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Dear Sir / Madam

Response to draft Water Policy Framework discussion paper

Thank you for the opportunity to comment on the above discussion paper.

The EDO WA supports legal and other mechanisms that facilitate both reduced water consumption and the limiting of water extraction to levels that adequately provide for WA's unique natural ecosystems. By virtue of the fact that we are a community legal centre, we confine this submission to the contribution that might be made by legal mechanisms in particular. Unfortunately, the discussion paper is unclear on the extent to which the final Water Policy Framework might use the law to generate water outcomes that are more consistent with the principles of sustainability.

It is acknowledged that the Government may have developed a position on many of the questions set out below, and has simply not covered them in the discussion paper for reasons of brevity. In any event, the EDO WA looks forward to seeing them clarified in subsequent consultation documents and / or by direct response to this letter.

Key question marks outstanding are as follows:

- What, if any, will be the legal effect of the proposed State Water Plan (pages 3 and 4)? Will it have the force of regulation like, for example, an Environmental Protection Policy ('EPP') under the Environmental Protection Act 1986?

If direct legal consequences for this plan are contemplated, will deviation from the plan be open to public accountability via such mechanisms as open standing under the relevant legislation?

- What, if any, will be the legal effect of the proposed regional water plans (pages 3 and 4)? As above, will they have the strength of an EPP? Page 4 notes that existing approval processes for specific water allocations or developments “are expected to align with the direction of a regional water plan”; does this mean such plans will have no direct legal consequences at all?

As above, if direct legal consequences for such plans are contemplated, will accountability be aided by allowing third party legal actions for a breach?

- In what way will the legislative program for water “[take] into consideration the policy positions adopted by the Government regarding the Water Reform Program and the State water planning process” (page 3)? Will key policy positions manifest as carefully worded legislative requirements, or just generally worded objectives?
- What, if any, will be the legal effect of the proposed Water Policy Framework (page 5)? To pick two examples, how will the Policy Framework “[ensure] regional water plans address local issues in the context of shared whole of State objectives” and “[ensure] the consistency of approach to water policy matters over time”?

Why might only “some” of the Policy Framework’s objectives appear in the proposed new water resources management legislation? Is there currently a view as to which objectives may appear, and which may not? What is the rationale for this view? Of the objectives that are expected to appear, is it intended that they might be drafted in either relatively specific or very general terms?

- Following on from similar points above, is it contemplated that community involvement (page 10) will include open standing access to third party enforcement of all aspects of the legal changes contemplated or likely under these proposed reforms? If not, why not?
- How might water plans be “progressively integrated with land planning and other natural resources management activities” (page 10)?
- What legislative changes are contemplated in order that the Government might “progressively manage all water resources with priority given to high value water resources...” (page 11)?
- How might environmental water allocations (page 13) be achieved with legislative changes?
- What, if any, are the legal consequences of ‘listing’ high value ecosystems in the regional water plans (page 13)?
- What will be the legal status of the proposed performance indicators (page 14)? Who will monitor them?
- What legislative changes are required to meter all significant abstractions by licenced water users (page 15)? By when would the transition to that situation be completed?
- Will the principles of the contemplated sustainability assessments (page 17) be captured in legislation? How and by when?

It seems that a number of the elements outlined on page 18 will clearly end up in legislation, however, and the EDO WA takes this opportunity to express its support for the following elements of that objective:

- the capacity to reserve allocations;
- the licencing of significant consumptive water use (note that our support for this principle is probably implicit in the second last of the above collection of questions);
- discouraging speculation in water allocations (note that rather than just “planning for productive use”, actual productive use should be regularly demonstrated by licence holders, by analogy with the regulation of mining activity); and
- the separation of water allocation from either land access or title.

We strongly oppose, however, the principle that changes to the consumptive pool arising from climatic variation should be shared ‘equitably’ with the environment; a notion that assumes the environment is “just another user”. Both now and in the foreseeable future, climatic variation, other than in a seasonal sense, will essentially just be a local manifestation of global climate change. In response to this human-caused problem, it would only be appropriate to adjust human, rather than environmental, water allocations.

We are unable to provide more detailed comment on the above discussion paper at this stage, but we would be keen to be involved in subsequent consultations on these issues.

Yours sincerely

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Principal Solicitor