



Environmental
Defender's
Office

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By email: waterlawreform@water.wa.gov.au

Dear John

Draft report on the recommended legislative framework for the proposed Water Resources Management Bill

This letter is a submission by the Environmental Defender's Office (EDO) about the draft report on the recommended legislative framework for the proposed Water Resources Management Bill (the draft report).

The relative brevity of the submission is in part a function of the fact that the consultation period for the review of the draft report was too short, a point I am aware was made by many of the stakeholders at the recent public consultation meeting. Further recent causes of our inability to spend more time on the matter are the fact that the EDO moved offices last weekend and has experienced staff shortages for serious medical reasons. Disappointingly, I was unable to get an extension of time for our submission on the basis of those reasons.

In some cases then the restricted time to consider the draft report has meant we merely indicate our support for a particular recommendation. While we are generally supportive of the aspects of the proposed reforms not specifically commented on here, a lack of specific comment cannot be interpreted either as support or objection.

1. SPECIFIC COMMENTS

Statement of objectives – Recommendation 4

The EDO strongly supports the inclusion in the Bill of a statement of objectives. We would further urge that the Bill should (as distinct from could, or may, the current words in the draft report) include the objectives suggested at pages 35 and 36 of the draft report. In particular, the EDO strongly supports the following proposed objectives:

- “enhance the security of water provided for environmental and other public benefit outcomes...”;
- “recognise and protect the benefits of water resources for Indigenous people and to recognise the role of Indigenous people in managing water resources”;
- “use and recycle water wisely”;
- “plan and manage water resources sustainably”; and
- “protect ecosystems, water quality and resources”.

Management principles – Recommendation 5

The EDO strongly supports the requirement that all persons involved in the administration of the Act have regard to the water resource management principles expressed in the Draft State Water Plan. On page 36 of the draft report there is reference to those principles potentially being non-justiciable, and we oppose this suggestion on the basis that for proper accountability there must remain the possibility that decision-makers could be required in court to demonstrate that they did indeed have regard to the relevant principles.

The EDO also strongly supports the proposal that the Bill include the most important principles, including “the use of best available scientific knowledge, the precautionary principle [and] security of environmental water”. We would oppose the suggestion on page 37 of the draft report that the Bill express the first two of the above principles as being merely “generally relevant to water resources management”. We cannot currently think of any situations where the first two of the above principles should not be applied.

The EDO also recommends the Bill include the principles of:

- “intergenerational equity”; and
- “adaptive management”.

Who is to be bound – Recommendation 6

The EDO strongly supports, as a matter of good governance, the notion that the Act binds all persons including the Crown in right of the State and, to the extent possible, the Commonwealth and other States. We would therefore further urge that the “specific exemptions” to this principle mentioned in Recommendation 6 be kept to a minimum.

Relationship with other legislation – Recommendation 8

The EDO supports the notion the proposed Bill expressly state where it is intended to prevail over particular requirements of other legislation.

We would agree that further consideration is needed about the relationship between the Bill and existing planning and environment laws, and we reserve the right to comment further on these matters when the Bill is released. In the interim, we should express our strong view that the Bill should be (in all material respects, at least) subject to the *Environmental Protection Act 1986* (EP Act) and that only “particular routine management practices” be considered for exemption from other planning and environmental laws.

Advisory committees – Recommendation 10

The EDO supports the proposal that “The Bill will provide for the constitution of local committees in a manner adequate to their proposed advisory and possible management functions, specifying criteria that includes significant Indigenous membership, wherever

possible.” We would also strongly support that the Bill provide for representation by a suitable environmental group, or at very least a suitable person representing public interest environmental concerns. Given the potential for conflict of interest if the environmental water manager role ends up residing with the Minister for Water (see below), it will be vital to give proper representation on the proposed committees to people who are not beholden to extractive interests.

Because of the tight consultation time available for this draft report we consider it premature to express a view as to the circumstances in which the proposed committees might have more than just advisory functions. If management roles were contemplated of course, the need for public interest environmental representation on the committees would be even more acute.

Environmental water manager – Recommendation 11

It is the strong view of the EDO that the role of the environmental water manager should not be located with the Minister of Water because of the potential for conflicts of interest. Instead, this vital role should be held by an agency or Minister without the responsibility for issuing extractive licenses. It is our view that this role would best fit within either the Conservation Commission or the proposed Biodiversity Commission (please ask if more details are required on the conservation sector’s model for the latter). A less satisfactory alternative, but better than what Recommendation 11 currently proposes, is that the Minister for the Environment have this responsibility (which of course means that functionally it will reside within the Department of Environment and Conservation).

Because of the tight consultation time available for this draft report we consider it premature to express a final view as to the circumstances in which a non-governmental organization could be appointed as an environmental water manager, but we are provisionally inclined to support such a reform.

Duties - Recommendation 12

As a minimum, the EDO strongly supports the proposal that “The Bill will require all persons with administrative functions under the Act to give effect to the objectives and management principles of the Act and to have regard to the objectives and management principles of the Draft State Water Plan and the content of any applicable strategic plans made under the Act.”

The EDO would go further however and recommend these provisions are strengthened so that persons with administrative functions under the Act would be bound to give effect to (not merely have regard to) the objectives and management principles of the Draft State Water Plan and the content of any applicable strategic plans made under the Act. If these key documents are to attract the confidence of stakeholders and the public, there must be no chance that they will be selectively applied by the regulator.

Subject to seeing the detail of the drafting if the proposed Bill addresses the issue, the EDO strongly supports the introduction of “a statutory duty of care or duty to act reasonably for all water resource managers and users with respect to all water resource activities”.

Expansion of Crown vesting – Recommendation 13

The EDO supports this proposal.

Authorisation required – Recommendation 14

The EDO strongly supports this proposal.

Water access rights in Statutory Water Management Plan areas – Recommendation 18

The EDO notes that the Statutory Water Management Plans (SWMPs) in question should guarantee the security of environmental water allocations; see further below.

Bores – Recommendation 19

The EDO supports the existence of a power to require all new stock and domestic bores in a defined area to be registered, on the basis that that information will be vital for resource management purposes.

New water resource works on watercourses and wetlands – Recommendation 20

The EDO strongly supports this proposal, but notes that the circumstances in which the proposed Ministerial exemptions can be granted should be appropriately constrained by the proposed Bill. We would further submit that the proposal be strengthened by changing the words “works on watercourses and wetlands” to “works affecting watercourses and wetlands”.

Separate authorisation in SWMP areas – Recommendation 25

The EDO strongly supports the proposal that a SWMP may require the separate authorisation of the use of water within a plan area, because the process of generating such a SWMP may uncover situations where such separate authorisations are necessary for good resource management.

Drainage powers – Recommendation 26

In view of the potential impacts of inappropriate or badly managed drainage schemes, the EDO strongly supports the proposed powers to proclaim drainage management areas and declare drains. We also support the proposed power to issue notices or make management agreements regulating the construction and operation of drains that receive the Minister’s public funding.

We note however that our support for the above is on the basis that the *Soil and Land Conservation Act 1945* and the EP Act will continue to potentially apply to drainage issues as well, which is what we understood from the recent public seminar on the draft report.

Authorisation of works – Recommendation 27

The EDO strongly supports this proposal.

Waterway, wetland and floodplain works – Recommendation 28

We would agree that further consideration is needed about the relationship between the Bill and the environmental harm provisions of the EP Act, and we reserve the right to comment further on these matters when the Bill is released. In the interim, as above, we express our

strong view that the Bill should be (in all material respects, at least) subject to the EP Act. Because of the tight consultation time available for this draft report we cannot further comment on the issue at this time.

Authorisation and notice of works – Recommendation 29

The EDO strongly supports this proposal.

Floodplain management – Recommendation 30

The EDO supports this proposal.

Public drinking water protection – Recommendation 31

The EDO strongly supports this proposal, and further submits that the relevant penalties should be increased in line with the changes to the EP Act of recent years.

Management areas under the RiWI Act – Recommendation 33

The EDO supports this proposal.

Powers for assessment etc – Recommendation 34

Having regard to the Auditor-General's 2003 finding that government assessment of water resources was deficient, we strongly support the proposed new powers relating to assessment, investigation and accounting.

Long-term assessment of water resources – Recommendation 36

The EDO strongly supports the long-term assessment of water resources, but submits that:

- such assessments should be overseen by the EPA; and
- in these times of accelerating climate change, the assessments should be undertaken every five years rather than every ten years as proposed in this recommendation, notwithstanding that it will put an increased burden on the Department of Water to do so.

For the purposes of carrying out these assessments, it would be preferable for SWMPs to include clear objectives and meaningful performance indicators (see further below).

Interim allocation orders – Recommendation 37

The EDO strongly supports this proposal.

Existing water access – Recommendation 38

The EDO strongly supports this proposal, but notes that environmental water allocations should be unaffected by any proportional reductions that may be necessary as it would be unacceptable on principle to treat the environment as being equivalent to extractive users.

Water resources planning – Recommendation 39

The EDO supports this recommendation, but reserves its right to express a different view later when the detail emerges about the comment in the recommendation (which the commentary on that recommendation, with respect, did not seem to clarify) that “these management plans may have different levels of binding legal effect”.

Overview of statutory plans and the legal effect – Recommendation 41

Judicial review should not be confined to applications made within three months of approval of the relevant management plan. It is important that a person who has an interest in the matter can seek judicial review of the legality of the process and content of SWMPs, and we cannot see any good public policy grounds to limit the already restricted way in which these rights can be pursued (in terms of the costs of Supreme Court action and rules relating to standing, to name but two existing hurdles). We are unaware of any comparable legislation where such a restriction exists.

Indeed, we would question why SWMPs are said not to be amenable to merits review in the State Administrative Tribunal (SAT), although we understand that matters specifically the subject of the Government Response to A Blueprint for Water Reform in Western Australia (Government Response) cannot be reconsidered as part of the current consultation process.

Declaration of intention – Recommendation 42

The EDO strongly supports the existence of a power to declare moratoriums on certain actions during the preparation of a SWMP, because the absence of such a power may compromise the plan that is ultimately produced.

Contents of SWMPs – Recommendation 44

The EDO supports this proposal, and emphasises the importance of having strategies, performance indicators and obligations for monitoring and reporting. We are also strongly supportive of an explicit requirement to address the potential effects of climate change and how those effects are proposed to be managed.

Contents of Water Allocation Plans – Recommendation 46

The EDO strongly supports the proposed embargo power.

Power to suspend – Recommendation 53

The EDO strongly supports the suggestion that there be a power to suspend the operation of the plans dealt with in Recommendation 39, including SWMPs, in “severely changed circumstances”.

Integration with land use planning – Recommendation 55

The EDO supports this proposal.

Metering – Recommendation 70

The EDO strongly supports this proposal, with the qualification that the Minister’s power to exempt licences from metering should be tightly fettered.

Metering and trading – Recommendation 71

The EDO strongly supports this proposal.

Metering and stock / domestic – Recommendation 72

The EDO supports this proposal.

Security of environmental water allocations – Recommendation 74

It is not sufficiently clear in the draft report, but we assume from Recommendation 74(3) for example that environmental water allocations are ‘secure’ in that they are not considered part of the consumptive pool. The proposed Bill should put issues as fundamental issues as this totally beyond doubt.

Third party property rights – Recommendation 86

The EDO strongly opposes the proposal to only protect third party property rights for the reasons set out below in relation to Recommendation 92.

Objections to entitlement applications, and applications to the State Administrative Tribunal for review – Recommendation 92

As mentioned above, we question why SWMPs are said not to be amenable to merits review in the State Administrative Tribunal (SAT), although we understand that matters specifically the subject of the Government Response cannot be reconsidered as part of the current consultation process.

However, we do not read the Government Response as having dealt with the questions of whether or not there may be third party rights:

- to make comment in response to licence applications; and
- to review decisions made under the proposed Bill.

We therefore strongly submit that any person should have a right to comment in response to licence applications, in a comparable way to the current process under the EP Act where public comments are sought in relation to native vegetation clearing applications. We note that there is a power to advertise applications under the RiWI Act but it is discretionary, which puts the process out of step with the more modern clearing regime.

We further strongly submit that any person should have the right to appeal, to the SAT, decisions with the potential for significant public interest impacts including:

- the grant of a licence;
- the conditions of a licence;
- allocation decisions, including environmental allocation decisions.

Central to the draft report is the importance of the public interest in relation to water resource management, and it believes that public interest if meaningful rights of public participation are only extended to licence applicants.

Environmental externalities – Recommendation 93

We strongly support the making of regulations that allow for the recovery of environmental externality costs.

Notices / directions – Recommendation 96

The EDO supports the proposed power to issue notices or directions in certain circumstances. We reserve the right to comment on the detail relating to such a proposal when it emerges in the proposed Bill.

Positive management actions – Recommendation 97

The EDO supports the proposed power for the Minister / Director-General “to take various positive management actions” in certain circumstances. We reserve the right to comment on the detail relating to such a proposal when it emerges in the proposed Bill.

Enforcement Powers – Recommendation 98

The EDO strongly supports the suggestion that “certain essential enforcement powers” will be modeled on existing related legislation such as the EP Act. We reserve the right to comment on the detail relating to such a proposal when it emerges in the proposed Bill.

Data – Recommendation 101

The EDO supports this proposal, but would go further and recommend that the Bill provide that data collected in connection with demonstrating compliance with the Bill’s provisions be deemed to be owned by the State. This would be very important to ensure that key information relating to water resources is not made inaccessible to the public because the person who collected it argues that the copyright resides with them.

Offences – Recommendation 103

Subject to some reservations that are beyond the scope of this paper, the EDO supports the use of the EP Act as a model for intentional and strict liability offences, and again with some reservations regarding the use of the proposed changes to the EP Act as a model for civil penalty provisions. We reserve the right to comment on the detail relating to such proposals when they emerge in the proposed Bill.

Penalty orders – Recommendation 104

As above, subject to some reservations, we regard the EP Act as a useful model. We reserve the right to comment on the detail relating to such proposals when they emerge in the proposed Bill.

Institution of Criminal and Civil Proceedings – Recommendation 105

It is the view of the EDO that the Act should extend the rights of third parties at common law to institute proceedings to enforce a breach of the Act. At very least, limited “extended standing” should be granted in the terms set out in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Judicial review – Recommendation 106

As stated above in response to Recommendation 41, judicial review should not be confined to applications made within three months of approval of the relevant management plan.

2. GENERAL COMMENTS**Transparency and accountability in the enforcement of water allocations**

Members of the public should always be able to ascertain from public information whether a water resource is being managed in compliance with its statutory management plan. There should be an express requirement that statutory management plans and monitoring results be made available to the public by an accessible means and in a comprehensible form.

SWMPs for high risk water sources

There should be statutory duties to make SWMPs set out water access entitlements for those water sources that can be classified as high risk, high stress or of high conservation value. It is proposed that the Bill require such “high priority” SWMPs to be developed within two years of the new legislation taking effect.

Yours sincerely

CAMERON POUSTIE
Principal Solicitor