

8 May 2026

Submission of the National Environmental Law Association to the Productivity Commission's inquiry into National Water Reform 2026: A Western Australian Perspective

NELA's objects and its interest in this consultation

The National Environmental Law Association (**NELA**) welcomes the opportunity to provide inputs to the Productivity Commission's inquiry into National Water Reform 2026. NELA provides national leadership and a strong voice in environmental law, policy and practice. NELA is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA brings together lawyers, academics, judges, scientific experts, environmental practitioners, business and industry representatives and the wider community to discuss, consider, research, and progress matters of environmental law, policy and practice.

NELA undertakes, facilitates and encourages the advancement of environmental law, policy and practice, including by using its unique expertise to make submissions, engage with, and make recommendations to government. NELA is managed by a national board that includes directors with expertise in international and domestic legal frameworks for biodiversity conservation, ecological restoration, environmental and carbon markets, environment and planning laws and regulatory theory, and natural resource management. NELA also has a Biodiversity Working Group and Climate Change Working Group which are made up of leading Australian experts on national biodiversity and climate law and policy, respectively.

NELA advocates for positive environmental outcomes using environmental law, policy, and practice. In doing so, NELA seeks to be a progressive but politically neutral participant in the discourse on environmental law, policy, and practice. When considering environmental legislative reforms, NELA considers several factors including whether the reform advances environment protection and restoration, the environment protection principles integral to environmental law, and the integrity and transparency of the reform.

NELA has had a strong history and membership base in Western Australia. This 2026 Productivity Commission (**PC**) inquiry is particularly relevant to Western Australia (**WA**) because WA has unfortunately distinguished itself by being one of the 2 or 3 jurisdictions (with the Northern Territory and Queensland) not to implement key parts of the National Water Initiative (**NWI**), as reported by the PC in its National Water Reform 2024 Inquiry Report: see pp2 & 14. Indeed, the package of NWI water reforms that WA promised to implement for 18 years was withdrawn in December 2023 for reasons that are little understood in Western Australia, let alone outside the State. Furthermore, two key issues for reform that the PC emphasised in its 2024 report (pp.11-12, First Nations peoples water ownership and water security in a changing climate) are at least as important in WA as in any other Australian jurisdiction.

This submission offers a focused WA perspective to the inquiry. Three WA members of NELA (Professor Alex Gardner, Kian Rafie and Alex Brunswick) have prepared this brief submission for delivery by the extended date of 8 May 2026. It is also our intention to prepare a submission from a WA perspective for the [Review of the Water Act 2007](#) (Cth), which has a consultation period of May-August 2026.

Scope of this document

By the terms of reference for this inquiry (**Terms of Reference**) on the PC's website ([link to terms of reference](#)), the PC is directed to: "... provide recommendations on approaches that Australian governments and the **water services industry** can take to improve the security, resilience and sustainability of water services ...". The inquiry will **focus on pricing, economic oversight and regulatory design, governance options to improve the overall sustainability of the industry, and regional and equity considerations, including structural challenges faced by regional and remote utilities**. In conducting the inquiry, the PC is also directed to have regard to various important existing policy measures, such as the National Water Initiative, other Commonwealth and State reform initiatives (including the new National Water Agreement, which the Commonwealth has signed and which the States are invited to sign); reviews of the *Water Act 2007* (Cth) and the Basin Plan; and Indigenous perspectives and socio-cultural rights and Commonwealth Government commitments in relation thereto.

The PC is directed to conduct its inquiry in accordance with the requirements of s.88 of the *Water Act 2007* (Cth), noting the history of its role in reporting on the implementation of the NWI and recommendations for actions to better achieve the objectives and outcomes of the NWI: s.88(3)(b).

The NWI does address: [24](iii) "Best Practice Water Pricing";¹ [24](vii) Knowledge and Capacity Building;² and [24](viii) Community Partnerships and Adjustment,³ which appear relevant to the terms of this inquiry. These provisions are quite lengthy and while they do mention water services, much of the tenor of these provisions of the NWI are directed at improvement of water resources management more than towards water services delivery. We suggest that better guidance on reform of the water services industry to address the issues now before the PC is to be gained from the National Water Agreement objectives 1, 2 and 3.

The Regulation of Water Services in WA

The regulation of water services in WA is conducted under the *Water Services Act 2012* (WA) (**WSA**). In essence, the WSA provides for the licensing of water service providers creating the standards of the services to be delivered. The issue and enforcement of licences is conducted by the Economic Regulation Authority of WA (**ERA**) under s.207 of the WSA and *Economic Regulation Authority Act 2003* (WA) ss.25-26. Its powers include issuing orders that a licensee pay compensation to individuals or corporations who suffer loss from a breach of the licensee's service requirements. The ERA currently administers more than 20 water services licences. Licensees must comply with codes of practice made by the Minister (s.26) and again a failure to comply with a code may lead to a licensee paying compensation to persons affected by the failure to comply with the code. The Minister made the Water Services Code of Practice (Family Violence) 2020. We did not find any other Code of Practice. The ERA can also make codes of conduct with which a licensee must comply with unless it is inconsistent with the terms and conditions of the licence (s.27). In 2023, the [ERA reviewed the Water Services Code of Conduct](#) (Customer Services Standards) 2018 which led to amendments and the promulgation of the Water Services Code of Conduct (Customer Services Standards) 2024. There is also statutory provision for Ombudsman review of complaints. Part 9 of the Code relates to "*requirements for supply of water to persons with special requirements or needs*" and establishes a register to be maintained by the licensee of persons at identified addresses who have special needs for a consistent supply of water.

While there is much to commend the essential framework of the WSA and its subsidiary instruments, we notice the following omissions from that framework that are relevant to the PC's current inquiry.

¹ NWI [64] Outcomes and associated Actions [65] – [77].

² NWI [98]-[101].

³ NWI [93]-[97].

Concerns with Water Services Regulation in WA

First, there are no statutory objectives expressed in the WSA and no fundamental human rights in relation to the provision of water services. The Act is a framework for discretionary decision-making by the ERA and the Minister. There seems to be little guidance provided by the Minister in making Codes of Practice. We could find no guidance on addressing the fourth dot point of the Terms of Reference in relation to sustainability of water services: *“regional and equity considerations, including structural challenges faced by regional and remote utilities”*, notwithstanding some evidence of concerns about the management of regional water services. For example, an AI overview of a search for “Western Australia, critique of water services” produced the following. ***“Declining Water Quality & Supply in Regional Areas: Some regional and Aboriginal communities face water quality risks (nitrate, arsenic, heavy metals) and rely on water carting. Furthermore, regional pipe networks in places like Geraldton and Kalgoorlie-Boulder have double the leak/burst rates of the Perth metropolitan area,”*** with a reference to a 2021 report of the WA Auditor-General entitled [“Water Corporation: Management of Water Pipes – Follow-Up”](#). A key comment was that the Water Corporation *“has a strategic aim to improve efficiency by reducing unbilled water but does not have a clear plan to achieve it”*. There have been two notable sewerage system leaks in the Perth metropolitan region in the past 2 years, but we had no opportunity to gather evidence of the regional circumstances.

A repeated criticism of the national water reform inquiry reports is that Western Australia does not have independent water pricing regulation, including of water services pricing. The ERA has the function of reviewing water pricing under the *Economic Regulation Authority Act 2003 (WA)* but only on the reference of the Minister: s.32. The Minister may at any time amend or withdraw the reference: s.33. The ERA must publish notices of any reference: s.34. The index of notices issued under the *Economic Regulation Authority Act 2003 (WA)* shows that inquiry notices relating to water pricing have not been issued since 2011. The Government is open about setting water services prices with a political eye to managing cost of living pressures for members of the public. Again, an AI search produced the following statement. *“The State Government, via the Minister, determines price increases for water and wastewater, often balancing cost-of-living concerns with infrastructure investment.”* In 2025, the ERA published the [“Water Corporation 2025 asset management system review”](#). The summary of the report states:

“The review found that while the Water Corporation has plans for asset maintenance and management, resource constraints have prevented full implementation of its maintenance plans and the replacement of aging assets. As a result, performance has declined across nearly all asset management effectiveness processes since the 2021 review.

In response, the ERA has required the Water Corporation to develop and implement an action plan to address the deficiencies. The ERA will actively monitor the Water Corporation’s progress in implementing those actions and will conduct another review in 2028, covering the period 1 July 2025 to 30 June 2028.”

In other words, the ERA has used a different function to make a comment on the Water Corporation’s resource constraints affecting the performance of its functions. The inevitable conclusion is that water pricing policies are depriving the Water Corporation of financial resources.

How does all of this affect the natural environment, especially by the interaction of water services with the management of water resources under the very outdated *Rights in Water and Irrigation Act 1914 (WA) (RiWI Act)*, which was last amended in 2000? There is one small link made between the WSA and the RiWI Act. WSA s.19 says: *“A decision of the Authority under this Part is of no effect to the extent to which it is inconsistent with any relevant water resource management plans (however described) made under a written law and prescribed for the purposes of this section.”* However, there is no legally effective link between water allocation planning and water services provision. The RiWI Act provides for the making of water resource management plans, but the statutory provisions have never been used because the State Government has refused to appoint the Water Resources Council, and the Council is expressly required to be consulted in the making of water resource

management plans. Consequently, the Department of Water and Environmental Regulation has for the past 25 years relied solely on non-statutory water allocation plans and water licensing of the water corporations to allocate water resources. We incorporate into this submission that by [Professor Gardner to the PC's National Water Reform Inquiry 2024](#), especially regarding the non-statutory water allocation planning system and the inflexible water licence entitlements. While it is true that the State Government has effectively maintained a high-quality drinking water supply system to the Perth metropolitan area by the development of desalination plants, such measures do not resolve water allocation planning issues beyond the south-west integrated water supply system for drinking water.

In a drying climate, especially in the south-west of WA and in the West Pilbara, there are significant water allocation pressures caused by diminishing rainfall leading to greatly depleted surface water flows and groundwater recharge.⁴ The water allocation planning responses are delayed and inefficient. The lack of statutory allocation planning means that the Government goes to great lengths to manage the public discussion of pressures to reduce water entitlements of licensees. Rather than appointing statutory local water resource management committees under the RiWI Act, the Government has for years used an obscure statutory provision to appoint non-descript committees and constrain their public advisory functions. For example, see clause 2.1 of the Code of Conduct of the [Warren-Donnelly Water Advisory Committee Terms of Reference, November 2023](#). Committee members are required to:

- adhere to applicable legal requirements, policies and all other lawful directives regarding communication with Parliament, Ministers, ministerial staff, lobbyists, the media and members of the public; and
- only make public comment on behalf of the Committee to the media or outside organisations when authorised to do so in consultation with the Minister's Office.

No such constraints appear in the RiWI Act provisions for establishing local water resources management committees.

There is a similar slow recourse to [non-statutory water allocation planning in the Pilbara](#). The cumulative impacts of the huge extractions of groundwater by the mining industry and associated communities have depleted groundwater and surface water systems of great significance to Indigenous communities. In the absence of an effective statutory water allocation planning system to address the issues, the State Government has again called on the Environmental Protection Authority to conduct a strategic review of the issues associated with the Millstream and Bungaroo water systems.⁵ Ultimately, the extent of water supply from those water resources will be determined only by the RiWI Act water licensing system.

Another practical feature of the RiWI Act is the lack of enforcement. The maximum penalty (fine) for a breach of the Act by an individual is \$10,000 and by a corporation is \$50,000, many times lower than other Australian states. Furthermore, the evidence of departmental non-enforcement for unlawful taking of water is glaring. The WA Court of Appeal decision *Crossley v English* [2025] WASCA 141, read with the trial court decision in *Crossley v English [No 2]* [2024] WASC 268, shows both local government and the Department of Water failing to enforce key provisions of the *Planning and Development Act 2005* (WA), the *Environmental Protection Act 1986* (WA) and the RiWI Act, even when faced with clear and repeated breaches of the law. The plaintiffs in that case commenced Supreme Court civil proceedings seven years after construction of the unlawful dam, and only after spending years requesting that the Department issue directions to the upstream landholder to correct the unlawful behaviour. The Minister, acting on Departmental advice, refused

⁴ S Gelsinari and others "Nonstationary recharge responses to a drying climate in the Gngangara Groundwater System, Western Australia", (2024) 633 *Journal of Hydrology* 131007; Don McFarlane and others, "Runoff and groundwater responses to climate change in South West Australia", (2020) 103 *Journal of the Royal Society of Western Australia* 9-27.

⁵ Minister for the Environment (WA), media statement, 16 October 2025, "[Minister requests EPA advice on water future for the Pilbara](#)".

to issue directions and recommended judicial proceedings. The Court of Appeal held that the civil proceedings to address an unlawfully constructed dam needed to be brought within the statutory limitation period of 6 years after construction of the offending dam, even though the evidence was clear that the upstream landholder continued to exceed his riparian entitlement under the Act. On 11 June 2025, the same day that the Court of Appeal heard arguments in *Crossley v English*, the WA Auditor-General issued a highly critical report of the Department’s compliance program in the “[Regulation of Water Licences](#)”. The weak compliance program is also reflected in the very low level of RiWI Act prosecutions.⁶

In conclusion, the resolution of the water services issues identified in the Terms of Reference for this inquiry can only be resolved in Western Australia by the long overdue reform of the water resources legislation, as identified in its National Water Reform Inquiry Report 2024. The National Water Agreement gives valuable guidance on the reform of Western Australia’s water services and water resources and catchment management and water supply legislation. We ask the PC to draw the connection between these two lines of inquiry and again point to the need for Western Australia to reform its water legislation in accordance with national water policy.

Signed by Board Director:

NELA Vice-President

Submitted by:

**NELA Director
Publications and Submissions Co-Lead**

⁶ Department of Water and Environmental Regulation, “[Environmental Enforcement](#)”, 29 April 2026, scroll down to “prosecutions”.