

15 February 2024

Attention: Joanne Chong, Commissioner,  
And Dr Anne Poelina, Associate Commissioner  
The Productivity Commission  
National Water Reform 2024

Dear Commissioners,

### **Submission regarding Western Australia's Implementation of the NWI**

Thank you for the opportunity to make this submission. I am grateful for the extension of time to complete my submission.

My water resources law expertise is based on 29 years' experience in water resources law reform in WA and nationally, including contracted research for the WA Government (1995-1997), contracted consultancy with the WA Government (2001-2003, 2005, 2006-2008), and participation in two nationally funded Co-operative Research Centres (2008-2016). I have been teaching and researching Water Resources Law since 1995 at the University of WA, the Australian National University and the University of Queensland. See below the link to my UWA profile.

After eighteen years of reform promises by Western Australian Governments, including signing in 2006 the [Intergovernmental Agreement on a National Water Initiative 2004](#) (NWI) and accepting Commonwealth support to work on the implementation of the NWI, the WA Minister for Water [announced on 21 December 2023](#) that reform of WA's water resources legislation was not necessary. My submission is that this decision and the reasons offered for it are legally mistaken as well as inconsistent with the NWI and water resource outcomes in WA.

Following correspondence with the Minister in the period 31 January – 13 February 2024, I suspect that the Minister may have had other considerations in mind. The work of the [National Water Reform Committee](#) to develop a refreshed National Water Agreement may have led the Minister to think that pursuing reform based on the 2004 NWI would look out of date before it was completed. WA still has much to learn from the NWI and the Productivity Commission's previous reform implementation reports. I trust that the Minister's assurance to me that WA is participating in the renewal of national water policy recognizes that we do need Water Resources Law reform in WA. I hope that a new National Water Agreement will include provisions that better secure these much-needed reforms in WA.

Water Resources Law reform in WA is well overdue. WA is the only jurisdiction in the country that has not enacted any statutory reform to implement the NWI, though there have been various regulations (amendment to [water metering regulations](#) in 2018), policies ([Waterwise Perth Action Plan](#), 2019 updated 2022) and administrative practices ([water register](#)) that have taken modest steps in the water reform direction. The case for Water Resources Law reform has been made by the WA Government's extensive policy statements in September 2013 and October 2015. I hold copies of these documents and can supply them upon request. These documents identified the reasons for Water Resources Law reform:

- the pressures of the impacts of climate change across WA causing significant reductions in stream flow and groundwater recharge, more events of extreme heat and intense rainfall and flooding, population growth and increasing water demand; and
- the inadequacies of antiquated laws spread across six statutes that are built on inefficient bureaucratic process that do not support security for environmental water allocations, the development of an efficient water rights market, and innovative approaches to the use and management of alternative water sources, such as storm water and wastewater.

Since those policy statements, there is an increasing need for legal clarity on addressing climate change and setting out the rights of Indigenous people to participate in water resources planning and enjoy secure access to water resources. Both of these points are acknowledged in the Government's Policy Position Paper, "[Water allocation planning in the Fitzroy](#)", October 2023.

There are many legal issues to address in implementing the NWI and responding to these pressures for Water Resources Law reform in WA. Let me address just three points in more detail because they arise from the Minister's media statement on 21 December 2023.

(1) **WA has "robust water allocation planning to manage water resources"** – This is legally inaccurate. The NWI conceives of water planning and water plans as processes and instruments defined by statute: see NWI paragraphs [23(ii)], [23(iii)], [36] and the definition of "water plan" in Schedule B(i). The WA Government has chosen not to produce such processes and instruments. Why does this matter?

The core of the NWI in paragraph [37] is that water planning by States will provide for (i) secure ecological and other public benefit outcomes and the management arrangements to achieve them, and (ii) resource security outcomes by determining the shares in the *consumptive pool* and the rules to allocate water during the life of the plan. These plans are to have a clear statutory framework for creating a binding legal effect on the management of water resources by both executive government and any persons with interests in environmental or consumptive use allocation.<sup>1</sup>

Western Australia is the only jurisdiction with non-statutory water allocation plans.<sup>2</sup> These plans are advisory guidelines only for Government and the community, including water rights holders such as water licensees and landholders with domestic bores. Consider the legal inefficiency of this in the [Gnangara groundwater allocation plan 2022](#), which has taken years to prepare and proposes a 10% reduction in approximately 2,500 water licensees' entitlements from July 2028 to address the over-allocation of almost all the water management areas of the Gnangara groundwater system. Every water licensee has the right to comment on and appeal a change of their licence conditions to the State Administrative Tribunal (SAT), and the SAT would be bound to consider each appeal on its individual merits.<sup>3</sup> Even if only 20-40 licensees (approximately 1% of licensees) were to appeal, it would consume a large amount of the SAT's time, not to mention that of the Departmental officers, and it may undermine the community's confidence in the plan, perhaps leading other licensees to disregard the terms of their licences. If the plan was statutory, its approval could change all the relevant licence conditions on the specified date, with no appeal rights. This would give robust legal certainty to all licensees, the community and government officers.

(2) **The existing and long standing [water licensing] arrangements are suitable** – This is legally inaccurate when measured against the NWI principles for reform of water access rights and the outcomes of water resources management over the past two decades. The Department manages 12,767 water licences across 775 groundwater and 413 surface water resources.<sup>4</sup> The Water Corporation holds water licences to take surface and ground water for public water supply purposes. Most of the population relies on this public supply system and never considers direct access to water resources for self-supply purposes unless they have a domestic or stock water bore or dam.<sup>5</sup> Nevertheless, licensed self-supply (especially from groundwater) is important for private gardens, industry (including mining), horticulture and

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<sup>1</sup> A Gardner and others, *Water Resources Law*, 2nd ed'n, 2018, chapter [14.42]-[14.44]. See also, V Chung, "Making Waves: An Overhaul of WA's Legislative Framework for the Allocation of Water", Parts 1 & 2 published in the *Australian Resources and Energy Law Journal*, vol 26, 2007, pp 161-184 & 380-395.

<sup>2</sup> Australian Government, Productivity Commission, report on the [Assessment of National Water Initiative implementation progress \(2017-2020\)](#), 28 May 2021, p.11.

<sup>3</sup> Michael Bennett and Alex Gardner, [Groundwater Regulation in a Drying South West](#), National Centre for Groundwater Research and Training, June 2014, pp.61-62.

<sup>4</sup> WA Government, Department of Water and Environmental Regulation, *Annual Report 2022-23*, p.10.

<sup>5</sup> It is estimated that one in four households across the Perth and Peel regions have a garden bore and that, in the Gnangara area approximately 69,000 domestic and stock watering bores use about 36 GL/yr (2022), approx. 13% of total groundwater use in the Gnangara area, which could rise to 43 GL/yr by 2030: [Gnangara groundwater allocation plan 2022](#), pp.44 and 59-60.

some forms of agriculture. Even with an increasing reliance on desalination for potable water supply, there are many people and businesses that rely on licensed self-supply of water resources. One 2014 estimate is that, in WA's southwest, self-supply amounted to 700 GL/yr, compared to public water supply of less than 350 GL/yr sourced from ground and surface water, plus desalination.<sup>6</sup> The legal nature of water access rights, especially water licences, is central to effective management of our water resources.

Under current law and practice,<sup>7</sup> water licensees are entitled under 10-year licences to extract up to a fixed maximum volume of water each year, regardless of the amount of rainfall or groundwater recharge that year. During temporary severe water shortages these entitlements may be reduced by ministerial direction and no compensation is payable. These powers are very rarely used, even though the circumstances of some of the past 25 years could have warranted it. Licence entitlements may also be reduced permanently on various grounds and no compensation is payable if the reduction is 'fair and reasonable'. This power also has been very rarely (if ever) used, even in overallocated areas, perhaps because of anticipation of an administratively onerous process and licensees' rights to appeal to the SAT. The Department has exercised statutory authority to recoup unused entitlements, though this is not an effective mechanism for addressing overallocation.<sup>8</sup>

The introduction of the more flexible NWI share entitlement scheme would have made it easier in the past / would make it easier in the future to manage allocations to the licensees' access entitlements within sustainable limits in a drying climate. Under NWI paragraphs [28]-[29], water licensees would hold a perpetual share entitlement in a *consumptive pool* determined annually under a legally binding 10-year water allocation plan. After the annual environmental allocation is determined, licensees would receive a credit to their water account of their annual allocation from the available water in the consumptive pool. Both the perpetual share entitlement and the annual allocation would be tradable property rights, thus enhancing the role of the water rights market in distributing water resources in times of scarcity. The terms of the plan could be adapted every ten years to revise (if so chosen) the environmental and consumptive pool allocation rules, distributing any risk of reduction of water resource availability for consumptive use between government and licensees.

Western Australia is the only jurisdiction that has not made any progress in enacting the NWI share entitlement principles in any form.<sup>9</sup> In my opinion, if these principles had been legislated in 2010, for example, the Gngangara groundwater system would not now be so seriously overallocated.<sup>10</sup> Since 2009, we have known that parts of the Gngangara groundwater system are either fully or over allocated,<sup>11</sup> leading to the reduction in some plan allocation limits and the reduction in some Water Corporation licence entitlements.<sup>12</sup> Yet, the current (2022) Gngangara groundwater allocation plan proposes to make the first reduction in private licence entitlements from 2028.

Further, WA has not been fulfilling its environmental water promises. The NWI reforms could have greatly improved environmental water allocations for the Ramsar listed wetlands

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<sup>6</sup> Michael Bennett and Alex Gardner, [Groundwater Regulation in a Drying South West](#), National Centre for Groundwater Research and Training, June 2014, pp.18-19.

<sup>7</sup> This explanation is adapted from Bennett and Gardner, *Groundwater Regulation in a Drying South West*, executive summary, p.xii.

<sup>8</sup> For example, *Beaglehole v Department of Water* [2017] WASAT 152.

<sup>9</sup> Australian Government, Productivity Commission, report on the [Assessment of National Water Initiative implementation progress \(2017-2020\)](#), 28 May 2021, pp.14-15. The Northern Territory operates annual announced allocations in the higher rainfall regions.

<sup>10</sup> Gngangara groundwater allocation plan 2022, Table 3, pp.33-34.

<sup>11</sup> Government of Western Australia, Department of Water, *Gngangara groundwater areas allocation plan: Evaluation statement 2009-2011*, at p.7, Changes in allocation status. It was recognised that more groundwater was being used than was being replaced by rainfall and recharge and that the previous allocation limits were too high for the changed climate.

<sup>12</sup> Government of Western Australia, Department of Water, *Gngangara groundwater areas allocation plan*, November 2009, pp. xii, 50, 66.

of the Peel-Harvey Estuary system instead of, in 2017, the meagre 2% of licensed annual extraction or 5-6% of inflow in the limited releases from water supply reservoirs operated by the Water Corporation under confidential water licence conditions.<sup>13</sup> The November 2017 allocation statements for the Serpentine and North Dandalup Rivers are a welcome advance in managing releases from these reservoirs but they are non-statutory information instruments and no substitute for statutory water allocation plans.<sup>14</sup> Neither do they take into account the opportunities of alternative water sources for public water supply.

- (3) **A more practical approach to water resource management is preferred** – This statement fails to understand that practical measures to support innovation and investment in our water resources management require legislative reform. The gaps in our legislation are the problem. For example, an important innovation advocated for more than a decade now is “managed aquifer recharge” (MAR) to store and make use of alternative water sources such as storm water and wastewater.<sup>15</sup> The Department has a revised policy, [Managed aquifer recharge in Western Australia \(2021\)](#), and endeavours to facilitate MAR schemes. Alas, these efforts are relatively unsuccessful. As the Department acknowledges, it does not have the statutory powers to regulate the volume of water injection; it is purporting to rely on existing statutory powers to regulate the construction of wells and extraction of water.<sup>16</sup> In my opinion, this legal uncertainty is a significant barrier to investment in important measures to address the growing scarcity of water resources caused by the impacts of climate change. There is also a gap in support for MAR projects for environmental benefit because they do not involve extraction of the injected water. There are numerous scholarly articles making the case for reform.<sup>17</sup> We need legislative reform to support this practical technological innovation.

There is so much more that could be said about the need for Western Australia to reform its Water Resources Law by enactment of a consolidated, modern statute, implementing the NWI in a way that suits Western Australia, better resourcing the administration of our water resources regulation, and supporting technological and policy developments since the NWI. We also need much stronger powers of monitoring and enforcement of water access rights,<sup>18</sup> better regulation of mine dewatering and associated processes of mine closure,<sup>19</sup> better regulation of large off-stream farm dams used for commercial purposes irrigation, and more effective protection of water quality, especially from the effects of diffuse source pollution from agriculture.<sup>20</sup>

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<sup>13</sup> Jeanette Jensen and Alex Gardner, “[Legal duties for environmental water provisions in Western Australia](#)”, (2017) 42(1) *The UWA Law Review* 206-246 at 238.

<sup>14</sup> Government of Western Australia, Department of Water and Environmental Regulation, “[Serpentine River allocation statement](#)” and “[North Dandalup allocation statement](#)”, November 2017.

<sup>15</sup> The value of these resources is explained by Adjunct Professor Don McFarlane, “[Is Perth really running out of water? Well, yes and no](#)”, *The Conversation*, 14 February 2018.

<sup>16</sup> Government of Western Australia, Department of Water, *Securing Western Australia's water future: Position paper – reforming water resource management*, September 2013, section 3.4.9, p.28.

<sup>17</sup> M Bennett, A Gardner, K Vincent, “Regulatory Renovation for Managed Aquifer Recharge Using Alternative Water Resources: A Western Australian Perspective” (2014) 24(1) *The Journal of Water Law* 5-14; Clare Ward-Noonan, “Legal rights to take water for managed aquifer recharge projects in Western Australia”, (2021) 38(1) *Environmental and Planning Law Journal* 75-95; Clare Ward-Noonan, “Recharge and recovery of water through managed aquifer recharge projects in Western Australia: The case for legislative reform”, (2022) 38(5) *Environmental and Planning Law Journal* 492-512; Clare Ward-Noonan, “Legal Liability Arising from Managed Aquifer Recharge Projects in Western Australia” (2023) 39 *Environmental and Planning Law Journal* 512-538.

<sup>18</sup> S Robertson, “A Regulatory Framework for Monitoring and Enforcing Water Access Rights in Western Australia”, (2014) 37(2) *UWAL Rev* 215-242.

<sup>19</sup> N Brown, “Still Waters Run Deep: Pilbara Iron Ore Agreement Rights to Mine Dewatering and Water Law Reform”, [PhD thesis, 2018](#), and N Brown, “Pilbara Iron Ore State Agreements and Mine Closure Regulation” (2024) 42(2) *Australian Resources and Energy Law Journal* (forthcoming). C Ward, “Miners liability to redress reduced water quantity and quality after mine site closure: A case study of the Collie Coalfields in Western Australia”, (2015) 32 *Environmental and Planning Law Journal* 455-485. N Sommer, “Mine Dewatering in the Pilbara: A Legal Framework for Managing the Cumulative Impacts on Environmental Values and Indigenous Interests” (2012) 31 *Australian Resources and Energy Law Journal* 65-90. The [Pilbara Groundwater Allocation Plan](#) (2013) includes no allocation limits for the fractured rock aquifers where mining is conducted, including extensive mine dewatering: see chapter 3.

<sup>20</sup> J Jensen, “A Socio-Legal Definition of the ‘Wicked’ Problem of Agricultural Diffuse Source Pollution in Queensland and Western Australia”, UWA Law School [PhD thesis, 2022](#).

The Department of Water and Environmental Regulation seems to understand the need for reform. The [Department's Strategic Plan 2022-26](#) sets as its first strategic goal: “We will improve our regulatory capacity”, including by the outcome “Our legislation is contemporary and outcomes focused”. With respect, the Minister’s media statement directly contradicts this strategic goal. I hope that the Productivity Commission’s National Water Reform Inquiry 2024 will inform and guide the WA Government and community about water reform and help strengthen the proposed new National Water Agreement.

Kind regards,

**Alex Gardner**

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