



# WATER REFORM IN WESTERN AUSTRALIA

## Allocation and Transfer of Rights to Use Water Proposal for Discussion



WATER REFORM SERIES

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1997



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COMMISSION

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# Foreword

We live in a world of change. Water resource management practices are coming under increasing pressure for change and adaptation to modern requirements. In responding to these pressures for change we must not neglect the important elements of investigation, planning and management of water use that have enabled Western Australia to avoid the problems of environmental damage and over-allocation that now plague the other mainland States.

Sound water resource management is essential for wise public and private economic investment and environmental protection. Resource management seeks to develop rules to maximise the overall public interest. It is the manager's task to improve the water resource management systems, balancing the competing requirements and helping water users to further their interests without causing injury to others.

The Water and Rivers Commission is this State's water resource management agency. The Commission collects and analyses water resources information, prepares management policies, issues licences, regulates water use and protects the quality of the water and the water dependent ecosystems. In discharging its responsibilities the Commission is required to exercise judgement and discretion in protecting and controlling water use.

This paper proposes changes that can strengthen and improve our system of allocation of rights to use water from natural sources. The changes build on national and State policies and draw on systems developed in other States and countries.

The changes are proposals only — they have not been “adopted” by the Commission or by Government. The proposed management system is designed to be coherent and stable, integrating the important elements of good natural resource management. Like any management system, it must be looked at as a whole.

The Commission is seeking the community's views on the proposal, together with suggestions for its improvement. When it has those views and suggestions it will make recommendations to Government on changes that it considers should be made.

The Commission will provide additional information on important aspects of the proposal to interested people. Commission staff will be pleased to explain the proposal to groups and to work with those groups to modify and improve the proposal. The Commission will also prepare more detailed policy papers to help in consultation over issues that arise from this proposal.

You are invited to submit written comments. Please try to be specific in your comments, identifying the issue you are addressing and giving the reasons for your concerns or support. Please say if your comments are confidential (no individual names will be used in published reports) and send them as soon as possible, or by October 31, 1997 at the latest to:

Water and Rivers Commission  
Attention: Rod Banyard  
Manager, Strategic Projects Branch  
PO Box 6740  
Hay Street  
EAST PERTH WA 6892

Initial enquiries and arrangements for group discussions should be made to Brigit Cosgrove, phone (08) 9278 0300.



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# Summary

This paper describes changes proposed to be made to water resource management in Western Australia. The changes will integrate the environmental, economic and social objectives of management, extend the rights and responsibilities of water users, simplify and modernise management and enable the rules for water use to be adapted to suit local conditions. The changes will meet the requirements of the Council of Australian Governments (COAG) agreement on water reform.

To establish these arrangements it is proposed to amend the *Rights in Water and Irrigation Act*.

## **Integration of water resource management objectives**

We now recognise that an integrated approach to natural resource management is necessary to maintain and improve the overall quality of our lives. It is not feasible to persist with our current water laws that ignore the wide ranging impacts of water use on the environment and the community.

To achieve this integration it is proposed to:

- set sustainable resource management objectives that balance economic development, biodiversity, resource stability and social needs; and
- extend the scope of management to include all significant water resources.

## **Water use rights**

Three sources of rights to use water are proposed:

- statutory rights — these rights are granted by the Act, they include riparian rights;
- licensed rights — these rights are granted by the resource manager when a licence is issued; and
- local rights — this is a new category of rights that will be granted under rules made by the resource manager. They are similar to statutory rights.

It is proposed to modify the existing statutory rights so

that these rights can be exercised only in a way that is environmentally and socially acceptable, as determined by the resource manager.

The current arrangement of fixed term licensed rights to use water is proposed to be modified allow the granting of perpetual licensed rights.

The licences will be transferable so that the need to redistribute water use among water users can be achieved by sale or lease of the licence.

The water resource manager will maintain jurisdiction over the issue, use and transfer of licences to ensure that the users act in a way that is compatible with the overall public interest as expressed in the resource management objectives.

The legislation will list the matters that may be considered in dealing with applications to issue or transfer licences. This will give the resource manager clear authority to take account of environmental, social and economic objectives. Under the present law it is left to the manager to determine what is important.

To ensure our limited supplies of water are used and to limit speculation a “use it or lose it” arrangement is proposed be adopted for licensed rights. Subject to safeguards that protect the legitimate interests of the licence holder, rights to unneeded and unused water may be compulsorily transferred to people with a current need.

To simplify water resource management and ensure that local needs are accounted for, it is proposed to remove the current distinction between proclaimed and unproclaimed areas and make general and local water resource management policies, rules and standards. This can remove the need for licensing common activities and modify the statutory rights to ensure water resource management objectives are met.

It is also proposed to widen the scope for making water charges for water use to equitably share the costs of management among the beneficiaries.



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# Why Change the Rules for Use of Water Resources?

## Our laws are out of date

The principal water resource management Act, the *Rights in Water and Irrigation Act*, was written to “make provision for the conservation and utilisation of water for industrial irrigation”<sup>1</sup>. Because of this limited scope the Act establishes a water resource management system that is simplistic and out of date with modern requirements. The Act fails to recognise or deal with the myriad of water uses other than irrigation, or the need to manage the environmental and social impacts of water use.

Significant developments are occurring in our society. New single-purpose water agencies have been established and water users and the community want to take more responsibility for their future. The Act provides very little opportunity for community input into management decisions or for passing power and responsibility onto water users.

The recent separation of water resource management and water supply functions into different agencies allows us to have more confidence in management integrity. It provides an ideal opportunity to set clear uncompromised guidelines for the resource manager and to give the manager the powers required for good management.

## COAG requirements

The States and the Commonwealth governments have committed themselves to reform of the water industry, especially to more formally defining private property rights in water use and promoting competition in an attempt to increase the value of water use. The Council of Australian Governments (COAG) agreement<sup>2</sup> requires:

- implementation of comprehensive systems of clearly specified water allocations or entitlements separated from land title;
- giving priority to formally determining allocations or entitlements to water, including allocations for the environment as a legitimate user of water;

- that environmental requirements will be determined on the best scientific information available;
- in cases where river systems are deemed to be stressed, a better balance in water resource use including appropriate allocations to the environment to restore the health of river systems;
- consideration of establishing environmental contingency allocations which provide for a review of the allocations five years after they have been determined;
- undertaking assessments to satisfy environmental requirements of the river systems before any harvesting of the water resource occurs;
- that water is used to maximise its contribution to national income and welfare, within the social, physical and ecological constraints of catchments;
- trading arrangements in water entitlements be instituted once the entitlement arrangements have been settled;
- that cross-border trading arrangements facilitate cross-border sales where this is socially, physically and ecologically sustainable; and
- that Western Australia develops the natural resource management institutional arrangements, that will facilitate trade in water.

<sup>1</sup> Long title of the *Rights in Water and Irrigation Act*.

<sup>2</sup> See Agriculture and Resource Management Council of Australia and New Zealand Occasional Paper Number 1, “Water Allocations and Entitlements — A National Framework for the Implementation of Property Rights and Water” and Occasional Paper SW3, “National Principles for the Provision of Water for Ecosystems” for more information



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# The Nature of Water and its Control

## Who owns and controls water?

Water is a unique resource, it is in limited supply and it moves from place to place. Any change to the flow or quality of water will affect all those downstream. Consequently our law does not allow natural water resources to be owned or used in a way that disregards the impacts of the use. The right to the use, flow and control of most water belongs to the Crown, giving it overall power to control the use of water and to manage any consequences of its use.

## Objectives of water resource management

Water resource management must take a multi-objective focus which considers environmental and social values as well as consumptive needs. It is therefore important to set clear, explicit objectives in the legislation.

It is proposed to:

- include an object clause in the *Rights in Water and Irrigation Act* to ensure that the use, allocation and management of the State's water resources are consistent with the principles of sustainable development;
- define sustainable development in a manner that is in keeping with the principles endorsed by COAG and establishes a clear environmental bottom line;
- require all powers and functions exercised under the legislation to be done in a manner which is in keeping with the stated objective of the Act; and
- extend the obligation to act in accordance with the objective of the Act to those persons exercising rights received under the Act.

## Sustainable development

A proposed definition of sustainable development is development of the State's water resources in a way and at a rate which provides for and protects the well-being of people and their communities provided that:

- the potential of those resources to meet the reasonably foreseeable needs of future generations is not diminished; and
- the ecosystems, including their biological diversity, that depend on those resources are protected; and
- detrimental effects of the use and development of those resources are reduced, as far as practicably possible, to a minimum.

## Management areas

Currently the level of management of the use of water resources is varied by the "proclamation" of the area. A proclamation can establish a surface water or groundwater management area. The following rules apply in each type of area.

### *Non-proclaimed areas*

In these areas:

*Surface water may be used for domestic and ordinary use and for watering stock. Surface water may be used for any other purpose provided the flow of the water is not diminished.*

*The owner of riparian land may water a two hectare (5 acre) household garden from a watercourse.*

*A direction may be issued by the Commission to people taking surface water without authorisation.*

*The right to the use, flow and control of all groundwater is vested in the Crown.*

*A licence is required for the use of artesian groundwater. Non-artesian groundwater may be used for any reasonable purpose.*



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### **Groundwater areas**

In these areas (listed in Appendix D):

*A licence is required to construct a well and draw groundwater.*

*Domestic groundwater use is usually exempt from licensing.*

### **Surface water areas**

In these areas (listed in Appendix D):

*The right to the use, flow and control of water in watercourses, lakes, lagoons and swamps is vested in the Crown.*

*The use of water for purposes other than irrigation of a domestic garden on riparian properties, domestic, ordinary and stock purposes requires a licence.*

### **Keeping the rules appropriate**

The differences in the laws relating to the different management areas are rather complex and confusing. Most significant water resources are now in a proclaimed area and the need for a proclamation process is diminishing. It is proposed to simplify management so that the same set of basic rules applies throughout the State. Provision will be made for tailoring management to the specific needs of any particular area and community by making local rules to modify and add to the basic rules.

### **What water should be subject to control?**

For management of water resources to be effective the Water and Rivers Commission (the Crown agency appointed to manage the water resources of the State) must have the ability to manage all water use or interference with water according to need.

Waters subject to the control or management of the Commission should include the following if the level of use or interference may affect other people, the environment or damage the resource:

- watercourses
- wetlands - i.e., lakes, lagoons, marshes, springs, swamps
- groundwater
- overland flow
- drainage water

Under current law the use of water from springs on private land is not controlled by the *Rights in Water and Irrigation Act*. This requires any disputes over use to be settled in the courts — a costly and unpredictable process. Many disputes arise in the community over the unmanaged use of spring water and it is proposed to change the law to enable the Commission to control and licence the use of springs as if they were watercourses.

Rather than giving the Commission blanket power over overland flow and drainage water it is proposed to bring them under control through the preparation of policies and rules that prescribe the level and means of control. The people affected will have the right to be consulted during the preparation of the policies and rules.

To avoid unnecessary control the Commission should have the power to exempt any use or interference with waters that does not affect other users or the resource.

Waters not subject to the control of the Commission should include the following:

- water collected from artificial surfaces such as roofs; and
- water flowing in trunk and distribution pipes or channels.



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## What activities should be controlled?

Many activities will affect water resources and the people who use them. If management is to be effective and efficient those activities that cause significant changes should be subject to regulation. Permission may be required for the following:

- taking water;
- collecting or storing water;
- diverting water;
- obstructing a watercourse or modifying the flow of a watercourse;
- discharging water into a watercourse, wetland or well;

- interfering with the bed or banks of a watercourse or wetland;
- building and operating a dam or other works on a watercourse;
- building or altering a well or bore or other means to take or obtain access to groundwater;
- damaging an aquifer; and
- building or operating drainage and dewatering works.

Local rules should allow works to be exempted from controls whenever the resource manager considers that controls are unnecessary.



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# Property Rights to Use Water

Certain statutory rights to use water are given directly by the legislation. These statutory rights have common application in that they may be exercised by anybody who meets the eligibility requirements set down in the legislation. Other rights are given by the water manager, such as those granted by issuing a licence. Under the existing law the statutory rights are entirely beyond the jurisdiction of the water resource manager. There are no means available to the Commission to modify the right if the environment, the water resource or other people are damaged. Licences on the other hand are issued for a fixed period and the Commission may refuse to renew the licence or it may make some modifications to a licence at any time.

## Statutory rights

Statutory rights allow people to take water that is available; they are not exclusive and do not prevent other people exercising their right to take water. The current riparian right to take water for domestic purposes includes a right for some riparian landowners to irrigate 2 hectares of garden. Throughout Western Australia the taking of such large quantities of water will cause damage to the watercourse and prevent other users getting adequate water for their needs. Considerable benefits to all water users could be obtained if the water resource manager is given powers to modify the riparian right of landowners.

It is proposed to establish statutory rights that will enable water to be used for:

- domestic needs, including the ordinary household use and irrigating a household garden;
- stock drinking water, but not irrigation of pasture or water for feedlots;
- firefighting; and
- for any other purpose provided there is no significant impact on the environment, other people, the water body or receiving waters.

To establish a sensible set of controls over statutory rights it is proposed to:

- extend the statutory right to take water for domestic needs to non-artesian groundwater;
- place restrictions on water use if impacts are serious;
- put conditions on statutory water use; and
- enable local rules to be made to remove or reduce the allowance for garden irrigation.

Presently any person may take domestic and stock water from a publicly accessible watercourse or wetland. It is proposed to remove this right and allow use of water found on other sites only under a local rule or a licence.

Statutory rights are not transferable — they cannot be sold or used by another person. The Commission must have regard to the use of water under a statutory right when it considers applications for a licence to take water but it should not be bound to regard the statutory right as being superior to licensed rights. The Commission should be able to issue licences that displace statutory rights if this is consistent with the objectives of the Act. The Commission may require the licensee to compensate for actual damage to statutory users.

## Licences — exclusive rights

### *What is a licence?*

A licence is a grant of permission to a person to do something that is otherwise prohibited, such as taking fish, timber, minerals or water. A licence may be valid for a particular period; it will specify what can be done and any conditions or obligations that must be complied with. Licences are often subject to governing legislation, rules and regulations.

Because it is a permission a licence has considerable value. The licence holder has the use of resources that are denied to others and the licensee expects that the licensed rights will be protected. There must of course be responsibilities that go with the rights. The stronger the right and the greater the period for which the right is granted the more scope there must be for placing responsibilities on the person exercising the right and for changing the right as water resource management needs change.



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## Allocation Process

Before a licence is issued the Commission undertakes sufficient work to satisfy itself that the use of the water will meet the water resource management objectives. In an ideal world the Commission would fully understand the water resource, the environment, the community's needs and how the water can be used for the best overall advantage. However, much of the needed information is often unavailable and in these circumstances the Commission adopts a precautionary approach. The Commission will not issue licences, or will issue them for only a short period, if it does not have sufficient information to be satisfied that severe or irreversible damage will not occur. The allocation steps, outlined below, recognise these needs.

1. **Understand the water resource.** This initial step in the allocation process requires measuring and analysing the water resource flows, quality, social and biological systems and understanding how the water flow system and important environmental systems will change as water is used.
2. **Assign the water resource to beneficial uses.** This requires an understanding of the regional needs for water and the needs of the dependent environmental systems. The permissible uses of the water resource, approximate volumes of water available for use and the environmental water provisions are defined in this process. Interested parties have the opportunity to state their needs and say how the resource and environment should be managed. This step results in the publication of a **Regional Allocation Plan**.
3. **Define the rules for licensing.** This is also done in a public process that develops water resource policies and rules that satisfy the needs for the water and the local management objectives. The water resource manager prepares an **Allocation Plan** that specifies how the needs of the water resource system, the community and the environment will be met.
4. **Issue licences.** This is normally done in accordance with the **Allocation Plan**. Circumstances may require the water resource manager to issue licences before completion of the steps described above or to depart from the plan because of unforeseen issues. In these situations the water resource manager assesses the impacts of the proposed use on the water resource, the environment, the community and other users. The Commission may delay the application or require the applicant to undertake studies to obtain the information that it must have before it can deal with the application.
5. **Monitor water use to ensure that the objectives are met.**
6. **Amend the plan and licences as required.** After a licence is issued the Commission reserves the right to change the licence, including the amount of water that is allocated, if this is necessary for good water resource management. The licence allocations and conditions of use may be varied by subsequent plans or policies made to satisfy the evolving requirements of good water resource management. No compensation will be made for the changes.



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### *Licence tenure*

At present licences are issued for a fixed period, usually in the range of five to 10 years. Although normal practice is to renew licences when they expire there is no guarantee that a replacement licence will be issued or that a licence will be issued under the same conditions. This arrangement enables the Commission to periodically change the licence conditions to suit the current requirements.

The discretionary renewal leaves water users uncertain of their future, with the value of the allocation reducing as the licence term expires. Under the present system of non-transferable licences this reduces the security available to a purchaser of a licensed property and under the proposed transferable licence system will reduce the market value of the licence.

Because of the limited powers of the water resource manager to amend licence conditions during the term of the licence it is not feasible to simply lengthen the term of licences.

Two means of resolving the dilemma present themselves:

- renewing licences before expiry; and
- issuing perpetual licences and introducing clear powers to amend licences.

### *Renewing licences before expiry*

Under this strategy licences would be issued for a period determined by the confidence of the water resource manager in the sustainability of the use. Where the impact of the use is well known and acceptable and management policies and rules are well developed, licences would be issued for extended periods, say up to 15 years. Under less certain conditions licences would be issued for periods as short as 5 years. As the licence period runs down the licensee will be free to apply for the renewal of the licence. This will give the licensee the security needed to continue the operation or sell the licence at its true value. The licence application would be dealt with under the policies and conditions prevailing at the time. If the new licence conditions prove to be restrictive the licensee would be free to abandon the application and continue with the existing licence for its remaining term. The licensee may, of course, find that the conditions under which the licence is ultimately renewed are even less favourable.

### *Moving to perpetual licensed rights*

The granting of perpetual rights is only feasible if the management policies and rules are well established and described in management plans and the water resource manager has clear and continuing authority to amend the licence. The water resources manager will change the allocation and the licence conditions as needed to ensure that the water user operates in a way that meets the objectives of the Act. This new arrangement will provide the following benefits:

- progressive water users, those people who keep up to date with water conservation and environmental protection practice, will have much greater security with regard to continuing use of the water resource;
- licence holders will have an incentive to use water in a sustainable way;
- the value of the water right will be increased and will not run down with licence expiry; and
- investment funds will be cheaper and easier to obtain.

The obligations on water users to act responsibly are described in more detail in the section “Changing needs and continuing responsibilities”.

The granting of perpetual water allocations is new to Australia, although they have been a feature of Californian water law since the initial settlement of that State. Because of powerful rights that perpetual licences will provide to licence holders they should be granted only after the requirements for ecologically sustainable use are understood and local management objectives and rules are well defined and operating.

It is proposed that a licensing system that allows early renewal of fixed term licences and the issue of perpetual licences is adopted. This will provide added flexibility for the water user and the water resource manager to satisfy their needs and responsibilities.

### *Probationary issue of new licensed rights*

As a precautionary measure it is proposed that new licences, especially perpetual licences, be issued subject to a probationary period of five years. During this time the licensee must demonstrate the *bone fides* of the application and that the water use will be well managed. At the end of this time, subject to satisfactory performance, the licensed right will be confirmed.



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### ***Who can hold a licence?***

The current legislation is written around the concept that licence holders will be landowners using water on the property. Recent changes have extended the licensing requirements to water service providers and it is becoming increasingly common for licence holders to want to “sell” rather than “use” water. It is necessary to extend the scope of licensing and it is proposed that any person may hold a licence provided that person:

- has legal access to the water source (the person need not own the land on which the water source exists);
- has the intention and means to use or supply the water for a worthwhile purpose; and
- is able to demonstrate that taking and using the water will be sustainable, efficient and environmentally acceptable.

A demonstration of environmental acceptability may require the applicant to undertake detailed work, possibly for formal assessment under the *Environmental Protection Act*, for projects that have serious environmental impacts.

### ***Applications***

Applications for licences must include sufficient information for the Commission to assess the application and to identify people who may be injured by the grant of the licence or who may want to make representations over the issue of the licence. Applications must:

- describe the proposed use for the water;
- describe the location and means of obtaining the water, measuring the volumes taken and monitoring the effect of the activity on the water resource and the environment;
- provide any additional, relevant information required by the Commission; and
- be advertised in a newspaper that circulates in the region.

### ***Considering the application — private rights and public trust***

The Commission will determine the application, giving effect to the objectives of resource management through consideration of:

- the use and need for the water;
- other sources of water that are available to the applicant;
- impacts from the taking of the water and any associated activity on the water body, including the associated ecology, the environment, the community and other users;
- any Commission policies and rules;
- any agreements between the Commission and other resource managers;
- Government policy;
- advice from Commission committees and other authorities;
- local custom and practice;
- any objections and submissions from members of the community;
- international and interstate agreements; and
- local policies, rules, regulations and directions.

### ***Licence Conditions***

The Commission may impose any conditions it deems necessary or convenient for meeting the objectives of the Act, including conditions relating to:

- the protection of a watercourse, wetland or aquifer;
- the purposes for which the water may be used;
- the maximum amounts of water which may be taken in particular periods or circumstances;
- payment of fees and charges;



- protection of the environment, including mitigating any environmental consequence of the use of the water;
- the proper management of the watercourse, wetland or aquifer;
- the physical and hydrological circumstances that affect the water resources and water flow;
- the efficient use of water and water resources;
- restrictions applied during drought or water shortages;
- avoidance and mitigation of and compensation for adverse impacts of the activity;
- the installation and use of measuring devices or pumps;
- strategies to be followed in the operation of water supply or water use systems;
- arrangements under which the water may be sold or disposed of;
- prohibitions, restrictions or arrangements relating to transfer of the licence;
- the standard of construction, dimensions, and any other feature of any works;
- the maintenance and operation of the works;
- the date of commencement of the works and the notice required to be given of that commencement;
- the submission of reports on the carrying out of the works;
- the qualifications held by persons undertaking, designing, constructing or operating the whole or any part of the works;
- the protection and enhancement of instream uses;
- the protection of the watercourse, wetland or aquifer and its surrounds;
- the maintenance of flow in the watercourse;
- the maintenance of the drainage regime;
- steps to be undertaken to maintain the availability of water to other requirements;
- works or measures to be undertaken for the protection

of the aquifer or for the maintenance of water pressures; and

- monitoring, sampling, analysis and reporting of flora, fauna, water and strata.

The conditions may incorporate documents, such as policies and operating arrangements and may provide for the amendment of those documents.

### ***Providing for future growth***

Water service providers and some other water users undergo progressive expansion in their water use. These developers must undertake investigations to determine the yield and operating conditions of their future sources. They require some security of access to justify their investment. Although the source may not be used for some time it is proposed to issue “access licences” for the future use of a source.

The developer wishing to obtain an access licence must substantiate the need for future water supply with a development plan matching growth to new water sources. The plan may require assessment under the *Environmental Protection Act*.

The application will be advertised to alert other interested people who may wish to use the source or object to its development or use.

The Commission will issue water access licences for a specific period that will depend on anticipated regional and local demands on the source, other sources available for development, water entitlements available through transfer, water conservation and efficiency measures employed by the applicant, the soundness of the development plan and any representations from the Water Services Coordinator.

Access licences will be issued subject to the normal licence application and assessment requirements. The licence will allow the developer to use the sources from a prescribed date for the specific purposes stated on the licence. The access licences will require the developer to undertake an investigation and development program and make the information available to the Commission. The conditions of use, including the volumes that may be taken, will be determined during and following the investigations. Other people may be given temporary use of the source before its development by the access licence holder.



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If the source is not developed in accordance with the program or the development program is altered, the access licence must be transferred, surrendered or an application made to vary the development program.

If, because of unexpected or unplanned changes in demand or management requirements, the Commission considers that the source should be reallocated or used by another person the Commission may require the access licence to be transferred, resumed subject to fair compensation, or shared under third party access rules.

The transfer price or resumption compensation of the access licence will be restricted to ensure that the sale does not provide an excessive profit to the licensee or the transferee (that is, no more than a reasonable return on incurred costs or the injury suffered by the access licence holder). The access licence holder must be able to substantiate the costs claimed. The Commission will liaise with the Water Services Coordinator in establishing the transfer price if one of the parties is a Water Service provider.

### ***Compensation***

Where, after due process, the Commission decides to issue a licence that will result in injury to another party the Commission may specify compensation payable by the licensee for injury. Failure to pay the compensation will be sufficient reason for the Commission to cancel the licence.

### **Local rules**

It is proposed that local rules be made to allow water uses that would otherwise be forbidden or require a licence. The local rules would grant rights similar to statutory rights in that:

- a right will vest in whoever meets the criteria specified in the rule;
- the right may be made subject to conditions;
- the rules may be changed as needed for proper resource management; and
- the right is not transferable.

The process for making local rules is described in the section “Fine tuning rights - policies and rules”.

### **Appeals**

It is proposed to retain the current appeal system, suitably modified to suit the proposed arrangements. An applicant may appeal to the Minister against any decision of the Commission to refuse, issue or modify a licence. Any person affected by a direction may appeal against the direction. Appeals will be decided in accordance with the objectives and provisions of the Act.



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# The Licensed Use May Be Transferred

## **Tradable and non-tradable water allocations**

As time goes on the amount of water required for any particular purpose may change, especially as agronomic and technological improvements are made. New and more profitable demands and uses for the water will emerge and existing uses may prove to be unsustainable. Under these conditions a voluntary reallocation system is required to promote the flow of water to better uses, provided the change in use does not cause injury to the resource or other parties.

A market system, in which the licensed rights are sold or leased, can meet these needs, provided the transfer of the rights is subject to the jurisdiction of the water resource manager to ensure that the water resource management objectives are met and third parties are not damaged.

The following water's allocations are specific to the land or the people and may not be transferred:

- Water affected by statutory and local rights to its use water;
- flows required to maintain the water balances essential to prevent damage to the water resource; and
- flows required to protect biodiversity and support natural life.

The following water allocations may be transferred, subject to the jurisdiction of the water resource manager and provided the custodian of the allocation has the legal authority to trade:

- flows required to correct environmental damage, such as flushing flows in rivers to wash away nutrients and algae, subject to the environmental damage being corrected in another way;
- flows maintaining artificial environmental features, such as ornamental lakes subject to the feature not being required to protect biodiversity and support natural life;
- allocations to support economic and social development; and

- surplus allocations held by water service providers, subject to the determination of the Water Services Coordinator to ensure the water supply system can cope with demand.

## **Market rules**

The Commission will consider applications for transfer rights with respect to the same issues as are appropriate to the issue of a new licence (including the requirements of any relevant policies and rules).

The legislation should provide for making policies and rules that govern market operations. This will provide an important function of keeping the market participants well informed so as to avoid incorrect valuation and pricing of the rights being traded.

Specifically, the policies and rules regulating the transfer of water allocations may provide for:

- conditions under which licensed rights are deemed to be transferable;
- procedures for making non-transferable licensed rights transferable;
- fees and charges for application and evaluation of transfers;
- restrictions or incentives to trade that support water resource management and community goals such as maintenance of irrigation schemes, salinity amelioration and improvement to river flows;
- division of allocations into tradable portions and minimum allocation sizes;
- minimum retained allocations; and
- restrictions to protect other users, particularly the greater membership of cooperatives and irrigation schemes.



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# Changing Needs and Continuing Responsibilities

## Reasonable and responsible use

The change to perpetual allocation of water use rights requires complementary mechanisms to enable the water resource manager to intervene if water use is inappropriate or inconsistent with the legislative objectives. The management system should require water users to keep up-to-date with practical and technological improvements in water use and act responsibly with respect to the impacts of the use on the environment, the resource and other users. To develop this concept it is useful to develop management principles that guide the user and which, if violated, would lead the resource manager to intervene.

The following management principles are proposed. The use of the water must be:

- Sustainable — Renewable water sources must not be unacceptably depleted;
- Beneficial — The water must be used for a purpose that contributes to the economic or social development or well being of the community. Management systems should encourage the transfer of water to more valuable use;
- Necessary — The water source used should be the most appropriate for that use, with other sources of water that could reasonably meet the needs of the user without excessive cost and with less consequential damage being preferred;
- Harmless — The use of the water must not unduly damage the environment or third parties, with damage being avoided, mitigated or compensated; and
- Efficient — The amount of water used must be minimised by the use of “best practice” technology, system design and control, with determination of best practice recognising both its costs and benefits.

It is proposed that the legislation require the water user to act responsibly by complying with the management principles. The Commission will be vested with sufficient powers to enable it to satisfy itself that the principles are being followed. The water user may be required to monitor and report on his activity and the water resource condition.

General or local rules may be made setting down more specific requirements to ensure the water use is reasonable and in context with local needs and practice.

If the Commission believes that the principles are being violated it may modify the licence. Before modifying a licence the Commission must consult with the user who may appeal to the Minister against any modification.

It will be an offence to contravene any rule or licence requirement.

The maximum penalties under the Act are in the range \$500 to \$2000 with maximum daily penalties for continuing offences of \$50 to \$200. It is proposed to increase the maximum penalties ten times.

## Fine tuning rights — policies and rules

Any system of allocation of the rights must be just. The way in which water is allocated and restrictions are imposed should be well defined and fair to all concerned and the manager’s decisions should be subject to review. The rules should be consistent and public, enabling interested parties to understand the requirements and plan for their needs.

As discussed earlier it is recommended that the distinction between proclaimed and unproclaimed areas be abandoned. While this will establish a common set of basic controls it is not appropriate that every activity in every area of the state be subject to the same controls. Rather it is proposed to adopt a planning system that establishes enforceable policies and rules suited to local conditions and needs.

The policies and rules should apply in levels. Some may be general and operate across the State. At a regional and local level the plans will set out the local policies and rules and:

- define the policy objectives and desired outcomes;
- define the area subject to the plan;
- assign water resources to particular uses;
- streamline controls, possibly removing the need for licences, for common activities;



- invoke stricter controls on activities that have severe effects;
- specify procedures to be followed;
- provide information on resources and relevant matters; and
- define rules for the transfer of water use entitlements.

Enforceable policies and rules will provide a clear guide for the use of power which, in conjunction with a public process for writing the policies and rules, will ease the way for devolution of management to local bodies. This will facilitate local government or local management groups taking over water resource management if this is desired.

The following steps should be followed in formulating the policies and rules:

- preparation of a proposal to make policies and rules;
- public notice of the proposal, in newspapers and the government gazette;
- referral of proposals to authorities which will be impacted;
- a period of public comment and submission on the proposal;
- analysis of the comment and submissions to determine any changes; and
- approval by the Minister.

### **Who makes policies and rules**

In our society, rule makers must be ultimately accountable to the people governed by the rules. The following accountability systems apply in Western Australia.

#### ***Discretionary powers subject to review by appeal***

Where an authority, such as a water resource manager, is given power to grant approval or refuse permission for an activity or to set conditions, the decision is normally subject to appeal to a higher or judicial authority. An example of such an arrangement is the issue of licences to use water under the *Rights in Water and Irrigation Act*. The licence applicant may appeal to the Minister for Water Resources if he or she is aggrieved by the Commission's refusal to grant a licence or by the conditions attached to the licence.

#### ***Review of decision by Parliament***

This system, which applies to by-laws, requires the rules to be submitted to Parliament for review over 14 sitting days. During this time either House of Parliament may vote to disallow the rules.

#### ***Referral of decision to the Minister***

Under this system the Government authority does not have the power to make the decision. The authority will make a recommendation to the Minister who will approve, change or reject the recommendation. A good example of this system is found in the environmental impact assessment process where the Environmental Protection Authority makes a recommendation to the Minister for the Environment.

This proposal recommends that the system of referring the proposals to the Minister be adopted for making rules over water resource use.



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### **Fine tuning rights in an emergency — directions**

The Commission should be given the power to issue directions as to the volume, method or timing of taking water for different uses. A direction may be made if an acute shortage of water exists or is expected or damage to the environment, water body or other parties is occurring or is likely to occur.

The direction may specify conditions and limitations under which water is stored, diverted, taken or used and must have a limited life of no more than one year. The direction should be subject to expedited appeal to the Minister.

### **Licence cancellation, resumption and surrender**

A licence may be cancelled by a court of law if the licensee is convicted of failing to observe the licence conditions or any other obligation under the Act. If a water allocation is required for public purposes and the licence holder refuses to transfer the licence for a fair price it is proposed that the licence be compulsorily resumed, subject to the payment of fair compensation. The resumption procedures of the *Public Works and Land Resumption Act* should apply.

A licence may be voluntarily surrendered, subject to any conditions imposed by the Commission on the surrender. The landowner or occupier will be responsible for making good any works that endanger the water resources or dependent systems. For example an unused or unsafe well must be repaired or removed.

### **Monitoring the use to protect the water user and the resource**

Water is a vital resource; it must be available to those who want to use it. Water users must report annually on their use of water to clearly establish and maintain their right to continued use of the water and provide the data necessary for the proper management of the resource. Such data will further our understanding of the resource and assist in the consideration of applications for new or increased water use.

The reports should include the following information:

- volume of water taken (metered or estimated from crop factors);
- place of diversion and place of use;
- purpose of use; and
- any other information specified on the licence or under relevant policies and rules.

If reporting is also required under the *Environmental Protection Act* this will be taken in account on setting the reporting requirements under the licence.

Information in licence reporting will be publicly available, subject to the provisions of the *Freedom of Information Act*.



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# Paying the Cost of Water Resource Management

Before 1996 the cost of water resource management was paid for by the customers of the Water Authority through water supply and sewerage charges. Currently the monies are provided from the consolidated fund which, in turn, receives funds from the Water Corporation.

The National Competition Policy and the COAG Water Reform Agreement promote user-pay funding and the removal of subsidies. If State Governments elect to retain any subsidies the agreement requires that the subsidy be clearly identified.

There are sound reasons for establishing user-pays funding by raising water licence fees and water use charges. The strengthening of property rights in water use and establishment of transferable rights will increase the value of water licences enabling a contribution to be made by the licence holder to the costs of managing and protecting the water resource. Market distortions will occur if the cost of management of the water is not borne by the user and the benefits flowing from the market system will be diminished.

The existing legislation provides for:

- licence application and issue fees to cover the administrative costs of dealing with applications;

- a “royalty” charge to water service providers for the use of the community’s water resources — royalty charges are based on the value of the resource rather than the cost of the management service; and
- charges for services provided by the Commission.

The following additional sources of cost recovery should be provided for in the legislation:

- water use charges for licensed water use to cover the costs of water resource protection, investigation, monitoring and management;
- water use charges for non-licensed water use, such as riparian use, so that these users make a contribution to the cost of managing the resources and protecting their rights; and
- a fixed resource management charge or rate on landowners — this type of charge is especially suited to financing “Boards” of local management.

Discounts should be made to fees and charges to recognise a licensee’s contributions to water resource management, investigation and monitoring.



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# Appendix I - Proclaimed Areas

## Groundwater areas

Albany  
Arrowsmith  
Blackwood  
Bolgart  
Bolgart East  
Bremer Bay  
Broome  
Bullsbrook  
Bunbury  
Busselton-Capel  
Canning-Kimberley  
Carnarvon  
Cockburn  
Collie  
Condingup  
Derby  
Dwellingup  
East Murchison  
Esperance  
Gascoyne  
Gingin  
Gnangara  
Goldfields  
Gwelup  
Happy Valley  
Hopetoun  
Jandakot  
Jurien  
Kondinin-Ravensthorpe  
Mirrabooka  
Murray  
Perth  
Pilbara  
Rockingham  
Serpentine  
South West Coastal  
Stakehill  
Swan  
Wanneroo  
Westonia  
Yanchep  
Yenart

## Surface water areas

Avon River  
Bolganup  
Brunswick River  
Canning River  
Capel River System  
Churchman's Brook  
Collie River System  
Dandalup River  
Gascoyne River  
Gingin Brook  
Harvey River System  
Lennard Brook  
Limeburners Creek  
Margaret River  
Moore River  
Mundaring Weir  
Murray River  
Ord River  
Pilbara Region  
Preston River  
Serpentine River  
Southern River  
Stony Brook  
Swan River System  
Victoria Dam  
Waroona River System  
Warren - Lefroy Rivers  
Wungong River



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## Appendix II - Glossary

**Access licence** means a licence issued for the future right to take water.

**Allocation** means giving a person an entitlement to use water or setting aside a water resource for a designated use.

**By-laws** are specific rules made under the Act to assist in administration of the Act.

**Charges** mean monies paid for the use of water or the provision of a service, *cf* fees.

**Consumptive use** means any activity that depletes the total flow or volume of water in a water body.

**Divert** means to change the course of or impede the natural flow of water. Water diverted from its natural course and not returned is deemed to be taken.

**Ecologically sustainable development** (commonly called ESD) means development of the State's water resources in a way and at a rate which provides for and protects the well-being of people and their communities provided that:

- the potential of those resources to meet the reasonably foreseeable needs of future generations is not diminished; and
- the ecosystems, including their biological diversity, that depend on those resources are protected; and
- detrimental effects of the use and development of those resources are reduced, as far as practicably possible, to a minimum.

**Entitlement** means a right to make use of water resources.

**Environment** means living things, their physical, biological and social surroundings, and interactions between all of these.

**Environmental water provisions** means the water that is provided to support the ecosystems dependent on the water resource.

**Environmental water requirements** means water flows, quantities, levels, pressures and qualities necessary to support the natural ecological systems.

**Fees** mean monies paid for administrative action such as issuing a licence.

**Instream water use** means any use of the flow or waters of a water body that does not remove the water from the water body (e.g., swimming).

**Legislation** means an Act of Parliament.

**Licence** is a written permission given by an authority acting pursuant to statutory powers.

**Plan** means a document setting out the characteristics, allocation and development or management regime of water resources. The plan may include policies and rules.

**Policy** means a statement of how an agency will act in relation to a particular matter.

**Proclamation** means an Order in Council declaring an area to be, or not to be, subject to certain provisions of the legislation.

**Regional water resource allocation plan** means a document prepared by the Water and Rivers Commission setting out the background, policy and rules relating to protection of the water resource, the environment and allocation of water resource to classes of use.

**Regulations** means rules made under the Act that bind the agency as well as the public.

**Rules** mean rules made under the authority of the Act that are enforceable by law.

**Service provider** means a body supplying water to others and licensed under the Water Services Coordination Act.

**Statutory** means relating to legislation.



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**Statutory right** means a right endowed directly by legislation, not by the decision of an authority.

**Storage** means diverting the flow of a water body to store the water. The water may be required for later use, release, recharge to groundwater or merely to create a lake.

**Take** means to remove water from the natural or modified flow systems whereby the water makes its way to the ocean.

**Transferable water entitlement** means a licensed right to take and use water that may be transferred in whole or part to another person or another place.

**Use**, in relation to water, means to put water to a use regardless of whether the water is consumed in the use.

**Works** means pumps, pipelines, dams, weirs, bores and other structures used to take, divert, manage or monitor water and water resources.



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# Notes



