co-operative Research Centre for Water Sensitive Cities. In addition, we attach a copy of a paper prepared by Sarah Robertson, “A Regulatory Framework for Monitoring and Enforcement of Water Access Rights in Western Australia”, which is to be published in the University of Western Australia Law Review in December 2013.

We have not attempted to comment comprehensively on the content of the Position Paper. While it is necessarily general in many of its statements covering a broad range of issues, our submissions seek to focus in more detail on core issues that we have been addressing in our research. We look forward to seeing the Water Resources Bill in 2014, and to the opportunity to comment further on how the proposed legislation spells out the implementation of policy statements in the Position Paper.

The comments that follow in this document have been prepared by Alex Gardner.

OBJECTIVES
The guiding objective of the water resources legislation should be clearly stated as the “ecologically sustainable development” (“ESD”) of water resources. This has been the guiding purpose of the great majority of natural resources and environmental policy and legislation over the past 20 years. For example, in relation to water resources, it is found in:

- The National Strategy for Ecologically Sustainable Development 1992;¹
- The Intergovernmental Agreement on the Environment 1992;²
- The CoAG Water Reform Framework Agreement 1994;³ in various different guises;
- The Intergovernmental Agreement on a National Water Initiative 2004;⁴ in various places expressed as “environmental sustainability”;

² http://www.environment.gov.au/node/13008

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The water resource legislation of New South Wales (s.3), Queensland (s.10) and South Australia (s.7); and

Water Act 2007 (Cth), ss.3 and 21(4).

In the existing water resources legislation of Victoria, Western Australia and the Australian Capital Territory, the concept of sustainability of water resources management is included without the explicit use of the ESD formula. In the Tasmanian legislation, the concept of sustainability is incorporated from the land use legislation into the water resources legislation. The current Western Australia statutory formula for sustainability (RiWI Act s.4) is quite strong because it states as the primary proposition the management of water resources for their sustainable use and development to meet the needs of current and future users and for the protection of their ecosystems and the environment in which water resources are situated.

The Position Paper does not give “sustainability”, let alone ESD, the same importance: see Figure 1, Vision, objectives, principles and outcomes, p.2. This is to be regretted for the long term sustainability of water resource management. While the proposed reforms are undoubtedly important to give greater security of water resource access title to those who invest in economically productive activities, it is fundamental to the sustainability of economic activity that the ecological sustainability of our water resources systems is preserved and, in some cases, restored. The Position Paper does not intend to represent specifically the statutory language of the Water Resources Bill, but it may well have an influential effect on drafting instructions and perceptions of values and principles to be reflected in the statutory language. For this reason, it is submitted that the Department and the Government must give careful thought to ensuring that the statement of objectives and guiding principles in the Water Resources Bill recognises:

the fundamental importance of ecological sustainability in the management of water resources for their use and development to meet current and future needs;

that over-allocated and overused water resources should be returned to an environmentally sustainable level of take and that the precautionary principle will be applied in making any new allocations to consumptive uses purposes; and

that, in implementing the National Water Initiative reforms, the provision of water to meet agreed environmental and other public benefit outcomes will have the same degree of legal security as water access rights for consumptive use.

There has been much debate about the legal effect of statements of statutory objectives and principles: see A Gardner, R Bartlett and J Gray, Water Resources Law, LexisNexis Butterworths, 2009, chapter 4. While their legal importance should not be underestimated, it is clear that statutory objectives will not have the effect of providing a legal measure of what any particular water resource allocation should be and that courts of law will not entertain arguments about the substance or merits of any management decision-making by executive government. The effective limits on resource allocation are appropriately defined in water resource plans, which the Position Paper proposes as a key element of the reforms. The statutory objectives will be a guide to what factors must be considered in decision-making and will present the community ethic and goals for governmental decision-making. It is essential at this stage of the State’s economic and social development that the pre-eminent ethic is one of ecological sustainability, especially as we confront the challenges of climate change impacts on water resources.
WATER QUALITY

The Position Paper says at 3.4.2 that current rules on water quality, which are spread over several pieces of legislation, will be consolidated and an explicit requirement included in the new legislation that water quality is to be taken into account in all applicable decision-making processes. It would be helpful to have some better guide as to what are the current rules being referred to. It is also essential that this reform process take steps to strengthen water quality protection, especially from diffuse source pollution.

The essence of this submission is that the State needs to include powers for planning for water quality objectives and targets in the form of Total Maximum Pollutant Loads, as per the National Water Quality Management Strategy, Australian Water Guidelines, and provide for the creation of mechanisms for allocating particular responsibilities for reducing pollutant load emissions, including from diffuse sources. In support of this submission, I include extracts from a draft paper by Alex Gardner and Marie Waschka, “Diffuse Source Pollution and Water Quality Law in Australia: Why the reticence to regulate?”, December 2013. The following extracts from Parts 2 (Regulatory Approaches) and 3.3 (Case study of the South West of WA) of the draft paper endeavour to explain the regulatory methods available for addressing diffuse source pollution, especially from agriculture, which is a serious problem in the south-west of WA. In February 2014, we could make available to the Department a full revised draft of the paper.

2. REGULATORY APPROACHES

What regulatory measures have been taken or might be available. Various policy and regulatory approaches could be taken and these approaches, and factors influencing their success, are as complex as the issue of diffuse water pollution itself. Key challenges are to agree on broad water quality objectives and targets to guide management and then translate them into effective policy and regulatory tools that are adequately implemented and enforced. In their review of policy instruments for addressing diffuse water pollution, Gunningham and Sinclair (2005) identify the following as possible tools or options: education and information initiatives; voluntary instruments such as best management practices; economic instruments such as taxes or levies; regulatory instruments such as enforceable emissions caps, environmental management plans, bans or other controls on farm inputs; and, planning instruments, such as rezoning or land management covenants. These options range from voluntary (education, training, information) at one end of the spectrum to regulatory (legally binding) at the other, with self-regulation (for example, industry codes) in between, depending on the capacity for these measures to be enforced. At an individual farm or business scale, this review by Gunningham and Sinclair categorised measures into three types of standards that can be applied to reduce diffuse water pollution: performance based standards such as emission limits; specification standards such as improved practices or designs (for example, limits on nutrient inputs or improved technology) that are known to reduce pollution; and, process standards which relate to management decision making processes (such as farm planning). Overall, Gunningham and Sinclair (2005) make a number of observations about the effectiveness of various approaches to managing diffuse water pollution, including that:

difficulties in measuring diffuse pollution emissions, and quantifying reductions required at a property level, limit or negate that practicality of some policy options;

‘process standards’ such as farm management plans, nutrient management plans, or
codes of practice have been the preferred approach in many cases, and the success of
these approaches is dependent on their scope, implementation and compliance;
regulating agricultural inputs through quotas and bans has proven to be successful and
has the potential to be very effective; however, this approach can potentially create a
large administrative burden in terms of implementation and compliance; and
policy makers have largely sought to address diffuse pollution through voluntary
mechanisms; however, voluntary approaches alone have been ‘manifestly unsuccessful’
in reducing diffuse water pollution from agriculture.\(^8\)

There is evidence that, to be effective, policy and regulatory frameworks for diffuse water
pollution must be ‘purpose-built’ and context specific, including a range of appropriate measures
and instruments (voluntary, economic, regulatory and planning), and that no single approach will
work in all situations.\(^9\) Experience shows that neither voluntary nor regulatory measures alone
are the solution to effectively reducing diffuse water pollution.\(^10\) According to Chittock and
Hughey (2011), there is a ‘reciprocal’ relationship between voluntary and regulatory approaches
and, whilst there is ‘little evidence on the effectiveness of voluntary approaches’ alone to reduce
diffuse water pollution, they can effectively be used to support regulation.\(^11\) Suter et al (2010)
also view regulation and voluntary approaches as being complementary, finding that voluntary
programs are more effective under the threat of regulation.\(^12\) For example, there is some evidence
that the ‘threat’ of a regulation (or other mandatory mechanism such as a tax) where voluntary
mechanisms are unsuccessful, can induce adoption of voluntary programs, and contribute towards
their success.\(^13\) Chittock and Hughey (2011) identified the ‘threat of credible enforcement’ as
one of a number of critical factors in the design of successful voluntary approaches to reducing
pollution.\(^14\) Other factors for success of these programs are: collaboration with industry, adequate
and consistent funding, single sector focus, setting credible targets, provision of information and
resources, effective monitoring, apparent participant benefits, and reporting of results.\(^15\) The case
studies analysed below provide examples of approaches, challenges, and lessons learnt in relation
to managing and regulating diffuse water pollution. Arguably, each case study demonstrates a
lack of a key regulatory mandate, perhaps a national mandate, to drive the suite of measures that
may be used.

Australia does have a National Water Quality Management Strategy (“NWQMS”).\(^16\) It
is an evolving set of guidelines, developed since 1992, that provides guidance on how water

51-81; M Waschka and A Gardner in “Using Regulation to Tackle the Challenge of Diffuse Water Pollution and its Impact on the Great
Barrier Reef” (20112) 15(2) Australasian Journal of Natural Resources Law & Policy 109, 114.

\(^9\) Donald Chittock and Kenneth Hughey (2011) ‘A review of international practice in the design of voluntary pollution prevention programs’ in
Journal of Cleaner Production 19 (2011) 542, 543.

Management Vol 12, 221, 221

\(^11\) Donald Chittock and Kenneth Hughey (2011) ‘A review of international practice in the design of voluntary pollution prevention programs’ in
Journal of Cleaner Production 19 (2011) 542, 543.

\(^12\) Jordan Suter, et al (2010) ‘Voluntary-threat approaches to reduce ambient water pollution’ in American Journal of Agricultural Economics,
92 (4), 1195, 1195-1196

92(4), 1195-1213

\(^14\) Donald Chittock and Kenneth Hughey, ‘A review of international practice in the design of voluntary Pollution Prevention Programs’ (2011)
547, Journal of Cleaner Production 19, 542-551

\(^15\) Ibid, 547-549

\(^16\) Australian Government, Department of the Environment, “National Water Quality Management Strategy”, information available at
quality may be protected through decision-making under State, Territory and Commonwealth laws that govern activities that may impact on water quality. Thus, there are three overview documents that give an outline of the policies and principles, and their implementation, and then a suite of technical guidelines to be applied for fresh and marine water quality, drinking water, recreational water, sewerage systems, effluent management, water recycling, groundwater protection, and for managing diffuse and points sources of pollution, including from rural land uses. There are also guidelines on the procedures for setting water quality targets derived from the fresh and marine water quality guidelines, and for water quality monitoring and reporting. There are even water quality guidelines for the Great Barrier Reef Marine Park. This is not a comprehensive list. The NWQMS does not set national water quality targets nor mandate action to do so at state, regional or local levels. Any regulatory effect is for the decision of existing government agencies acting under existing legislation. There is not even a clear mandate for monitoring and reporting on water quality at a national or state level, though this may occur through state of the environment reporting and the Bureau of Meteorology’s water resources assessment and information program.

The NWQMS has recently been reviewed and recommended for continuation with significant reforms. A key issue identified in the 2011 final review report was that historical weakness in the links between water quality and water quantity in the key national water policies of the past twenty years has diminished the relevance of the NWQMS. In particular, the review found that there was a lack of a clear policy objective for the NWQMS; a need for clearer definition of roles for all parties, especially the Commonwealth Government; more efficient process for review and approval of the guidelines; a greater capacity to address emerging issues; and a better process for reporting against water quality, policy and efficiency objectives. In the present context, it is notable that the report highlighted that application of the NWQMS was seen as more effective in urban contexts, where there are more secure regulatory foundations for its implementation, and weaker in regional areas, particularly in respect of diffuse source pollution from farming and agricultural industries. The report proposed a model of reform that would give the Australian Government a greater role in a revised NWQMS.

Proposing a greater role for the national government in water quality management invites comparisons with international examples, especially other federal systems. While not highlighted in the review report, we suggest that the American experience with setting total limits on emissions that compromise water quality may offer a potential improvement in the Australian transjurisdictional regulatory effort. The approach taken by the United States towards managing diffuse water pollution is of interest to Australia because opportunities for addressing diffuse water pollution are influenced by similar governance arrangements in both countries. Australia and the US have a federal style of government and, in both cases, state governments have responsibility for natural resource management and land use regulation.

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18 Australian Government, Department of Sustainability, Environment, Water Population and Communities, KPMG report on “Evaluation of the National Water Quality Management Strategy, Final Report, December 2011”, pp.37-38. The NWQMS has been supplemented in regional areas by the strategic planning of Commonwealth-funded, State-managed programs aimed at guiding investment in natural resources management – the National Action Plan for Salinity and Water Quality (2000) and its successor, the Caring for our Country Program (2008). These programs have water quality objectives to guide investment decision-making and contained varying levels of State legislative and policy support, but their regulatory effect has been limited. Further, the effectiveness of these public investments in natural resources management has been questioned for a few reasons, including a lack of agreement on performance indicators and the means to measure the achievement of defined outcomes. See Commonwealth of Australia, Auditor General, 2008, Regional Delivery Model for the Natural Heritage Trust and the National Action Plan for Salinity and Water Quality, Audit Report 21, 2007-08 Performance Audit, Australian National Audit Office, executive summary para 13.


Unlike Australia, however, the US federal government has a major role in regulating water pollution through the federal *Clean Water Act 1972* (CWA). The CWA provides a regulatory structure for managing both point source and diffuse water pollution whilst preserving the roles of the states in water pollution control. It sets three requirements for the states in their management of diffuse water pollution:

1. the establishment of ‘Total Maximum Daily Loads’ (TMDL), which are the ‘goal setting mechanism for planning actions’;
2. the implementation of best management practices; and
3. the establishment of collaborative governance arrangements for significant estuaries in areas where catchment areas (and diffuse pollution inputs) cross state boundaries.

The TDML approach is of particular interest because it could be considered for use in Australia (in addition to existing mechanisms). It involves establishing (for individual waterways) a ‘maximum amount of a pollutant that can be ‘loaded’ into the waters in question from *all* sources – point sources, nonpoint sources, and natural background sources’ – before the health of that waterway is compromised. The TDML must also account for seasonal variations, and include a precautionary safety margin. The TDMLs are developed by the states for degraded waterways and then submitted to the federal government’s Environmental Protection Authority for approval. They are a goal setting mechanism intended to influence state planning processes, and do not regulate diffuse pollution directly. However, TMDLs influence permit conditions for point source pollution. Therefore, ‘including nonpoint pollutant loads in TMDLs means that point sources may be subject to more stringent requirements to compensate for the lack of regulation of nonpoint sources’.

Whilst the US federal government can require the states to develop TDMLs, or even develop them on the behalf of states (in instances where a TDML has not been developed or approved), they do not have the statutory power to compel states to submit TDMLs, or to enforce their implementation. The only ‘power’ that the US federal government has to motivate participation by states is by providing funding incentives (federal grant money) to compliant states. States themselves largely rely on incentive based initiatives for reducing diffuse water pollution as ‘most states lack an enforceable mechanism for reducing contributions by nonpoint sources’. Although there are many flaws to the CWA approach, including issues associated with accountability, implementation and enforcement, the CWA has provided a national, coordinated regulatory structure to address water pollution, including from diffuse sources. This approach has supported the efforts of states and, in some instances, has led to the development of state based legislation to regulate diffuse water pollution. It has also motivated some innovative schemes (at a state level) to implement the TDMLs. One type of scheme involves ‘tradeable’ pollution reduction credits, including tradeable permits between point and nonpoint

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The factors observed as key to the success of such schemes were: ‘goal setting which includes nonpoint sources, broad stakeholder participation, good information, an ecological focus, and requiring ‘proof of concept’ for management plans to be approved’.  

This concept is not new to Australia. In 2002, the Australian Government produced a document titled *The Framework for Marine and Estuarine Water Quality Protection: A reference document* which includes identification of ‘total maximum pollutant loads’ (TMPL) as a key component of the framework. TMPL is defined as ‘the maximum load of a pollutant that a water body can receive and still meet its water quality objectives and maintain or protect the designated environmental values’. This document outlines the key steps to be followed in determining TMPL, including identification of all sources of pollution, and linking of these sources to water quality objectives. The TMPL must also include a margin of safety and account for seasonal variation, an approach which is very similar to the TDML approach under the US CWA. Whilst this approach has not been widely adopted in Australia, it has been taken into account in the development of catchment or estuarine water quality improvement plans, such as the one developed to manage phosphorus in the Peel-Harvey System in Western Australia. The following case studies explore the usefulness of the TDML/TMPL approach further.

### 3.3. CASE STUDY OF THE SOUTH-WEST OF WESTERN AUSTRALIA

Two basic propositions for State action may be distilled from the relevant Commonwealth guidelines; the *Fresh and Marine Water Quality Guidelines* and the *Framework for Marine and Estuarine Water Quality Protection*. First, it is for the States to develop a water quality planning framework and to use their own legal frameworks to make and implement those plans. There is no prescription as to what those legal frameworks should be or even that the plans measures should be implemented by binding regulatory tools. Secondly, in making the water quality plans, there should be identification, in respect of the receiving waters, of:

- the environmental values to be protected,
- the water quality issues that threaten those values,
- the pollutants that cause those issues,
- the water quality objectives that should ensure protection of those values,
- the TMPLs that a water body can receive and still meet its objectives, including seasonal variation,
- an allocation of current pollutant loads among the various sources, both point and diffuse, which will involve an estimation of the current pollutant loads as to:
  - the type and location of the sources,

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31 Ibid, 13

32 Western Australian Environmental Protection Authority (2008) *Water quality improvement plan for the Rivers and Estuary of the Peel-Harvey System – Phosphorus Management*, Environmental Protection Authority, Perth, WA.
the relative contribution of loads from each source,

- the delivery / transport mechanisms,

- the time scale of the loading, and

- the internal loading – i.e. the storage of nutrients or pollutants in the sediments of the receiving water body.

The difference between the TMPLs and the current pollutant loads provide the management goal as an indication of the reduction of pollutant loadings required to meet the acceptable level for the water quality objectives. The complexity of the task is acknowledged and guidance given on how it might be achieved. An additional complexity can be making pollutant load allocations to anticipated future sources, including a margin of safety.

The next task is tricky: how to allocate the burden of achieving the pollutant load reductions. This raises sensitive issues of equity and relative cost of attaining the reductions. What process should be adopted for allocating these burdens, taking into account established uses and any legal authorities that attach to the responsible land uses? These allocative issues have confronted numerous other environmental regulatory challenges, and there are numerous examples to draw upon – not least, reductions in allocations of water access rights. In the case of water quality protection, the point sources have been relatively well tackled with regulatory measures but not in a way that is integrated with diffuse source pollution.

Historically, WA has pursued voluntary and non-regulatory measures to address diffuse source pollution, which has been an unsuccessful strategy. In the 1990s, the Environmental Protection Authority (EPA) initiated development of statutory Environmental Protection Policies (“EPP”) for the Swan-Canning estuary and for the Peel-Harvey estuary. The former was little more than a plan to make a plan, and the latter set very general water quality objectives that allocated targets for phosphorus loads entering the estuary for each of the three tributary rivers. The implementation measures were only the most general of statements that the objectives would be achieved by the implementation of planning policy by local authorities and appropriate land management by landholders. The former EPP has now disappeared from the EPA website and the latter has been choked by a bloom of bureaucratic inertia since 2004.

With the support of the Commonwealth’s Coastal Catchments Initiative, the State Government has preferred to return since the mid-2000s to non-statutory instruments to plan for water quality. Between 2006 and 2012, Water Quality Improvement Plans (WQIPs) have been made for five of the estuaries located between Perth and the south-west tip of the State. A brief survey of these WQIPs shows that they follow the general model for determining pollution load reduction targets, identifying them by stream and drainage sources. For example, in the Peel-Harvey, the reduction targets are identified for 17 sub-catchments flowing to the estuary; compared to three river catchments in 1992. While there are general total figures for the proportion of the total load of nutrients from different forms of land use and the estimated percentage of reduction that could be made by various management practices, it is not apparent what criteria have been applied to arrive at the reduction targets, some of which are above 45%. Further, the WQIPs stop short of allocating pollution loads or reduction targets to particular

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34 The Environmental Protection (Swan Canning Estuary) Policy 1998 and the Environmental Protection (Peel-Harvey Estuary) Policy 1992 were made under Part III of the Environmental Protection Act 1986 (WA).


enterprises or land users. Rather, they provide information generated by computer modelling, including for predictions of the pollution reduction value of various measures.

Some of the measures could be implemented through existing legislative regimes, some of which are recently reformed; e.g. the native vegetation clearance controls under the Environmental Protection Act and the Environmental Protection (Unauthorised Discharge) Regulations 2004 (WA) that created a list of materials (e.g. animal waste and detergent) that were not to be discharged in the course of commercial activities without a permit. These are incidental to the major sources of nutrient pollution. A major management measure has been the Fertiliser Action Plan developed in 2007-08 and reformulated as the Fertiliser Partnership 2012-16.\textsuperscript{37} The original plan was to specify the levels of phosphorus in fertilisers, to phase out bagged water soluble phosphorus fertilisers and to prohibit the supply and use of bulk highly water soluble phosphorus fertilisers on the Swan and Scott Coastal Plains. Regulations were made to restrict, from January 2013, the amount of phosphorus in lawn and garden fertilisers sold in bags and small containers,\textsuperscript{38} but no regulation has been promulgated in respect of agricultural use of fertilisers. The 2012 Fertiliser Partnership is a weak instrument declared by the relevant State Government agencies seeking “collaborative effort” with fertiliser production and user industries. It has only a vague goal of “contributing to a goal of 50% reduction in nutrient loss to waterways and wetlands” on the two coastal plains and calls only for the development of best practice fertiliser use in agricultural activities and research into nutrient binding soil amendment products. The evidence is that industry groups have resisted regulatory approaches to best management practices because they want to maintain desired production levels while appearing to do something about the environmental issues through self-regulatory measures.\textsuperscript{39} A survey of Peel-Harvey farmers found that only 8% of those surveyed were using a slow release fertiliser and that there were still significant improvements required to achieve best management practices. Yet, most of them believe their farm management practices are not having a negative impact on themselves, their neighbours or the community.\textsuperscript{40} Other authors suggested that landholders cannot be left to their own devices to develop management systems and that they respond more to price burdens in reducing fertiliser inputs than just information.\textsuperscript{41} Is it any wonder that the WQIPs have not led to allocation of pollutant load liabilities to particular enterprises and landholders?

If the regulatory measures proposed for implementation under the Environmental Protection Act 1986 (WA) have failed to materialise, what other regulatory action could be taken in the South-West? While some progress can be made with land use planning instruments,\textsuperscript{42} the provisions of the Planning and Development Act 2005 (WA) are not directed at the regulation of rural land use. The most specifically relevant legislation is the Soil and Land Conservation Act 1945 (WA), which gives the Commissioner of Soil and Land Conservation powers to regulate “land degradation”, which is defined to include eutrophication caused by


\textsuperscript{39} C Gourley & D Weaver, “Nutrient surpluses in Australian grazing systems: management practices, policy approaches, and difficult choices to improve water quality”, (2012) 63 \textit{Crop & Pasture Science} 805-818, at 814. The authors note the demise of the regulatory intention of the Western Australian Fertiliser Action Plan.

\textsuperscript{40} K Lavell, R Summers, D Weaver, M Clarke, J Grant, S Neville, “An audit of the uptake of agricultural nutrient management practices in the Peel-Harvey catchment”, Department of Western Australia. (undated)

\textsuperscript{41} N Keipert, D Weaver, R Summers, M Clarke and S Neville, “Guiding BMP adoption to improve water quality in various estuarine ecosystems in Western Australia” (2008) 57(11) \textit{Water Science and Technology} 1749 at 1755.

“accumulation of nutrients in the water”. Those powers include the issue of notices\textsuperscript{43} to land owners or occupiers acting in a way that is associated with actual or potential land degradation directing them to adopt or refrain from adopting any agricultural or pastoral land use method and to take any specified action to prevent erosion or movement of any sediment, soil or water from the land. A notice is legally binding and a memorial of the notice is registered on the land title so that it binds successors in title. Breach of a notice is an offence, with only modest maximum penalties, and any other person harmed by breach of a notice has a right of civil action for damages. These notices could be used to allocate pollution load liabilities to particular landholders. There is no evidence that this is happening. In fact, the website for the Commissioner for Soil and Land Conservation does not even mention regulation of eutrophication or water erosion.\textsuperscript{44}

In fact, the Commissioner’s office is redolent with reticence to regulate. In one case of a tourism and aquaculture business (the business), a complaint was made to the Commissioner about the eutrophication caused to a trans-boundary shared dam by the single upstream neighbour’s overstocking of limited hillside pasture land with variable soil qualities. No water sheds from the business’s landholding to the shared dam, but the shared dam was legally preserved for domestic use on both properties. The evidence collected by the business showed that the dam had very good water quality before the neighbour purchased the land, and that the neighbour’s land management practices led to severe soil erosion with sediment and nutrients from the stock feed, stock manure and pasture fertiliser being washed into the shared dam. Over several years, the erosion got worse, eutrophication occurred and algal blooms proliferated. The business incurred significant costs for materials and labour to address the risks to their activities. The Commissioner sent an officer to investigate, who gave notice to the neighbour. Stock was removed and the officer’s report was that there was no risk of erosion or land degradation under current management practices. There were numerous faults in the process of investigation. The following winter season there were five episodes of water erosion from the neighbour’s land depositing sediment and nutrients into the dam, causing persistent algal blooms. Despite submissions of this further evidence, the Commissioner has so far refused to issue a notice but maintains an open file on the matter.

There are several observations to make about the Commissioner’s approach to this field of regulation. First, the Commissioner professes to maintain a neutral stance on the issue. With respect, if there is land degradation from eutrophication, the Commissioner has a duty to consider action that will address the degradation and that may necessarily impose a burden on the landholder causing the degradation. Secondly, the Commissioner says he will not issue a notice without being confident that the cause of the problem was demonstrated to the criminal standard of proof that would be applied if there were to be a prosecution for breach of a notice. This test misunderstands the civil standards of proof applied by way of merits appeal against the issue of a notice and that there is a separate prosecution process for demonstrating breach of a notice. Thirdly, it is apparent that the office of the Commissioner is inadequately resourced to deal with the scale of land degradation issues confronting the State, especially from diffuse source pollution from agriculture. One might ask, also, whether a statutory officer within the Department of Agriculture should be responsible for regulating agricultural landholders causing nutrient pollution. Perhaps this function should move to the Department of Environmental Regulation or the Department of Water.

Meanwhile, those suffering the impact of nutrient pollution and eutrophication may be left with the option of taking judicial proceedings for a breach of riparian rights. In the case of the tourism and aquaculture business, there is less difficulty in showing causation of the problem

\textsuperscript{43} Soil and Land Conservation Act 1945 (WA) Part V.

\textsuperscript{44} Western Australian Government, Department of Agriculture, Commissioner of Soil and Land Conservation; http://www.agric.wa.gov.au/PC_93232.html?s=0
from a single upstream neighbour. While such an action would also be the only way to recover damages for harm already sustained and to secure an independent adjudication on acceptable land use practices, the cost of legal proceedings is high for rural landholders with modest business income. However, there is an interesting comparison to be made with the Scott River Plain where there are a limited number of landholders causing the eutrophication. The information given in the Hardy Inlet WQIP may open the way for judicial proceedings for breach of riparian rights of water quality. The plan reveals that two thirds of the phosphorus load entering Hardy Inlet comes from the relatively small Scott River catchment, which has a limited number of landholders who have developed potato and irrigated dairy farms in the past two decades. As figure 3.9 shown below reveals, it is possible to identify the landholders with relevant high emission activities that, when aligned with a map of soil types revealing high risk of emissions, identifies the principal polluters. The figure also shows the location of Molloy Island at the mouth of the inlet, where the Scott River slows and deposits most of the nutrients, leading to severe annual algal blooms. Molloy Islanders are well-healed holiday house owners. Perhaps the scenario shows the potential for the common law to operate here.

One suspects that judicial proceedings would focus the attention of relevant regulators on the need to take the next step in the WQIP process and to allocate pollution load reduction liabilities to particular entities, where that information is available. The potential for judicial proceedings surely also demonstrates that protection of water quality should also be a significant part of Western Australia’s current water resources law reform.
Submission to the Department of Water in response to Securing Western Australia’s water future, Position paper – reforming water resource management

Madeleine Hartley†

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Introduction

1. The Department of Water (DOW) should be commended on taking the significant step of preparing a Position Paper regarding a new water allocation and planning framework for Western Australia (WA). Importantly, this includes seeking to address long-standing issues with water management and regulation that commentators have continued to identify.1

2. While still an important step forward, the author has concerns regarding the approach that the DOW is considering in drafting the new water resources legislation (the new Act). The Position Paper makes clear that the DOW does not wish the new Act to be

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prescriptive.\textsuperscript{2} In an attempt to ensure this, however, the DOW has created a Position Paper that is lacking crucial detail, both in terms of specific provisions, and their ultimate implementation.

3. This is particularly concerning given that the Draft Bill will undergo only limited public consultation, meaning that a large majority of the public are only able to comment on a document that is largely devoid of detail.

4. The extent to which the DOW seeks to implement change through the reform is illustrative of the DOW’s attempts to remain non-prescriptive. The Position Paper advocates for a number of possible measures in its ‘toolbox’ that enables improved water management.\textsuperscript{3} These include measures to address: the introduction of statutory planning, consumptive pool management, issues surrounding licensing and allocation, metering, compensation provisions, and reducing over-allocation of water resources.

5. There is concern, however, that such a degree of change cannot be effectuated without more prescriptive measures. This submission illustrates problems with the DOW’s proposed approach.

6. Additionally, this submission exposes the potential shortcomings that arise from a largely non-prescriptive approach, in particular the challenges it will create for ensuring water security, water use efficiency and productivity, and environmental health of water-dependent ecosystems.

7. In total, this submission pinpoints areas that remain problematic or are unaddressed in the Position Paper. Within the context of the Gnangara Mound, and drawing on the example of the Namoi Valley in northwest New South Wales (NSW), it addresses the following points:

Problematic
\begin{itemize}
  \item recognising and determining sustainable yields;
  \item reducing over-allocation;
  \item risk assignment and compensation provisions; and
  \item enforcement provisions.
\end{itemize}

Unaddressed:
\begin{itemize}
  \item metering provisions;
  \item pricing water; and
  \item carryover provisions.
\end{itemize}

These final three issues will be considered in line with their capacity to improve water use efficiency.

\textbf{a. Recognising and determining sustainable yields}

8. A sustainable yield represents the maximum volume of water that can be extracted while maintaining a healthy water-dependent ecosystem. Federally, it is defined as the groundwater extraction regime, measured over a specified planning timeframe, that allows acceptable levels of stress and protects dependent economic, social, and

\textsuperscript{2} Western Australia, Department of Water (2013) \textit{Securing Western Australia’s water future. Position Paper – reforming water resource management} 10 (Position Paper).

\textsuperscript{3} Ibid 1.
environmental needs’. This definition is predicated on extracting groundwater to a threshold of ‘acceptable levels of stress’.

9. The **Gnangara Areas Allocation Plan** defines a sustainable groundwater yield as: ‘the amount of water that can be abstracted over time from a water resource while maintaining the ecological values (including assets, functions and processes)’. This definition is predicated on maintaining essential ecosystem services.

10. The Position Paper fails to include any discussion of a sustainable yield or sustainable diversion limit.

11. Instead, it uses an approach that allocates water based on ‘the sustainable level of water that can be allocated’. The Position Paper contends that sustainable allocation limits will be reached through ‘balancing competing demands’ accounting for characteristics that are similar to those used in setting sustainable yields. These include: climate; environmental water requirements; existing use; and information relating to a water source’s hydrogeological characteristics.

12. Procedurally, the ‘allocation limit’ appears similar to a sustainable yield or level of take. It represents the maximum extraction limit for a water resource, and accounts for crucial elements of water resources and use.

13. Nevertheless, the author has concern with the approach taken by the DOW in the Position Paper. Sustainable yield is a well-defined concept, and has been integrated into water management worldwide. In Australia, the **Water Act 2007** (Cth) utilises the term ‘sustainable diversion limits’ and requires that it correlate to the maximum long-term annual average quantities of water that can be taken on a sustainable basis. The averages represent the long-term average sustainable diversion limit. The environmentally sustainable level of take means the level at which water can be taken without compromising a water resource’s key environmental assets, ecosystem functions, productive base, or key environmental outcomes.

14. The DOW’s failure to use the specific term is not fatal to its cause of improved management and regulation. However, given the well-established use of sustainable in determining allocation limits for water resources, not using the term can give the impression that the allocation limit is a distinct concept with no requirement of a sustainable limit of take.

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6 Western Australia, Department of Water (2009) **Gnangara groundwater areas allocation plan 93 (Gnangara Areas Allocation Plan)**.
7 Position Paper, above n 2, 16.
8 Ibid 17-18.
10 **Water Act 2007** (Cth) s 22(1) item 6.
11 **Water Act 2007** (Cth) s 22(1) item 6.
12 **Water Act 2007** (Cth) s 4(1) ‘environmentally sustainable level of take’.

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15. Importantly, the Position Paper does not determine how it will set its allocation limits, and how they will purport to be ‘sustainable’. At page 16, it states that the mechanism for the introduction of statutory allocation limits ‘will be developed through a consultative process and will be prescribed through regulations’. It is suggested that this mechanism define a methodology to determine and establish sustainable yields, and that this methodology be made publicly available. This has not been past practice of the DOW; rather, modelling has been used to set allocation limits, which have then been imposed on the public without adequate consultation or explanation of the modelling methods.

16. The point here is to make statutory plans fully transparent in terms of how they have assessed recharge amounts, aquifer capacity and storage, and abstraction levels, and how these combine to inform the allocation limit and ensure it is sustainable. A similar requirement is already found in s 26GX of the Rights in Water and Irrigation Act 1914 (WA) (RiWIA), but has historically remained unenforced.13

17. In reviewing its position pursuant to received submissions, the author would like the DOW to address its current silence on this issue. In particular, it is vital to demonstrate the process by which a ‘sustainable’ allocation limit is reached, in order to improve the transparency key to the proposed reforms. For administrative law purposes, highlighting the process by which such determinations are made ensures that the Minister has not acted outside his powers to do so if a later case challenges the making of this limit.14

b. Reducing over-allocation

The role of previous policies

18. The author wishes to raise concern over an inconsistency between the Position Paper and the most recent DOW discussion on statutory planning in the Gnangara Mound.

19. In 2010, the Water for the Future – Support for a statutory plan for the Gnangara Mound Final Report recognised that over-allocation and use in excess of a sustainable level of abstraction was addressed through a policy of recouping unused licences.15 Further, the Management of Unused Licensed Water Entitlements policy also pinpoints its use as a management tool for reducing overallocation.16 The author has previously observed that this policy has been under-pursued and suffered enforcement difficulties in returning over-allocated systems, particularly on areas like the Gnangara Mound.17

20. The Position Paper directly contradicts the DOW’s earlier position. Contrary to the above, it notes that recouping unused entitlements was ‘never intended to address over-allocation’.18

13 Rights in Water and Irrigation Act 1914 (WA) s 26GX(2)(a),(b),(d)(i)(ii), and (3).
14 Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources [2005] NSWCA 10 (although Spigelman CJ, Beazley and Tobias JJA found that the Minister had acted within his powers in making the relevant water sharing plan).
17 Hartley, above n 1, 498.
18 Position Paper, above n 2, 23.
21. Policy changes are an expected part of the political process. However, this does not extend to misidentifying the role that a fundamental policy was established to play in regulating such a critical resource as water. It is concerning that the DOW maintains two distinct positions on the role of this policy, particularly given its relaxed enforcement of this and other key policies.\(^\text{19}\)

**Methods of reducing over-allocation**

22. The Position Paper fails to specify how reductions will be made. On the one hand, this is an expected outcome from a paper not wanting to impose prescriptive requirements on the new Act. On the other, however, provisions can be included in this Act that broadly detail matters that the Minister must address in reducing allocation.

23. The author refers to the 2009 SKM Report for options.\(^\text{20}\) Pertinently, these include the history of extraction method used in NSW aquifers, and the Namoi Valley specifically.\(^\text{21}\)

24. History of extraction saw licences reduced proportionate to their historical use. The calculation of ‘historical use’ was based on years prior to the planning process, so that licensees could not increase their use artificially and wastefully in order to retain a higher entitlement.\(^\text{22}\)

25. History of extraction was a controversial method for reducing entitlements.\(^\text{23}\) Its alternative was across the board entitlement reductions, which would have seen allocations reduced by a mean percentage. In the Namoi Valley, this would have been 52 per cent.\(^\text{24}\)

26. Explaining available or considered options for reducing over-allocation is important given the likelihood that reductions will occur. This is particularly so in areas experiencing over-allocation, such as the Gnangara Mound.

27. The Position Paper addresses the issue at a superficial level only: ‘a process for returning over-allocated systems to the allocation limit needs to be included in the new Act to increase transparency and provide security to water users’.\(^\text{25}\)

28. Given that the new Act will not have a publicly released draft Bill, and limited public consultation will therefore feed into it, the author questions how the resulting methodology can purport to be transparent. This issue requires substantial consideration in the reform process, and the DOW must make clear what method it will adopt if allocation is to be reduced.

\(^{19}\) See especially, Hartley, above n 1, 498; and Skurray, above n 1.

\(^{20}\) Western Australia, Department of Water (2009) *Statement of Response: Review in to the management of over-allocated water resources in the Gnangara groundwater management area* (outlining the Government’s response to the Sinclair Knight Merz report) (*Statement of Response*).

\(^{21}\) Ibid 18-25.

\(^{22}\) See, for example, the rules governing history of extraction in the Namoi Valley: *Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources 2003* (Appendix 4).


\(^{24}\) Kuehne and Henning, above n 23, 27-28.

\(^{25}\) Position Paper, above n 2, 23.
c. Compensation provisions

Compensation versus ex gratia payments

29. The author would like to clarify a misunderstanding in the Position Paper. NSW did not pay compensation when groundwater entitlements were reduced pursuant to changes in legislation and licence structures. Rather, ex gratia payments were provided in accordance with structural adjustment mechanisms.

30. The legal distinction is important, as ex gratia payments do not arise from a legal duty to compensate. Critically, therefore, affected landholders in NSW groundwater basins did not receive payments proportionate to the value of their reduced entitlements.

31. The High Court of Australia confirmed the ex gratia nature of these payments in *ICM Agriculture Pty Ltd & Ors v The Commonwealth of Australia & Ors* (*ICM Agriculture*). In particular, it noted that a joint Commonwealth-State funding agreement required NSW to ‘make up-front ex gratia structural adjustment payments’ to licence holders.

32. In *ICM Agriculture*, Justices Hayne, Kiefel and Bell later observed that: ‘no party or intervener submitted that, if there was an acquisition of property, the making of these ex gratia structural adjustment payments would constitute the provision of just terms.’

33. It is important that WA recognise this distinction if looking to NSW as an example of neutralising the effects of entitlement reductions.

Improving water use efficiency

34. The DOW provides its most succinct definition of water use efficiency (WUE) in its Water Conservation/ Efficiency Plans policy. Pursuant to this policy, WUE is defined as ‘increasing water supply efficiency and water demand efficiency to minimise the taking and use of water’.

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26 See accompanying submission, Michael Bennett, ‘Submission on Water Resources Management Reform Position Paper’.


28 New South Wales, Department of Natural Resources (2005) *Achieving Sustainable Groundwater Entitlements Program 1*.

29 *ICM Agriculture v The Commonwealth* [2009] 261 ALR 653, 677 [99] (Hayne, Kiefel and Bell JJ) (payments received under the adjustment program were ‘not to exceed two-thirds of the final value of a licence holder’s water entitlement reduction at the end of the 10-year period over which the reduction was to occur’) (*ICM Agriculture*).

30 *ICM Agriculture* [2009] 261 ALR 653.

31 *ICM Agriculture* [10] (French CJ, Gummow and Crennan JJ).

32 *ICM Agriculture* [99] (Hayne, Kiefel and Bell JJ).

33 See especially, Stephanie Scott, ‘The Impact of ICM Agriculture v The Commonwealth in Western Australia: Returning the Gnangara Groundwater System to a sustainable level of extraction’ (2010) *University of Western Australia* Law Thesis (discussing the application of ICM Agriculture to Western Australia).

34 Western Australia, Department of Water (2009) *Operational Policy No 1.02 – Policy of Water Conservation/ Efficiency Plans* (*WCEP Policy*).

35. The object of WUE is ‘to achieve the best return from the available water entitlement.’36 This is clarified as maximising productivity. The DOW envisages two ways that the best return may be produced: either by applying less water to achieve the original purpose, or by increasing productivity with the same volume of water.37

36. This general idea, that less water can achieve the same purpose, forms the basis for the following points regarding WUE in the Position Paper.

d. Compliance and enforcement

37. The DOW should be commended for recognising the difficulties with compliance and enforcement that are embedded in the current RIWIA.

38. However, these difficulties flow beyond the Act, and into issues of administrative will. Prior to late 2012, the DOW had an unenviable record with implementing policies and enforcing non-compliance, particularly with licence limits.38 The DOW’s attitude towards enforcement appears to have changed dramatically with the creation of the Regulatory Division, and the successful prosecution of several licensees.39

39. Nevertheless, it is concerning that the Position Paper provides no precise detail regarding how enforcement will be improved, and what offences are envisaged under the new Act. For further discussion on this point, the author directs the DOW to the attached article by Sarah Robertson.40

e. Pricing and trading water

40. Pricing water facilitates WUE. When there is a cost of accessing water, users will necessarily improve their efficiency measures in order to ensure a successful business model. Together with proper enforcement provisions, pricing water is an important tool in the greater toolbox of management and regulation for the future protection and security of water resources in WA.

41. Licensees utilising the Gnangara Mound do not pay for their water. Rather, they pay a one-off administrative fee for the cost of obtaining a licence. The DOW has made it clear that it does not intend to change its position on this matter.

42. It is likely that the DOW envisages that reducing barriers to trade will have the result of pricing water. This has been the experience of other states, and broadly adopts a market based approach to water entitlements.41

43. However, the Position Paper fails to provide sufficient detail on the implementation of this mechanism, and the result is an unclear avenue for both facilitating trade and

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36 ibid 31.
37 ibid 1.
38 Hartley, above n 1, 498.
39 ibid.
ensuring that water is priced appropriately. Given the barriers to trade previously recognised,\(^{42}\) there is some concern that the market approach may not develop without the adoption of pricing measures.

44. In any case, the Position Paper contains a discrepancy on this point. It observes that groundwater trading will not occur to the extent that it exists in the Murray-Darling Basin. Simultaneously, however, it uses trading as a way to circumvent issues surrounding pricing water, relying on the market-based approach.

45. The author questions the extent to which this approach can succeed in place of large instances of trade. Although the DOW expects trade to increase concurrent to increased water demand,\(^{43}\) it is concerning that they are relying on this approach to secure future water resources.

f. Carryover provisions

46. The National Water Commission defines carryover as ‘the option to hold in storage a portion of unused seasonal allocations for use at a later date’\(^{44}\). Essentially, it is a management tool that allows allocations to be ‘banked’ within a set maximum limit for up to 3 years.\(^{45}\) After this time, the unused volume of carried over is recouped by the administrative agency. The statutory Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources 2003 (Namoi Plan) permits the carryover of aquifer access licences, but limits the maximum carryover amount to twice a licensee’s annual allocation of the share component.\(^{46}\)

47. Carryover facilitates WUE through reducing the likelihood of wasteful use. In situations where it does not exist, licensees risk losing any water excess to their entitlement if it has not been used for a period of time. WA currently operates under a similar mechanism to this through its use of the Management of Unused Water Entitlements policy.\(^{47}\)

48. Carryover provisions therefore also permit flexibility in the planning process,\(^{48}\) and provide a risk management strategy to combat dry years.\(^{49}\) Additionally, they provide an investment strategy to conserving water for future years.\(^{50}\)

49. The Namoi Plan permits the trade of water that is carried over for three years but remains surplus to requirements. Additionally, water purchased through trade can be

\(^{42}\) Skurray, Pandit, and Pannell, above n 1.
\(^{43}\) Position Paper, above n 2, 11.
\(^{46}\) Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources 2003 cl 34(7).
\(^{47}\) Statewide Policy No 11, above n 16.
\(^{50}\) NWC Irrigator case study.
stored for carryover purposes.\textsuperscript{51} Permitting these outcomes is illustrative of the flexibility that they provide to water planning and, consequently, WUE measures.

50. Including provision for such measures in the proposed new Act could greatly improve the security of water licences and facilitate further productive but efficient use of water.

51. These provisions are also useful when considering the effect that reductions in licence volumes will have on users. With such an outcome, users will have to improve their WUE in order to survive, and providing them with affirmative measures to facilitate this has proven a successful management tool. Again, any provisions to this effect will require authorisation by the new Act, as well as enabling provisions in statutory plans.

\textbf{g. Metering provisions}

52. Metering provisions facilitate WUE through providing as close to an accurate reading of water movement in a system as possible. Metering can uncover non-compliance with allocation limits and, when coupled with strong enforcement provisions, can simultaneously help increase compliance.\textsuperscript{52}

53. The author directs the DOW to her 2013 \textit{Australian Environment Review} article that discusses metering shortcomings on the Gnangara Mound. In particular, she notes that:

\begin{quote}
In 2010, thresholds were amended from requiring metering on licences abstracting \(\geq 500\text{ML/yr}\), to requiring metering on licences abstracting \(\geq 50\text{ML/yr}\). Due to a lack of funding, however, the thresholds have since been returned to pre-2010 levels.\textsuperscript{53}
\end{quote}

54. The author commends the DOW on a relatively detailed discussion of metering provisions in the Position Paper. She also commends the prescriptive nature of metering provisions as detailed in the Paper. However, the operation of the proposed principles remains unclear.

55. In light of past enforcement difficulties with metering requirements, the author has concern over the level of abstraction to which the DOW proposes to attach metering conditions. A prescription requiring licensees who use ‘less than 500ML to include a licence condition for measurement’ is unhelpful to parties wanting to understand regulatory objectives. Does it mean that all licences \(\leq 500\text{ML/yr}\) will have metering requirements, or is there a minimum standard or set of exemptions (for example, as explained above the quoted statement on the same page, 20)?

56. Given that licensees utilising \(\geq 500\text{ML/yr}\) are already required to have both an operating strategy and active metering,\textsuperscript{54} a metering requirement for licensees using \(\leq 500\text{ML/yr}\) is vague and meaningless. It is further problematic given that, in 2010, the DOW recognised the benefit of metering licensees utilising \(\geq 50\text{ML}\), yet have now settled on a much higher figure.

57. To this point, the author directs the DOW to the 2009 SKM Report:

\begin{quote}
Regardless of whether the existing legislation (Rights in Water and Irrigation Act...\end{quote}

\textsuperscript{51} Ibid.
\textsuperscript{52} Hartley, above n 1, 498.
\textsuperscript{53} Ibid 497.
\textsuperscript{54} Western Australia, Department of Water (2010) \textit{Operational Policy 5.08 – Use of operating strategies in the water licensing process} 24.
or the new legislation is in force, there is one action that would yield substantial dividends. That is to maintain and enhance the present program of metering and recouping unused entitlements. The enhancement would be in the form of auditing of licences smaller than 5ML/year. It is estimated that the cost, over the next ten years, of finishing the metering program, recouping unused entitlements, and auditing usage by small bores less than 5ML/year would be $5.95 million.55

58. The SKM Report explicitly recognises that a well-developed metering program will help reduce over-allocation. The metering requirements proposed in the Position Paper do not ‘enhance’ the current metering requirements and, therefore, cannot purport to have a positive impact on water resources management.

59. The Position Paper proposes to require meters for all water access entitlements in areas covered by a statutory plan, which would include the over-allocated areas of the Gnangara Mound. Although the position at page 21 is commendable, it is loose on specific detail that could effectuate a strong regulatory result.56 In particular, will meters be state or user owned?

60. In total, the author recommends that the metering provisions be reconceived to mandate metering of smaller licences, and that a minimum standard be set for when metering is required. To be truly effective, enforcement against non-compliance with allocation limits (ascertained through effective metering) will also require strengthening.57

Conclusion

61. This submission acknowledges that the Position Paper is a significant step forward in the management and regulation of water resources in WA.

62. Importantly, the release of the Position Paper signifies political momentum in undertaking water reform. This has been lacking over the past decade.

63. It is pivotal that that we ride the wave of political momentum in favour of the water reform that is currently occurring in the Government. This is particularly crucial when considered in light of reduced rainfall and groundwater recharge, and an increasing population. The position paper represents a critical opportunity to address long-standing issues with water management and regulation in WA.

64. While acknowledging the work that has gone into its preparation, this submission addresses concerns that remain problematic within the Government’s attempt to reform water legislation.

65. In broad terms, these concerns are:
   1. the lack of detail regarding the specific measures that can or will be used to effect the level of change foreshadowed by the Position Paper; and
   2. implementation methods for the proposed changes.

66. Both of these points are fundamental when considered in light of challenges that the DOW has previously suffered. This is particularly in regard to the implementation and enforcement of key policies and areas of law.

55 Statement of Response, above n 20, 94.
56 Position Paper, above n 2, 21.
57 See especially, Holley and Sinclair, above n 45.
67. These concerns are broadly addressed through a number of shortcomings with water management and regulation in WA that have been highlighted in the last decade.58

68. Further issues that will need to be considered include the heads of powers under which some measures can be enacted. For example, while not wanting to be prescriptive, a statutory plan could provide that ‘The Minister shall have regard to’, with these provisions pertaining to methods that could be used to reduced entitlements. Both the history of extraction and across the board entitlements reduction methods were controversial, but are useful to consider when addressing this issue.

69. The lack of detail in the Position Paper is particularly concerning because the DOW is not planning to release a draft Bill of the new Act, and will only be consulting with select stakeholders. This is problematic given that the new Act will hope to substantially change water management and regulation. Therefore, it is essential that details be given on its implementation, so that stakeholder support is secured and the process legitimised. Doing/ not doing this will ultimately have ramifications for the enforcement of the new Act, which – as noted – has suffered in the past.

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58 See especially, Chung, above n 1; Gardner, above n 1; Hartley, above n 1; and Skurray, above n 1.
Securing Western Australia's Water Future

DoW Submission December 2013 - Suzanne Hay

Every plan, every project and every position paper starts with the presumption of exponentially increasing demand. It is accepted that this is a given. With water being a finite (or dwindling) resource, such planning can only ever be like a dog chasing its tail until demand is addressed.

I am sorry that I have not commented on the nuts and bolts of water licensing arrangements contained in the proposed new legislation as you might have wished. However, I feel compelled to invite you to step back and consider the big picture and ask where all this science is getting us.

I appreciate that issues of population increase and self sufficiency go beyond DoW’s brief. There needs to be some meeting of minds at the highest level of government. There needs to be some bold and unpopular statements of policy starting with the premise that not all growth is good.

I live in a fire prone area and in recent times there has been a campaign to make people aware that responsibility for making your home fire safe starts with you. You cannot (especially in the bush) simply rely on the firies to come to your aid. Why cannot a similar campaign apply to water?

If you want to set up in a new suburb it should not be assumed that you are entitled to scheme water. Why not have to make provision for your own water needs or at least the majority of them. This could also extend to agriculture and industry. I would like to see the emphasis shift from plans to produce ever increasing amounts of supplied water to old fashioned self sufficiency.

Western Australia is a big place but there is little water and little arable land. I believe the problem is two fold in that is not just the increase in population but also a disproportionate rate of consumption per capita. Population increase from immigration can be the subject of government policy. I have no suggestions on how to reign in our rampant consumerism. Perhaps an advertising campaign pushing the message that our current quality of life here in Western Australia is in jeopardy and at risk of ending.

It concerns me that the use of the word “sustainable” seems to give legitimacy to projects just by the use of it. Projects with no (or restorative) impact on the environment are rejected on the basis of not being cost effective. But no amount of scientific conjecture about tolerances convinces me that the any amount of damage to the environment is acceptable. So much of the argument is subjective - one man's sustainable option is the next man's environmental disaster.

The heart of my submission is to push the pause button. Sure, let's put in place a legislative regime which helps us map what water is needed, where and how much is used and what amount is reused. But before we get too enthused about the next technological advance, let's take a look at where we are headed and what is driving the need. Take time to reflect on us humans as a specie here in a complex and fragile environment on this planet which we hope endures.
We are self-supply water users in agriculture in the Warren and Donnelly River catchments and object to the plans of the Department of Water in its *Position Paper* to apply water markets that will increase the cost of water as an input to agriculture and reduce the competitiveness of our produce. We request an increase in the allocation of water to agriculture to prevent the introduction of costly water markets and associated ‘red tape’.

1. **The Department of Water has restricted the water available to agriculture in the ‘food bowl of the South West’ to force ‘water markets’ policy onto water users.**

Over 90% of the water in the Warren and Donnelly River catchments is water for the environment flowing into the Southern Ocean. Two thirds of this area is forest where all of the water is for the environment. In the third that is cleared for agriculture only 40% of the water has been allocated to agriculture and other uses and 60% is allocated to the environment. The Department of Water forced this imbalance onto agriculture in 2012 through their *Warren Donnelly Surface Water Allocation Plan (2012)*. By restricting water available for agriculture to 40%, most areas are now fully allocated or nearing fully allocated. Thus the Department of Water is forcing agriculture into ‘water markets’ to pay for water by auctions, tenders and trades. This will enable the Department of Water to ‘tick a box’ for compliance with the dogma of the National Water Initiative. At our expense! Managing water markets and the associated increased ‘red tape’ will also assist the Department of Water to justify its $83 million budget and 452 staff. At our expense!

2. **More water must be allocated to agriculture in the ‘food bowl of the South West’ by revising the Warren Donnelly Water Allocation Plan.**

Our area is designated ‘Priority Agriculture’ by the State Planning Commission and water for agriculture should have priority over the environment. We request the *Warren Donnelly Surface Water Allocation Plan (2012)* be revised to provide 60% of water for agriculture and other uses and 40% for the environment. This will provide sufficient water for growth of agriculture and maintenance of property values. There would then be no justification for imposing initial purchase of water allocations from the State by auction and tender, restrictive consumptive pools requiring purchase of water from other licence holders, separation of water licence from land title with uncertain outcomes, and mandatory metering, all of which the *Position Paper* advocates.

3. **The Warren Donnelly Surface Water Allocation Plan must be a statutory Plan to provide security of water access for agriculture.**

The Department of Water ignored repeated requests that the *Warren Donnelly Surface Water Allocation Plan (2012)* be a statutory plan prepared in accordance with the provisions of the *Rights in Water and Irrigation Act*. Water licence holders demanded the security for water entitlements that can only be provided by a statutory Plan. The Department has now done a ‘backflip’ on this admitting in the *Position Paper* (page 17) that “Administrative allocation plans provide less security to licence holders as the plans may be changed with administrative, rather than legislative due process. Decisions made based on an administrative plan are not as certain as those based on a statutory plan, and there may be additional costs to water users and the government if those administratively based decisions are appealed.”. The *Warren Donnelly Surface Water Allocation Plan* must be converted to a statutory Plan under the *Rights in Water and Irrigation Act*, without delay in 2014.

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The proposed legislation covers separation of water licence from land title, consumptive pools for periodic determination of how much water can be taken from private dams, water auctions and tenders, mandatory metering, and what types of dams are to be included, affecting property rights. These and many other provisions will require detailed consideration by water users affected in the ‘food bowl of the South West’. With controversial legislation, the ‘devil is in the detail’; thus it is vital the Minister for Water issue a draft ‘Green Bill’ for public comment.

Yours sincerely

John Horgan AM.FCA
Thank you for the opportunity to participate in the policy review process.

This initial submission will be a shortened document, as in this case as I feel that is all that is required.

*If I feel the need to add or refine the content between now and closing date I will submit later.*

I respectfully request that the Minister and the departments responsible for managing water resource in WA take steps to address the following inconsistencies within the existing system.

(Whilst obviously ensuring that the environmental integrity of WA is compromised in no way.)

I would like the inconsistencies pertaining to personal water use on all private properties to change immediately to reflect the dry and further drying climate, now and as forecast, and our projected population growth, and projected ageing demography of this state, both rural and urban.

Currently there are two (2) stand-out issues which need immediate resolution to reflect the reality of our contemporary water usage.

Firstly the allocation of automatic ‘rights’ within the existing act pertaining to **Riparian Rights**.

In this day and age no one has the right to create a large sized lush European style garden, at the behest of other landholders, residents or of the environment. This is another purely Euro-centric, political anachronism which has no place in modern WA.

Nor should this ‘right’ extend to allowing the ‘user’ vast areas of lawn, or permit them to irrigate substantial areas of private ornamental gardens, of *no production value.* (*No production would include creating green fodder for horse feed, etc*)

This right is obscene and should be removed immediately.

**Unproclaimed bores (groundwater)**

In areas where groundwater exists, no matter how pure, potable or finite, the current regs acts etc, set no limits to usage/extraction. This does not encourage water conservation, or appropriate use. It creates an incubator for community and landholder conflict, irreversible environmental changes and frankly depletes a finite resource for future water users. In short such a policy position is unsustainable and unacceptable, if the reviews the Ministry is conducting, and the campaigns undertaken by DOW and Watercorp are to be taken seriously.

To summarise those two (2) main issues I raise.

The responsible statutory bodies MUST adjust the parameters so that **all ground water extraction is immediately subject to checks and balances equal to a proclaimed area.**

**All personal private property water use needs to be limited to reasonable and sustainable outcomes.**

Lawn/garden watering policy needs to reflect a worse case scenario at all times, and days/times/total hours/methods adapted/adopted to suit. It is well past time when our policy makers should avoid restricting the size of lawns and inappropriate garden types.
Post the policy review and into reform, the stat bodies should lessen the 'education/familiarity period', afforded the community, and spend more time policing new policy infringements. WA still wastes too much water. Behavioural change is too slow to make gains in water conservation.

I also feel that a close eye should be kept on foreign ownership of areas with water as a recognised or potential asset, to ensure that WAs nutritional needs, by way of fresh food and dairy, are prioritised under all allocations, and not compromised and that our local safe/sustainable fresh food producers are not fiscally impacted by way of such foreign acquisitions. To this end there needs to be a publicly accessible database which shows where such purchases are proposed, with a period for comment available.

I also fully support the position of the WA Conservation council who correctly state the public MUST have a right to appeal all sections of the new Acts / policies:

“The (Statutory Allocation Limits) Bill grants WA’s Minister for Water the power to set the final Statutory Allocation Limits and indeed to exceed those limits if he/she sees it in the public good, with no means for public appeal provided.”

The EPA or similar independent body should have the final say, not a Minister. Otherwise, as in the case of farmers in Mingenew, communities and local producers will lose their current and future resource overnight, and adverse environmental impacts will be common place. This would be a retrograde policy, and contradicts the Ministers foreword to the ‘Position Paper’ which reads,

“Importantly, the framework is based on a foundation of greater transparency and engagement with water users and other stakeholders”

and

“Water management is important to our community, and public consultation-giving everyone a chance to have a say-is an important part…”

I feel that the first and foremost aspiration for all sustainable water management should be using less in the first place. We can only do that by treasuring what we have. The driver of all use should be to sustain life. Not just human life. We need to live within the means of the supply, NOT continually and unsustainably make the supply stretch to suit the demand. A wise man once said of an extended water restriction period in WA, “If they can survive that long with that much water, then any use above that level constitutes wastage.”

The data and evidence I cite to support the points in my submission can be found in DOW and Watercorp studies (and others) and by looking honestly at the reality of the issue on any day in any place in our community. I also believe very strongly that the state government should fully support the visionary and sustainable proposals espoused by the esteemed visionary Professor Jörg Imberger.
In closing I would say that I have previously submitted more in depth suggestions for managing WA water, during one of the previous ALP governments tenures. I would hope that somewhere along the way some of those ideas have filtered through to policy makers. If not I encourage those responsible for the current round of submissions, to revisit all peoples input on earlier reviews, because there will be plenty of useful input to be garnered from such sources.
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<thead>
<tr>
<th>Question</th>
<th>Response</th>
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<tr>
<td><strong>Question 1 - general thoughts on important elements of water reform</strong></td>
<td>Longer tenure of licence, creates certainty of development by developers. By informing all end users, community, horticulturalists, miners etc of all scientific data to prepare for times of shortage, drought etc, before the taps are &quot;screwed down.&quot; Keeping up with technology re monitoring and management.</td>
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<tr>
<td><strong>Question 2 - thoughts on overarching elements</strong></td>
<td>All dot points are relevant and necessary</td>
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<td><strong>Question 3a - specific aspects you agree or disagree with</strong></td>
<td>Support proposed policy changes except 3.3.3 re Meters. Large users i.e., Carnarvon Growers should NOT have the ability to read THEIR meters, the end user should not take the responsibility of MANAGEMENT in reading of meters, either the DEPARTMENT or INDEPENDANT BODY should be entrusted with this function. Reason: Long time experience of end user malpractices. Advisory Bodies 3.3.4 These bodies are essential in being a conduit between department and end users.</td>
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<td>The most important aspect is improved water use accounting. Major users of water (i.e. above a specified threshold) should be required to provide annual reports of detailed water accounts to the state government. These reports should then be made available to the public through a public website. The public should then be encouraged to compare these accounts against the regional water allocation plans published by the State water agency.</td>
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<td><strong>Question 2 - thoughts on overarching elements</strong></td>
<td>One Act is my preferred option. The Act should enshrine the ownership of the State's water resources in the commons (i.e. 'The Crown'). I do not want to see the possibility where the water resources are over allocated (as was seen in the Murray Darling Basin). Therefore this Act should include a comprehensive water accounting component tied to, but not exclusively applying to, water use licenses. These water accounts should then be used to adjust regional water resources assessments and strategies.</td>
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<tr>
<td><strong>Question 3a - specific aspects you agree or disagree with</strong></td>
<td>Tradeable rights to water is a subject that must be approached carefully. The rights to water will be seen as an asset tied to the property being watered. Therefore the value of the property will increase in proportion to the assigned value of the right to water. This will then be taken into account by mortgage holders of the property. If the rights to water are separated from the property and then traded away, the mortgage holder may find they have an interest which is greater than the value of the property. The question then arises as to how the independent water rights are recognized on the Certificate of Title for the property so as to protect the interest of a mortgage holder. Or should the rights to water be recognized with its own Certificate of Title administered through a Torrens Title system in parallel to the land title system. These are not easy issues to resolve.</td>
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Submission to:

The Water Reform Policy and Innovation Directorate
Department of Water
PO Box K822
Perth WA 6842

policy@water.wa.gov.au

on

“Securing Western Australia's Water Future”

by

John McBain
B. Commerce (UWA)
188 Canning Highway
South Perth WA 6151
haywoodfarm@yahoo.com
0416949033

31 December 2013
Introduction:
Firstly I would like to outline my personal overview of water, its role in our physical environment, our materialistic perception of it, the moral choices connected with water use and allocation and its critical role in all life processes. Then I will make my submission.

Overview:
There are three essential needs for human life: air, water and food in descending order of need. We die after 3 minutes without breathing, 3 days without drinking or 3 weeks without eating. Human life is inseparable from water: in a sense, we are water and water is us.

The Gaia Hypothesis says the earth is a living being and all of it is inter-connected. So water is also essential to life on earth, especially on the surface which is our habitat. Our planet has a natural self-regulated water recycling system that sustains all life.

A bioregion that consumes more water than is naturally available is unsustainable as it takes water naturally allocated to another bioregion. Consider the connection between the horticultural water use of say the Jindong Treeton region on the limestone cave ecosystems of the cape region. Or the impact on natural vegetation from human induced water table changes.

Similarly, any bioregion that in the process of using water degrades its quality, is unsustainable. Consider the impact of fertilisers, chemicals and faecal material of introduced livestock on water. Or the salt water intrusion on coastal aquifers.

These and other uses of water help sustain the life of Western Australians and people in other parts of the nation and world. They are also essential to our local, national and global economies. However, any bioregion that satisfies economic and social imperatives at the expense of the natural environment is unsustainable.

This is the essence of the challenge of balancing our material and natural needs.

In settling this nation we have transposed a culture(s) from the other side of the planet upon a land mass that is totally different. It also seems we have imported a way of life that provides us with some genetically based form of psychological comfort that conflicts with the integrity of this nation. How else can we describe, for example, the green summer lawns and gardens of Perth when the natural form of country during the Birak and Bunuru seasons is dry and brown?

There is also a clash between our western and Aboriginal perspectives on water, land and nature. To Aboriginal peoples the land is akin to a church – to our society it is largely a money box. First peoples globally mainly lived in harmony with their natural environment, whereas we tend to degrade its natural life processes on which we depend to satisfy both our wants and needs.

A species that degrades its own habitat and that of other species is unsustainable.

Food is the only one of the 3 essentials for life that humans produce and it is natural that we trade or sell it. Air and water are 'produced' by nature and our interactive roles are qualitative and do not imply ownership nor the rights to trade. The increasing commodification of water is concerning and I submit unsustainable. Access to clean water is a human right, not a commodity.
Finally the moral issues:

1. The water was in essence stolen from the first peoples of this nation. If this is not true, please provide evidence of a transfer of 'ownership' that has been agreed to by them. The trading of water is in essence a trade in stolen property.
2. Water is an essential component of Aboriginal law and culture. Water ecosystems are of special significance to all first nations of Australia. Our societal perception and ensuing unsustainable use of water is racially and 'religiously' discriminatory.
3. As 'servants of the public' all government bodies have a duty of care to the public. To assume that the rights, needs and expectations of our first peoples are the same as all Australians fails in that duty of care to them. In moving toward 'reconciliation' we need systems that achieve both.

Submission context:
I am the Chairperson of ANTaR WA, a member of ANTaR's National Management committee, the WA representative of the Australian City Farm and Community Garden Network, a member of the Sir James Mitchell Park Advisory Group, a Board member of the Film and Television Institute and founder and Chairperson of Sustainable Urban Nutrition (SUN) Inc.

SUN is a systematic and integrated approach to sustainable urban food production.

I have recently been: secretary of the Sustainability Practitioners Association, a member of the Sustainable Nedlands Committee and a member of the Architect's Board of WA.

I have also been accepted into the law and culture of the first peoples of the Western Pilbara region.

Having only been notified of this process a few days ago, this is a personal submission that does not necessarily represent the views of any of the above mentioned organisations.

Submission:

1. Water is fundamental to the law and culture of Australia's first peoples - any and all trading of it should at the least include a royalty type payment to the local representative organisation(s). Ideally, any water trading should be done by the first peoples of this state and nation. Water has additional potential to assist with the economic independence of our first peoples on their own lands. Over-use of water should be treated as theft from those peoples. Similarly, pollution and degradation of water should be a crime. In both instances any penalties should be decided by the representative organisations and payable to them. As an example, we refer to the Yarragadee aquifer as the 'Noongar underground bank'.
2. Similar penalties should apply for the degradation of special places done in the process of securing water supplies. This damage can extend beyond the site of water exploitation, and can arguably be legally justified in a moral sense to include retrospectivity. Examples include the taking of water from the Western Pilbara and Jindong Treeton areas.
3. Water consumed for purposes such as community gardens should be free of charge, or at significantly decreased rates, in recognition of their social and environmental benefits and the water conservation ethos and educational values.

In closing, I submit that the timing of this process is unfortunate and given my past involvement with water consultative processes going back more than 2 decades, I am very disappointed that I was not notified of the process earlier enabling me to better study the documents and make a more comprehensive and relevant submission.

I also advise I would welcome the opportunity to be part of any related stakeholder group.
Dear Policy Makers,

Thank you for the opportunity to comment on your draft policy "Securing Western Australia's Water Future".

The issue of water management is fundamentally important, so thank you for your reform efforts.

One thing that strikes me is the anthropocentric flavour. Even the introductory paragraph "Western Australia’s water resources support population growth, industry and the environment..." has it the wrong way around. Humans are just one of many thousands of species whose existence depends on water. In fact the synergy of non-human systems is what creates our capacity to live. It's not just immoral, it's short-sighted and dangerous for us to be greedy. It cannot be about which human is better financially positioned to exploit water.

Please think about the word "Resource", which permeates your document. The word should be interpreted ecologically, since water is fundamental to the basic biological needs of so many species, including our own. This use trumps economic desire. Adjacent your pie chart is the remark "Water use in Western Australia has almost quadrupled in the past 30 years, driven by economic and population growth" Try replacing the last word with "cancer" to understand a different perspective. Perhaps you could attach another chart, that shows what proportion of total water is subject to licence. Maybe the situation (for others) is not as dire as is suggested.

Population and consumption must be guided by what our environment can sustainably provide, in order to do the right thing by other generations and other species.

I understand what you are trying to do, and its necessity. What I'm asking you to consider is an introduction showing its context, and what's guarded for other generations and species. Otherwise it has the danger of appearing to legitimise a greedy grab mentality.

Many thanks,
Katherine McCann

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Over 90% of the water in the Warren and Donnelly River catchments is water for the environment flowing into the Southern Ocean. Two thirds of this area is forest where all of the water is for the environment. In the third that is cleared for agriculture only 40% of the water has been allocated to agriculture and other uses and 60% is allocated to the environment. The Department of Water forced this imbalance onto agriculture in 2012 through their Warren Donnelly Surface Water Allocation Plan (2012). By restricting water available for agriculture to 40%, most areas are now fully allocated or nearing fully allocated. Thus the Department of Water is forcing agriculture into ‘water markets’ to pay for water by auctions, tenders and trades. This will enable the Department of Water to tick a box for compliance with the dogma of the National Water Initiative. At our expense! Managing water markets and the associated increased ‘red tape’ will also assist the Department of Water to justify its $83 million budget and 452 staff. At our expense!

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The Department of Water ignored repeated requests that the Warren Donnelly Surface Water Allocation Plan (2012) be a statutory plan prepared in accordance with the provisions of the Rights in Water and Irrigation Act. Water licence holders demanded the security for water entitlements that can only be provided by a statutory Plan. The Department has now done a ‘backflip’ on this admitting in the Position Paper (page 17) that “Administrative allocation plans provide less security to licence holders as the plans may be changed with administrative, rather than legislative due process. Decisions made based on an administrative plan are not as certain as those based on a statutory plan, and there may be additional costs to water users and the government if those administratively based decisions are appealed.”. The Warren Donnelly Surface Water Allocation Plan must be converted to a statutory Plan under the Rights in Water and Irrigation Act, without delay in 2014.


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Yours sincerely

Kerry Reeve
Hello,

i have just received by email the new position paper, which triggered some thoughts:

I find a bit scary for the main water users to see new constraints and stricter legislation with allocation limits about their water usage. I am afraid they will not be willing to cooperate much and may feel reluctant as they will see this as an addition of constraints and monitoring.

Why not trying to promote a more positive message highlighting all the benefits of maximising the utilisation of water and reducing wastes?

Living in Margaret River, it breaks my heart everyday to see wineries watering their vineyards during the day, considering the evaporation due to the sun. Is it much constraining just to water in the late afternoon so the water can penetrate in the soil over night ? and thus less water is required to efficiently water the vineyards... This is just an example where i believe we can improve a lot to save water.

Hope this helps,

Nicolas
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Yours sincerely

Gary Ryan
There are a number of issues presented in the discussion paper prepared by the Department of Water ‘Securing Western Australia’s Water Future’, that I wish to address.

There seems to be an inherent assumption that growth in population, economic growth and increased consumption are all good and necessary objectives. I contend, that in light of the severe environmental challenges the south west of WA is now facing, due to the effects of climate change and unrestrained exploitation of natural non-renewable resources around the planet, that the state government needs to work for and with the community to restrain growth and develop a ‘steady-state’ economy. If we are to have a liveable planet in the near future then the short sighted and selfish paradigm of relentless growth must change.

Water is a basic universal human right and as such should be a publically owned, managed and available resource for all people. Water resources should never become privatised and controlled by private interests ahead of public interests. The discussion paper advocates the potential for opening up ‘competitive and market based mechanisms’ for the provision of water to the people of Western Australia and to industry and agriculture. This should not be allowed to occur. It is not in the public interest to privatise water resources. Public resources must remain under the control of the public.

The Public Trust Doctrine proclaims that it is the duty of the state to protect public natural resources for public use ahead of private exploitation.

In light of the environmental challenges this state is facing, the production of food needs to be of paramount importance in maintaining our food sovereignty and security. Water plays a pivotal role in ensuring that we are able to firstly feed ourselves and to secondly export high quality produce to global markets. Agriculture must have first priority to water security ahead of industrial use, mining and the speculative use of water for private profit. The water resources of this state are rapidly diminishing and yet we seem to expect to be able to use more water as time goes on. In the current scenario of a drying climate this is simply not possible or feasible. Reality needs to be addressed in making long term decisions about our finite water resources. Further to this, water is of vital importance in maintaining a healthy and functioning ecosystem. Many water bodies in Western Australia are severely degraded, and with the reality of continually reducing rainfall in WA another priority must be the maintenance of the environment. We simply cannot allow the environment to continually degrade in order to maintain ‘economic growth’. With a compromised environment we will also have a compromised economy and all the negative attendant issues this implies.

A limited public resource as important as water must be regulated by the public to ensure that realistic priorities such as clean and safe drinking water is available, that water is available for food production and for environmental health. Mining and many other industrial processes are not essential for life and community and environmental wellbeing, whereas water most certainly is. We
cannot afford to compromise our water resources, both surface and groundwaters. Abstraction from aquifers in order to service vast mining and industrial processes at the expense of forests, rivers, wetlands and urban and regional communities makes no sense. We cannot simply destroy the basis of life for short term private profit.

The state government of WA must heed the many warnings provided by experts such as Jorg Imberger of the University of WA, and the CSIRO with regard to the responsible management of this most precious public resource. We cannot afford to compromise our water resources. We must take the long term, well informed science based view of responsible resource management if we wish to live within the limitations of our physical environment into the future. I trust that the Department of Water and the WA state government will act with caution and responsibility in reforming our water regulations, and not lose sight of the fact that this essential resource is a public resource and should not be a potentially privately controlled resource.

Thank you.

Julian Sharp.

jsharp@wn.com.au

PO Box 134

Pemberton WA 6260.
We are self-supply water users in agriculture in the Warren and Donnelly River catchments and object to the plans of the Department of Water in its Position Paper to apply water markets that will increase the cost of water as an input to agriculture and reduce the competitiveness of our produce. We request an increase in the allocation of water to agriculture to prevent the introduction of costly water markets and associated ‘red tape’.

1. The Department of Water has restricted the water available to agriculture in the ‘food bowl of the South West’ to force ‘water markets’ policy onto water users.

Over 90% of the water in the Warren and Donnelly River catchments is water for the environment flowing into the Southern Ocean. Two thirds of this area is forest where all of the water is for the environment. In the third that is cleared for agriculture only 40% of the water has been allocated to agriculture and other uses and 60% is allocated to the environment. The Department of Water forced this imbalance onto agriculture in 2012 through their Warren Donnelly Surface Water Allocation Plan (2012). By restricting water available for agriculture to 40%, most areas are now fully allocated or nearing fully allocated. Thus the Department of Water is forcing agriculture into ‘water markets’ to pay for water by auctions, tenders and trades. This will enable the Department of Water to ‘tick a box’ for compliance with the dogma of the National Water Initiative. At our expense! Managing water markets and the associated increased ‘red tape’ will also assist the Department of Water to justify its $83 million budget and 452 staff. At our expense!

2. More water must be allocated to agriculture in the ‘food bowl of the South West’ by revising the Warren Donnelly Water Allocation Plan.

Our area is designated ‘Priority Agriculture’ by the State Planning Commission and water for agriculture should have priority over the environment. We request the Warren Donnelly Surface Water Allocation Plan (2012) be revised to provide 60% of water for agriculture and other uses and 40% for the environment. This will provide sufficient water for growth of agriculture and maintenance of property values. There would then be no justification for imposing initial purchase of water allocations from the State by auction and tender, restrictive consumptive pools requiring purchase of water from other licence holders, separation of water licence from land title with uncertain outcomes, and mandatory metering, all of which the Position Paper advocates.

3. The Warren Donnelly Surface Water Allocation Plan must be a statutory Plan to provide security of water access for agriculture.

The Department of Water ignored repeated requests that the Warren Donnelly Surface Water Allocation Plan (2012) be a statutory plan prepared in accordance with the provisions of the Rights in Water and Irrigation Act. Water licence holders demanded the security for water entitlements that can only be provided by a statutory Plan. The Department has now done a ‘backflip’ on this admitting in the Position Paper (page 17) that “Administrative allocation plans provide less security to licence holders as the plans may be changed with administrative, rather than legislative due process. Decisions made based on an administrative plan are not as certain as those based on a statutory plan, and there may be additional costs to water users and the government if those administratively based decisions are appealed.” The Warren Donnelly Surface Water Allocation Plan must be converted to a statutory Plan under the Rights in Water and Irrigation Act, without delay in 2014.


The proposed legislation covers separation of water licence from land title, consumptive pools for periodic determination of how much water can be taken from private dams, water auctions and tenders, mandatory metering, and what types of dams are to be included, affecting property rights. These and many other provisions will require detailed consideration by water users affected in the ‘food bowl of the South West’. With controversial legislation, the ‘devil is in the detail’; thus it is vital the Minister for Water issue a draft ‘Green Bill’ for public comment.

Yours sincerely

Carla Reeve
On behalf of Peter Bowman, Silkwood Wines Pemberton
Policy and Innovation Directorate
Department of Water
P.O.Box K822
Perth W.A.6842.

Dear Sir

I am writing to enquire if the Water Reform Policy has been completed and if so when will we be able to obtain a copy.

Attached is a copy of part of my submission the other part was handed to you at the meeting in Carnarvon last year.

There have been several such reviews previously that I have put a Submission into but have never seen or heard of the results, I look forward to hearing from you.

Yours sincerely

Bruce Teede

Bruce Teede J.P.
Freeman of the Shire
SUBMISSION TO WATER REFORM

Dear Sir

Further to the Paper I presented to you at the Carnarvon Forum yesterday, (copy attached ) I hereby Submit further points to clarify some of my comments.

The Use It or Lose It Policy.

This Policy is not a good one, here in Carnarvon it has caused a lot of problems to local Growers who have been disadvantaged and had the value of their properties reduced because of it.
When a person has a Water Allocation which in most cases he paid for in the value of his property when he bought it he should be able to use it how and when he needs.

Situations arise whereby through no fault of theirs or conditions beyond their control growers have not not or can not use all their Allocation, they should not be Penalised for this.
The Use or Lose it Policy as it is it is open to misinterpretation or misuse, when such a Policy is able to be interpreted in various manners it is not a good Policy and should be removed, it serves no useful purpose. These comments refer to the use of water from Basin A here, not Scheme water.

Water Trading
I have covered this in the attached Paper. This Policy has some good points but it is open to abuse. Here in Carnarvon we have the situation whereby some have been able to acquire large volumes of Scheme Water, far more than could be used on their property just for the purpose of Trading it, this is abuse of the system, Policies should be made to prevent Speculators and Dealers.

Protection of the Resource

This should have a high priority in any new Policy, however it should not be the catalyst for the introduction of restrictive or unnecessary regulations that have no positive purpose.
Sound management practices in the main achieve good results, however at times there has been misinterpretation or manipulation of the facts to get a certain outcome.

My reason for this comment is that here in Carnarvon there has been a misinterpretation of figures to indicate that our resource known as Basin A is over allocated, this is because D.o.W used the figure of about 170 growers having an allocation of 72,000kl per annum results in a total of approximately 12 gigalitres which is well above the reported safe draw of 6.2 gigalitres per annum.
In actual fact records over some 50 odd years have shown that only once in this time has this figure of 6.2gl been achieved, mostly the use is in the order of 4 gigalitres.
With the knowledge of facts not all the 170 growers could ever use 72,000 kl from Basin A at all times. Especially at drought times. Originally the allocation of 72,000 kl was a conjunctive allocation, that is a grower could use all his allocation from Basin A, all from the Scheme or part of each, most growers used part from each, hence the average draw was in the order of 4 gigalitres from Basin A not 12 gigalitres as the figures indicated.

These comments are made only to illustrate how anomalies can arise, Policies should be structured so that rules or regulations are straight forward and can not be misinterpreted.

Yours sincerely

Bruce Freele