

# A Regulatory Framework for Monitoring and Enforcement of Water Access Rights in Western Australia

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*There is a strong need to reform compliance monitoring and enforcement of water access rights in Western Australia. The introduction of the National Water Initiative (NWI) reforms to Western Australia will be an important milestone towards ensuring sustainable use of the State's water resources. Importantly, the NWI requires that water access entitlements be 'enforceable and enforced'. This paper argues that there are problems with the State's compliance monitoring system, departmental enforcement policy, administrative measures and criminal enforcement provisions. Key reforms that address these issues include more extensive metering and auditing of water entitlements and strengthening of the criminal enforcement law by closing gaps in the offence provisions, increasing penalties and introducing provisions that make it easier to prosecute offences.*

## INTRODUCTION

The National Water Initiative Agreement (NWI)<sup>1</sup> requires that water access entitlements be 'enforceable and enforced'.<sup>2</sup> The Western Australian (WA) Government is in the process of drafting new water resource management legislation that will implement a number of WA's commitments under the NWI. Implementing the NWI regime into WA will reform the way water access rights are allocated by introducing water access entitlements that are shares of the available water and tradable in a water market. This new regime will require a

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1 The National Water Initiative is the Council of Australian Government's water policy agreement that was signed by a majority of states in 2004, and by Western Australia in 2006. The intergovernmental agreement sets out to achieve a nationally compatible market, regulatory and planning based system that manages water resources for rural and urban use. See National Water Commission *National Water Initiative* <nwc.gov.au/nwi>.

2 Council of Australian Governments, *Council of Australian Governments Meeting Communiqué: Intergovernmental Agreement on a National Water Initiative* (25 June 2004) [31(vi)] <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2004-06-25/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm)>. The WA Government signed the NWI in April 2006

sophisticated compliance and enforcement system to ensure water access rights can be effectively enforced.

The current system of monitoring and enforcing water access rights in WA is far from sophisticated. The existing legislation governing water resource management in WA is the *Rights in Water and Irrigation Act 1914* (WA) (*RiWI Act*). This Act provides statutory rights to take water and sets out a range of enforcement mechanisms to enforce the legal limits on these rights. However, little use is made of these mechanisms and there has been a notable lack of enforcement of the *RiWI Act*.

The results of the recent Gngangara Mound Metering Project indicate how extensive the problem of non-compliance with the *RiWI Act* has become and how little enforcement action is undertaken. The Metering Project began in 2005 and involved the Department of Water (the Department) installing meters on groundwater bores located on the Gngangara Mound that were licensed to extract between 5 and 50 megalitres of water per year. The results, set out below, indicate that a substantial number of licensees have been breaching their extraction limits.

**Table 1: Results of the Gngangara Mound Metering Project 2006-2010** <sup>3</sup>

<i>Financial Year</i>	<i>Total volume of licensed and metered entitlement/ number of licences with meters installed</i>	<i>Number of licensees that extracted less than their entitlement</i>	<i>Number of licensees that extracted more than but within 5% of their entitlement</i>	<i>Volume of water extracted over the licensed entitlement/ Number of licensees that breached their entitlement by more than 5%</i>	<i>Percent-age in breach</i>
<b>2006-07</b>	10 420 ML* across 115 licences	66 licences	5 licences	1580 ML across 44 licences	43%
<b>2007-08</b>	14 350 ML across 297 licences	205 licences	10 licences	4750 ML across 82 licences	31%
<b>2008-09</b>	19 320 ML across 436 licences	336 licences	16 licences	2230 ML across 84 licences	23%
<b>2009-10</b>	24 920 ML across 646 licences	543 licences	25 licences	2330 ML across 78 licences	12%

\* Megalitre, 1 ML = 1000 kilolitres.

In total, licensees were found to extract 10,890 megalitres above their licence

<sup>3</sup> Compiled from data recorded in the Hansard of the Western Australian Legislative Council. See Western Australia, *Parliamentary Debates*, Legislative Council, 10 September 2009, 6756b–6758a (Hon Helen Morton); 15 September 2010, 6649a–6651a (Hon Helen Morton); 28 June 2011, 5064a–5064a (Hon Helen Morton).

allocation throughout the four-year period between July 2006 and June 2010. Despite these results, the Department did not prosecute any of the licensees found to be in breach during this period.<sup>4</sup> Only four of the licensees found in breach were issued with infringement notices and \$500 fines.<sup>5</sup> Some licensees were issued warning letters.<sup>6</sup>

Compliance did improve during the metering project. The introduction of metering meant licensees could measure accurately how much water they were extracting for the first time. Over time, and in consultation with the Department, a number of licensees became compliant. This suggests that non-compliance was not necessarily deliberate and that education and consultation can play a key role in improving compliance.

It is likely that with time, and further consultation with the Department, compliance might improve further. The Department have not released any up-to-date statistics that outline the progress of the Metering Project. However, it is known that in December 2012, the Department successfully prosecuted a Gngangara mound water user for illegally taking water from the Gngangara mound and deliberately tampering with a state owner water meter.<sup>7</sup> This was the first time a Gngangara mound water user has been prosecuted for breaching the RiWI Act.

Taking water in breach of a licence condition is essentially theft of a scarce public resource. Failure to enforce the law fosters a dangerous culture of entitlement among water users. It also undermines the objectives of the legislation and erodes the ability for the law to act as a deterrent. Although in the past it may have been permissible to allow breaches of the water management system, this is no longer acceptable policy. Declining rainfall, along with a history of overuse, has left a number of water resources under significant strain.<sup>8</sup>

The enforcement mechanisms under the *RiWI Act* include administrative measures, criminal sanctions and civil enforcement mechanisms. The administrative measures are those implemented by the government that do not require court action.<sup>9</sup> Criminal enforcement refers to the prosecution of offences and the powers

4 Western Australia, *Parliamentary Debates*, Legislative Council, 15 September 2010, 6649a–6651a (Hon Helen Morton).

5 Western Australia, *Parliamentary Debates*, Legislative Council, 20 September 2011, 57b–58a (Hon Helen Morton); Department of Water, Government of Western Australia, *Dry Season Response Update Monday 9 May 2011* (2011) <[www.water.wa.gov.au](http://www.water.wa.gov.au)>.

6 Western Australia, *Parliamentary Debates*, Legislative Council, 15 September 2010, 6649a–6651a (Hon Helen Morton).

7 Western Australian Government, *Current News* (Department of Water, 2009), [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 10 February 2013.

8 See generally Commonwealth Scientific and Industrial Research Organisation (CSIRO), *Context Report on South West Water Resources For: Expert Panel Examining Kimberley Water Supply Options* (2005) <[www.hannover.csiro.au/files/files/p3uh.pdf](http://www.hannover.csiro.au/files/files/p3uh.pdf)>.

9 Lipman Z, “An Evaluation of Compliance and Enforcement Mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and their Application by the Commonwealth” (2010) 27 EPLJ 98, p 101.

of the Department to investigate those offences.<sup>10</sup> Civil enforcement mechanisms are those that require a stand of proof on the balance of probabilities and involve civil rather than criminal procedure.<sup>11</sup>

Part One of this paper sets out the current regulatory framework governing water resource management and the current enforcement mechanisms available under the *RiWI Act*. This will be followed by a discussion of the proposed NWI reforms and the importance of compliance monitoring and enforcement to achieving the goals of the proposed reforms.

Part Two will identify issues with the current compliance monitoring system and the enforcement law and policy. This chapter will propose reforms to improve these aspects of the enforcement system. Reference will be made to other Australian jurisdictions that already have implemented the NWI reforms and made improvements to their criminal enforcement law and policy.

The scope of this paper is limited in three ways. First, it focusses on administrative and criminal sanctions but does not include extensive discussion of civil enforcement mechanisms. Civil enforcement is also important and there is definitely room for improvement when considering the civil enforcement mechanisms under the *RiWI Act*. However, this raises an additional range of issues that cannot be adequately addressed within the limits of this paper.

Secondly, this paper is limited to a discussion of licenced water uses. Licenced users take significantly more water than non-licenced users. Also, the NWI reforms introduce changes to the licensing system and do not affect the water access rights of unlicensed users. It may be that there are also difficulties with enforcing the legal limits on non-licensed water rights. For example Perth has approximately 177,000 unlicensed garden bores which collectively use around 120 gigalitres of groundwater per year. The sheer number of bores makes it difficult to monitor their use, although these bores are subject to water restrictions and bore owners can be issued with fines when restrictions are breached.<sup>12</sup> There are also ongoing issues with water users in the South West exercising their landholder rights to build dams to capture overland flow at the expense of water sources further downhill. This is an ongoing issue that will need to be addressed at some point, perhaps by licensing overland flow.<sup>13</sup> However, as the focus in this article is licensed users,

10 Criminal offences are prosecuted to a standard of proof beyond reasonable doubt, with conviction resulting in a serious penalties and the odium of a criminal record. See generally Bates G, *Environmental Law in Australia* (5<sup>th</sup> ed, Butterworths, 2000) pp 204–206; Bronitt S and McSherry B, *Principles of Criminal Law* (3<sup>rd</sup> ed, Thompson Reuters, 2010) pp 6–11.

11 See generally Bates, n 10, p 165.

12 See generally Western Australian Government, *Managing Unlicensed Groundwater Use* (Department of Water, 2009), [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 1 May 2011; Western Australian Government, *Managing Water Garden Bores* (Department of Water, 2011), [www.water.wa.gov.au/Managing+water/Garden+bores/default.aspx](http://www.water.wa.gov.au/Managing+water/Garden+bores/default.aspx) viewed at 1 May 2011.

13 The proposed *Water Resources Management Bill* is not expected to require licensing of

these additional issues will not be considered further.

Thirdly, this paper focusses mainly on groundwater users. Groundwater is traditionally a key water resource for WA. Perth relies on groundwater resources for two thirds of the city's drinking water supply. As rainfall levels continue to decline, groundwater resources are impacted and sustainable groundwater use is becoming more challenging.<sup>14</sup> At present, 24 percent of WA's groundwater resources are either fully allocated or over allocated and 39 percent of the state's groundwater resources are over 80 percent allocated.<sup>15</sup>

## CURRENT REGULATORY FRAMEWORK AND THE PROPOSED NWI REFORMS

The compliance and enforcement regime in the current WA water resource management regulatory framework requires reform in order to provide for the proposed NWI reforms. This part begins by explaining the scope of the *RiWI Act* and the requirement under the Act for statutory authorisation to take water as well as the key characteristics of the licensing system. Secondly, it discusses the present compliance monitoring system, the administrative and criminal enforcement mechanisms and the lack of enforcement activity. Thirdly, it explains the proposed NWI reforms and the importance of compliance and enforcement to meet the goals of those reforms.

### Water Access Rights under the Current Regulatory Regime

#### 1. *The Scope of the RiWI Act*

It is helpful to define the scope of the *RiWI Act* and the term 'water resources' under the Act. The principal concern of the *RiWI Act* is the allocation of rights to take and use water resources, as management of water quality was bought under the *Environmental Protection Act 1986* (WA) in 1986.<sup>16</sup> 'Water resources' is defined to include 'watercourses and wetlands together with their beds and banks; other surface waters; and aquifers and underground water'.<sup>17</sup> The *RiWI Act* vests in the Crown 'the right to the use and flow, and to the control, of the water at any time in any watercourse, wetland or underground water source'.<sup>18</sup> Absent from the

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overland flow. However, approval for the construction of off-stream dams may be required if controls for overland flow interception have been introduced through water allocation plans or regulations. See Western Australian Government, *Discussion Paper Water Resources Management Options* (Department of Water, 2009) pp 11–12, 52, [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 1 April 2011.

14 See generally National Centre for Groundwater Research and Training, *What is Groundwater*, (National Centre for Groundwater Research and Training, 2013) < <http://www.groundwater.com.au/pages/what-is-groundwater>>.

15 Western Australian Government, *Securing Western Australia's Water Future, position paper reforming water resource management* (2013) p 3.

16 Water quality was previously dealt with under pt IIIA of the *RiWI Act* prior to the enactment of the *Environmental Protection Act 1986* (WA). See Gardner A, "Water Resources Law Reform in Western Australia – Implementing the CoAG Water Reforms" (2002) EPLJ at 8.

17 *Rights in Water and Irrigation Act 1914* (WA), s 2.

18 *Rights in Water and Irrigation Act 1914* (WA), s 5A.

vesting provision entirely is the right to take dispersed surface water or overland flow, as well as the right to take water from a spring or wetland on private land.<sup>19</sup> The right to take these water resources still derives from the common law but is limited by the duties in the *RiWI Act*<sup>20</sup> and can be regulated by local-by laws.<sup>21</sup>

## 2. *The Requirement of Statutory Authorisation to Take Water*

Section 5C of the *RiWI Act* requires statutory authorisation to take water from any of the following water resources:

1. Watercourse or wetland;
2. Groundwater from any artesian well; and
3. Groundwater from any non-artesian well in a proclaimed or prescribed underground water management area.

There is no requirement for statutory authorisation to take non-artesian groundwater from an area that is not proclaimed for regulatory management (although all groundwater is vested in the Crown). The source of the right to take non-artesian groundwater outside management areas is unclear, but it most likely resides in the remnant common law. Alternatively, it may only be exercisable with authority under another written law.<sup>22</sup>

‘Take’ is defined as ‘to remove water from, or reduce the flow of water in a watercourse, wetland or underground water source, including by –

- a. Pumping or siphoning water;
- b. Stopping, impeding or diverting the flow of water;
- c. Releasing water from a wetland;
- d. Permitting water to flow under natural pressure from a well; or
- e. Permitting stock to drink from a watercourse or wetland,  
and includes storing water during, or ancillary to any of those processes or activities’.<sup>23</sup>

The *RiWI Act* confers a number of basic statutory rights to take water, for which a licence is not required. These include:

1. Basic rights to take water for stock and domestic purposes, namely;

<sup>19</sup> *Rights in Water and Irrigation Act 1914* (WA), ss 5–5B.

<sup>20</sup> *Rights in Water and Irrigation Act 1914* (WA), ss 5B, 5E.

<sup>21</sup> *Rights in Water and Irrigation Act 1914* (WA), s 26L. See generally Gardner A, “The Legal Basis for the Emerging Value of Water Licenses – Property Rights or Tenuous Permissions” (2003) 10 APLJ 1, p 4–5.

<sup>22</sup> Gardner A, Bartlett R and Gray J, *Water Resources Law* (LexisNexis Butterworths, 2009) pp 443–444; Gardner A, “Water Resources Law Reform in Western Australia – Implementing the CoAG Water Reforms” (2002) EPLJ, p 10 - 11.

<sup>23</sup> *Rights in Water and Irrigation Act 1914* (WA), s 2.

- a. Statutory riparian rights in and outside proclaimed surface water management areas;<sup>24</sup>
  - b. Public rights to take water in and outside proclaimed surface water management areas for persons who can access the water resource by a public road or reserve;<sup>25</sup>
  - c. Basic rights to take water from a non-artesian well in proclaimed groundwater management areas;<sup>26</sup>
2. Rights acquired under a local by-law made pursuant to the *RiWI Act*;<sup>27</sup> or
  3. Rights acquired under another written law.<sup>28</sup>

In the absence of one of the rights listed above, a licence will be required to take water from a water resource to which s 5C applies.<sup>29</sup> The Minister can alter a right to take water by issuing directions restricting or prohibiting the right to take water.<sup>30</sup>

A separate authorisation is required for the construction of works for water access. Permits are required for the construction of dams on watercourses.<sup>31</sup> Licences are required for the construction of any artesian well and non-artesian wells in proclaimed management areas.<sup>32</sup> However, stock and domestic non-artesian wells are exempt from the licensing requirement.<sup>33</sup>

### 3. *The Characteristics of a Licence to Take Water*

Under the *RiWI Act* licences to take water can be granted for a fixed or indefinite term.<sup>34</sup> In practice a licence is granted for 10 years, or if the application is for the development of a water resource, a shorter term, subject to development conditions.<sup>35</sup> Only persons with some form of land access or public utility

24 *Rights in Water and Irrigation Act 1914* (WA), ss 9, 20.

25 *Rights in Water and Irrigation Act 1914* (WA), ss 10, 21. It is likely that this right was included in the *RiWI Act* to permit landholders with land adjacent to rivers (but with boundaries surveyed back from the river bank) to take water by putting a pipe across the public reserve. See Gardner, n 22, p 10.

26 *Rights in Water and Irrigation Act 1914* (WA), s 25A.

27 *Rights in Water and Irrigation Act 1914* (WA), ss 5C(1)(c)(ii), 26L(3)(d).

28 *Rights in Water and Irrigation Act 1914* (WA), s 5C(1)(c)(iii). This may include rights under a statutory endorsed state agreement and a licence to conduct an activity on Crown land. See for example *Land Administration Act 1997*, ss 91, 267. See generally Gardner, Bartlett and Gray, n 22, p 444.

29 *Rights in Water and Irrigation Act 1914* (WA), s 5C(1)(c).

30 *Rights in Water and Irrigation Act 1914* (WA), ss 26GB–26GF.

31 *Rights in Water and Irrigation Act 1914* (WA), ss 11, 17 and 17B.

32 *Rights in Water and Irrigation Act 1914* (WA), ss 26A & 26D.

33 Gardner, Bartlett and Gray, n 22, p 437.

34 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 12.

35 Gardner, Bartlett and Gray, n 22, p 437.



qualification are able to apply for a licence.<sup>36</sup>

The Minister may include in a licence any term, condition or restriction.<sup>37</sup> The water licence will always specify the water entitlement of the licence, that is, the maximum volume that can be taken annually.<sup>38</sup> Other licence conditions commonly imposed include: restrictions on irrigation of non-commercial crops between 9.00am and 6.00pm;<sup>39</sup> a requirement to develop an Operating Strategy or a Water Conservation and Efficiency Plan;<sup>40</sup> and conditions regarding metering. The standard metering conditions require the licensee to record meter readings monthly and report readings to the Department annually. The licence may also specify a permitted use for the water.

Reforms introduced in 2001 allow for the transfer of water rights. Unlike in other States, water rights remain bundled (that is, the water rights to access a volume of water, construct works in order to access that water, and to use the water on the land remain tied to the land).<sup>41</sup> Water trading has not been embraced to any great extent in WA.<sup>42</sup>

## Enforcement Under the Current Regulatory Framework

### 1. Compliance Monitoring

The enforcement of water access rights begins with compliance monitoring. The main method of monitoring water consumption is metering. Under the *RiWI Act* the Minister has the power to install a meter or to require the licensee to install a meter.<sup>43</sup>

In 2009, the Department published a Metering Policy that required meters to be installed on licences with annual water entitlements greater than or equal to 50

36 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 3.

37 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 15(2), sch 1 app.

38 Western Australian Government, *Operational Policy 5.13 Water Entitlement Transactions for Western Australia* (Department of Water, 2009) p 3, [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 29 April 2011.

39 There is an exception for newly planted areas, which can be watered between these hours for up to 28 days from the date of planting.

40 Western Australian Government, *Operational Policy 5.08 Use of Operating Strategies in the Water Licensing Process* (Department of Water, 2009), [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 29 April 2011; Western Australian Government, *Operational Policy 1.02 Policy on Water Conservation Efficiency Plans* (Department of Water, 2009), [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 29 April 2011.

41 *Rights in Water and Irrigation Act 1914* (WA), sch 1 div 7. See generally Gardner, Bartlett and Gray, n 22, pp 603–608.

42 Gardner, Bartlett and Gray, n 22, pp 603–608. For water trading statistics see Western Australia, *Parliamentary Debates*, Legislative Council, 23 February 2011, 946b (Hon Helen Morton). See also Skurray J, Roberts E, and Pannell D, Hydrological challenges to groundwater trading: lessons from south-west Western Australia”, *Journal of Hydrology* 412–413, (2012) 256–268.

43 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 46(1).



megalitres.<sup>44</sup> In priority management areas,<sup>45</sup> where water extraction is regulated more closely, this threshold was reduced to 5 megalitres. The Policy said that the Government would arrange for the installation of government-owned water meters in the priority management areas.<sup>46</sup> In other areas of the state, the obligation was on the water licensee to install meters.<sup>47</sup> However, due to a failure to secure national funding, the Department recently returned the thresholds in this Policy to the pre-existing limit of 500 megalitres.<sup>48</sup> Metering obligations may still be imposed in some situations on licensees whose annual water allocation is below 500 megalitres.

The Government has made limited progress in terms of rolling out the Metering Policy, and currently only a proportion of licences have meters installed. It is likely the Government's reluctance to roll out metering more substantially to date has been licensee resistance to self-funded meters.<sup>49</sup> Other methods of compliance monitoring used by the Department include site surveys and aerial surveys.<sup>50</sup> However, on average, only about 12 per cent of licences are surveyed for compliance each year.<sup>51</sup>

## 2. Administrative Measures

The *RiWI Act* provides the Minister, or authorised officers of the Department, with the power to issue the following administrative measures:

1. Directions ordering compliance with the Act or a licence condition;<sup>52</sup>
2. Notices suspending or cancelling a licence, where a licensee has breached

44 Western Australian Government, *Strategic Policy 5.03 Metering the Taking of Water* (Department of Water, 2009) p 1 [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 20 April 2011.

45 The priority management areas are defined in the metering policy to include Gngangara Mound, Carnarvon Artesian, Gingin GWA/ SWA, Ord Irrigation Area, Bunbury and Busselton-Capel.

46 Western Australian Government, n 44, p iii. See also of Western Australian Government, *Western Australia's Implementation Plan for the National Water Initiative* (2007) pp 82–85, [www.nwc.gov.au](http://www.nwc.gov.au) viewed at 20 April 2011.

47 Western Australian Government, n 44, p iii. The standard for installation and maintenance of meters is set out in the *Rights in Water and Irrigation (Approved Meters) Order 2009* (WA). See also Western Australian Government, *Guidelines for Meter Installation* (Department of Water, 2009), [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 20 April 2011.

48 Sinclair Knight Merz, *Assessment of Groundwater Licensing, Metering and Extraction Estimation Arrangements and Techniques in Australia, Draft Report* (Australian Government, National Water Commission 2011) p 13. Western Australian Government, n 15, p 20.

49 Sinclair Knight Merz, no 48, p 13.

50 Western Australia, *Parliamentary Debates*, Legislative Council, 28 June 2011, 5064b–5065a (Hon Helen Morton).

51 Western Australia, *Parliamentary Debates*, Legislative Council, 2 December 2010, 9831–9832 (Hon Helen Morton).

52 *Rights in Water and Irrigation Act 1914* (WA), ss 22, 26G(1), sch 1 cl 18(3)(a). The power to issue directions lies with the Minister. There are also directions powers under ss 26G(2), 26GB–26GF. These powers are not ‘enforcement powers’ as they allow the Minister to modify existing rights under certain circumstances; for example, in times of drought.

3. a licence condition or been convicted of an offence under the Act;<sup>53</sup> and Infringement notices where there is reason to suspect a person has committed certain offences under the Act.<sup>54</sup>

A person issued with an infringement notice has 21 days to pay the prescribed fine or faces prosecution.<sup>55</sup> For the offence of taking water without authorisation the prescribed fine is \$500.<sup>56</sup>

Other administrative enforcement actions include issuing a warning letter and issuing a written notice to immediately cease illegal activity. These remedies are not mandated in the legislation, although they have been adopted by Department.<sup>57</sup> There is little publicly available information regarding how often these measures are used. The Department does not publish statistics regarding enforcement measures, nor is any information available in their annual reports. The author is aware however, through discussions with members of the Department, that there has been minimal use of these powers, although the directions power has been used from time to time. As already noted, only four infringement notices were issued to licensees on the Gngangara Mound during the first four years of the Metering Project.<sup>58</sup>

### 3. Criminal Enforcement

It is an offence under s 5C of the *RiWI Act* to take water from a watercourse or wetland, artesian groundwater, or non-artesian groundwater in a management area without authority under the statute. This includes where a licensee takes water in excess of their water entitlement. This offence incurs a penalty of \$10,000 for an individual<sup>59</sup> and \$50,000 for a corporation.<sup>60</sup> There are also various offence provisions under the Act regarding unauthorised construction of works.<sup>61</sup>

53 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 25(1). See also s 26G(4). The power to cancel licenses lies with the Minister.

54 *Rights in Water and Irrigation Regulations 2000* (WA), rr 50–56, sch 2. See also *Water Agencies (Powers) Act 1984* (WA), s 103. The power to issue infringement notices lies with certain Department officers. See *Rights in Water and Irrigation Regulations 2000* (WA), rr 52A–52B.

55 *Water Agencies (Powers) Act 1984* (WA), s 103(2). See also *Rights in Water and Irrigation Regulations 2000* (WA), sch 3, form 3.

56 *Rights in Water and Irrigation Regulations 2000* (WA), sch 2.

57 Western Australian Government, *Managing Breaches of the Rights in Water and Irrigation Act 1914 on Watercourses in Western Australia* (Department of Water 2010) p 9 [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 20 April 2011.

58 Refer to Introduction. See also Western Australia, *Parliamentary Debates*, Legislative Council, 20 September 2011, 57b–58a (Hon Helen Morton); Western Australian Government, *Dry Season Response Update Monday 9 May 2011* (Department of Water, 2011), [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 20 April 2011.

59 *Rights in Water and Irrigation Act 1914* (WA), s 5(c)(1).

60 *Sentencing Act 1995* (WA) s 40(5). (A body corporate is liable to a maximum penalty five times that specified for an individual where the statute does not expressly provide a penalty for a corporation).

61 *Rights in Water and Irrigation Act 1914* (WA), ss 17, 18, 25, 26A, 26B, 26F, 26F.

Only conditions relating to the taking water can be enforced under s 5C. It is not an offence to breach other conditions, such as conditions regarding use. The Minister can issue directions ordering the licensee to comply with their licence<sup>62</sup> and it is an offence not to comply with a direction.<sup>63</sup> Standing to enforce the criminal law is restricted to the Minister.<sup>64</sup>

It has already been stated that the Minister has only prosecuted one of the licensees on the Gnangara Mound found to be in breach of their licence conditions.<sup>65</sup> Across the whole of WA, it appears there have been only seven prosecutions under the *RiWI Act* since 2003.<sup>66</sup>

#### 4. Civil Enforcement

It is worth briefly mentioning the civil enforcement mechanisms available to enforce water rights, although they will not be discussed further. Section 5E of the *RiWI Act* provides a statutory right to civil action for breach of statutory duty where a person contravenes s 5C,<sup>67</sup> or where a person does not take all reasonable steps to minimise the degradation of a water resource.<sup>68</sup> Standing under s 5E is restricted to a person who has a right to take water listed under s 5C,<sup>69</sup> or a person 'directly affected' by the degradation.<sup>70</sup>

There are also some very limited civil rights under the general law. One could apply for an injunction under the Supreme Court's extraordinary equitable jurisdiction to issue an injunction restraining the commission of an offence.<sup>71</sup> It has also been argued that the common law right to sue for breach of riparian right is preserved, at least to some extent, in non-proclaimed management areas.<sup>72</sup>

There are no reported cases that indicate any of these rights either at general law

62 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 18(1).

63 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 18(3)(a). Maximum penalty is \$2,500 for individuals, \$12,500 for corporations. See also sch 1 cl 18(3)(b).

64 *Rights in Water and Irrigation Act 1914* (WA), s 26J.

65 Refer to Introduction. See also Western Australia, *Parliamentary Debates*, Legislative Council, 15 September 2010, 6649a–6651a (Hon Helen Morton).

66 Director of the Magistrates Courts, *Report of Department of Water Prosecutions in the Western Australian Magistrates Court* (2010). Court records are not available prior to 2003.

67 *Rights in Water and Irrigation Act 1914* (WA), s 5E(1)(a).

68 *Rights in Water and Irrigation Act 1914* (WA), s 5E(1)(b).

69 *Rights in Water and Irrigation Act 1914* (WA), s 5E(2)(a).

70 *Rights in Water and Irrigation Act 1914* (WA), s 5E(2)(b).

71 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102; *Re McTiernan; Ex parte Coogee Coastal Action Coalition Inc* [2004] WASC 264; *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 85 LGERA 296; *North Coast Environment Council v Minister for Resources* (1994) 85 LGERA 270. But note the observations of Kirby P in *Peek v New South Wales Egg Corporation* (1986) 6 NSWLR 1 at 2–5.

72 Scott S, *The Impact of ICM Agriculture v The Commonwealth in Western Australia: Returning the Gnangara Groundwater System to a Sustainable Level of Extraction* (LLB Hons Thesis, The University of Western Australia, 2010).

or under s 5E of the *RiWI Act* have ever been utilised to enforce water access rights.

There are no civil penalty provisions in the *RiWI Act*.<sup>73</sup>

### Water Access Rights under the NWI Regime

The NWI reforms will introduce a new system of allocating water access rights. The proposed *Water Resources Management Bill* will be the primary piece of legislation implementing the NWI regime into WA.<sup>74</sup> The Bill is expected to establish two entitlements regimes to manage water resources. In areas where the demand for water is high and the area is at or near full allocation, a consumptive pool regime would be introduced by statutory water allocation plans. However, the current licensing regime (taking of fixed volumes of water) will continue to operate in areas where there is little competition for water.<sup>75</sup>

In the areas where the NWI regime is established, water users would be given perpetual water access entitlements (WAE) as shares of a consumptive pool. The consumptive pool is the amount of water resource that can be made available for consumptive use in a given water system under the rules of the plan.<sup>76</sup> The size of the consumptive pool and the volume of water available to each WAE would be announced periodically by the Department.<sup>77</sup> The size of the pool would reflect an acceptable level of impact on the environment that would result from taking a certain quantity of water from the resource. The available volume would be determined as part of the ongoing water planning process and change seasonally or periodically dependent on the amount of rainfall and water resources recharge. This system is designed to provide water users with long-term secure water rights in a drying climate. The statutory water allocation plans will be binding on all water users and government.<sup>78</sup> Ownership or occupation of land would not be a requirement for a person to hold a WAE, therefore WAEs would be fully tradable. The desired outcome is to allow water to be used for the highest value use.<sup>79</sup>

For each WAE issued there would be a water account. This would record credits of water to the account after each announcement of trading and debits when water was taken from the relevant resource.<sup>80</sup>

73 No other Australian jurisdiction has adopted a comprehensive civil penalty scheme in their water management legislation. However, some jurisdictions give statutory authorisation to the respective courts to order penalties that are analogous to civil penalties. See *Water Act 2000* (Qld) s 789(2)(b); *Natural Resources Management Act 2004* (SA) s 201(1)(e), s 201(1)(d).

74 Western Australian Government, n 44, p 13.

75 Western Australian Government, n 13, pp 9–10.

76 Council of Australian Governments, n 1, Schedule B(i).

77 Western Australian Government, n 13, p 10.

78 Western Australian Government, n 13, p 7.

79 Western Australian Government, n 13, p 40.

80 Western Australian Government, n 13, pp 10, 42.

Separate permits will be required to construct or operate water support works or to use water.<sup>81</sup> The basic statutory riparian rights will be included in the new legislation, so a person will still have a right to take water for stock and domestic purposes.<sup>82</sup>

### **Enforcement of the NWI Regime**

A strong compliance monitoring and enforcement system will be essential to meet the goals of the NWI reforms. Compliance monitoring and enforcement is going to be onerous in a market-based scheme where extraction limits change seasonally. Furthermore, there may be a greater problem with non-compliance under the NWI regime when holders of WAEs face a seasonal reduction in allocation.

The NWI Agreement says very little about enforcement or compliance monitoring, as the focus of the reform is the allocation system. The NWI Agreement, however, presumes that there will be rigorous compliance monitoring and enforcement of water access rights, stating that WAEs under the NWI should be ‘enforceable and enforced’.<sup>83</sup>

The NWI reforms will see WA’s water management law move from a traditional take and use water licensing system to a market based system where water access rights are perpetual shares of the available water. Compliance monitoring and enforcement will be challenging in a market-based scheme where extraction limits change seasonally. Therefore, the new regime will require a strong compliance monitoring and enforcement regime to ensure the protection of the private and public interests in water resources.

Currently, the enforcement mechanisms provided for by the legislation are rarely utilised. There will be issues with enforcing the NWI regime if the NWI reforms are not coupled with reforms to strengthen the current enforcement system. Part Two will identify weaknesses in the current compliance monitoring system and the enforcement system and propose relevant reforms.

### **COMPLIANCE MONITORING AND CRIMINAL ENFORCEMENT**

Both the compliance monitoring system and the enforcement law and policy require reform. This part will outline the problems with the current monitoring and enforcement system and propose reforms to address these issues, focussing on the administrative measures and criminal enforcement.

The drafting of the new water management legislation presents a good opportunity for the reforms to the enforcement mechanisms to be introduced. Reform to the compliance monitoring system, however, needs to be rolled out as soon as possible

81 Western Australian Government, n 13, pp 10–11, 58–59.

82 Western Australian Government, n 13, pp 35–36.

83 Council of Australian Governments, n 1, [31(vi)].

to ensure an effective monitoring system is in place by the time Parliament passes the proposed *Water Resources Management Bill*. A functioning compliance monitoring system will be essential to the success of the NWI reforms, not only to ensure that non-compliance can be flagged for enforcement action, but also to implement the water accounting system.

### **Improving Compliance Monitoring**

The problems with the current enforcement system start with the compliance monitoring system. A key problem is that currently only a small proportion of licences are metered.

Metering will be essential under the new legislative regime not only as a means of tracking compliance for enforcement purposes, but also to track the amount of water taken from a water account. Under the proposed reforms, each water access entitlement will have a water account that records credits of water to the account after each announcement and debits water when water is taken from the resource. Metering is required to measure how much water is taken from the water resource in order to debit the water account.

To achieve the NWI objectives, the National Water Commission (NWC) has taken the view that all surface water and groundwater extractions should be ‘metered or otherwise measured’, including water extracted for stock and domestic purposes.<sup>84</sup> The NWC has also recognised the practical constraints to universal metering and proposed a risk-based approach including prioritising aquifers where extraction is at, or approaching, full allocation.

The Government has indicated that under the new licensing regime, metering will be rolled out for all groundwater systems and for all multi user surface water systems, such as rivers and multi-user dams, except where there is no benefit to water management in doing so. The Government has made a commitment that by mid-2014 the following licences will have conditions requiring metering:

- all groundwater/ multi-user surface water licences with allocations of 500 megalitres or more; and
- sixty percent of single user surface water licences with allocations of 500 megalitres or more.

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84 Australian Government, *Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (National Water Commission, 2009) p 46, <http://www.nwc.gov.au/www/html/3057-biennial-assessments.asp> viewed at 10 April 2011. The NWC is responsible for driving progress towards the sustainable management and use of Australia’s water resources under the NWI. The NWC is established under the *National Water Commission Act 2004* (Cth).

The Government has also committed that by mid-2019 the following licences will have conditions requiring metering:

- all single user surface water licences will allocations of 500 megalitres or more;
- all licences with allocations of less than 500ML (on a needs basis).<sup>85</sup>

At this stage, the Government intends to continue to roll out metering using government-owned meters. Given limits on funding, this may be difficult. It appears likely that at some point licensees will need to carry the cost of metering, or at least a proportion of the cost. This could be achieved by imposing on the licensee the obligation to install, maintain and read meters or, if the Government conducts the metering, by charging a fee to recover the costs.<sup>86</sup>

Another issue with the compliance monitoring system is that only a small portion of licences are subject to compliance surveys. A 2009 Performance Report by the Auditor General highlighted compliance monitoring as an area in need of reform.<sup>87</sup> The Department needs to increase the number of compliance surveys especially targeting licensees with large entitlements or those located in over-allocated areas. Surveys and audits are important to ensure metering equipment is working properly and that licensees are compliant with licence conditions such as restrictions on the use of water. They can also have an educational function and help encourage compliance through consultation.

Another issue is that the Department does not have an adequate system in place to record, track and follow up compliance activity. The 2009 Auditor General Report found that the Department had ‘no systematic record keeping of compliance monitoring activities, potential non-compliance, follow-up actions and outcomes’<sup>88</sup>. The Department needs to develop a centralised data management system that can record and track the results of compliance monitoring activity. It would appear the Department has made some progress since the 2009 audit, as there is now a system of storing meter data electronically.<sup>89</sup> Also, a specialised Compliance and Enforcement Team has been established.<sup>90</sup>

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85 Western Australian Government, n 15, p 20.

86 Western Australian Government, *Inquiry into Water Resource Management and Planning Charges Final Report* (Economic Regulation Authority, 2011) p vi, [www.erawa.com.au](http://www.erawa.com.au) viewed at 2 September 2012.

87 Western Australian Government, *Public Sector Performance Report 2009* (Auditor General of Western Australia, 2009) pp 17–18, <http://www.audit.wa.gov.au> viewed at 2 June 2011.

88 Western Australian Government, n 87, 18.

89 Western Australian Government, *Strategic Water Information and Monitoring Plan, Western Australia* (Department of Water, 2011) pp 41, 82, [www.bom.gov.au/water/regulations/.../wa/2011\\_wa\\_swimp.pdf](http://www.bom.gov.au/water/regulations/.../wa/2011_wa_swimp.pdf) viewed at 2 May 2011.

90 Western Australia, *Parliamentary Debates*, Legislative Council, 28 June 2011, 5065a–5066a (Hon Helen Morton).



## Improving the Department's Enforcement Policy

The next step in improving the enforcement system and working towards achieving better compliance with the regulatory regime is for the government to adopt a firmer enforcement policy. As WA moves to implement the NWI reforms, the Department needs to adopt a more robust policy regarding criminal prosecution and enforcement generally. This is essential to give credibility to the NWI reforms and to ensure the sustainable use of water.

There is also a legal reason why the criminal law needs to be enforced. At common law, there is a basic duty on the police and prosecuting authorities to enforce the law.<sup>91</sup> Although prosecuting authorities have a discretion whether to enforce the law,<sup>92</sup> this discretion is not absolute.<sup>93</sup> If a prosecuting authority has a policy of refraining from enforcing a particular area of the law, the court may intervene, compelling the prosecuting authority to enforce the law.<sup>94</sup>

Care needs to be taken to make it clear that blatant breaches of the legislation will not go unpunished. However, equity issues need to be considered, and it is important that certain water users are not targeted while other users are allowed to flout the law. Administrative penalties such as directions and infringement notices should be used frequently to enforce minor or procedural breaches of the legislation and, if appropriate, first time breaches of more serious offences. Criminal prosecution should be used where the breach has caused actual harm or degradation to the water resource or the environment, or where the breach was clearly of a wilful or deliberate nature or a repeat of a prior breach.<sup>95</sup>

The Department has developed a draft Compliance and Enforcement Policy which has been released to stakeholders for review.<sup>96</sup> The draft policy states that the Department will target breaches that effect at risk water resources or undermine the public's confidence in effective water resource management. The draft policy

91 *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118; *R v General Council of the Bar; Ex parte Percival* [1990] 3 All ER 137.

92 *R v McAulay; Ex parte Fardell* (1979) 2 NTR 22, 29; *R v Chief Constable of Sussex; Ex parte International Trader's Ferry Ltd* [1991] 1 All ER 129 at 137 (Lord Slynn); *King-Brooks v Roberts* (1991) 5 WAR 500 at 518–519; *Smiles v Commissioner of Taxation* (1992) 35 FCR 405 at 408 (Davies J); *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308 at 320 (Kenny J).

93 *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118.

94 *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118; *R v Chief Constable of Devon and Cornwall; Ex parte Central Electricity Generating Board* [1982] QB 458; *King-Brooks v Roberts* (1991) 5 WAR 500 at 515–8; *R v Commissioner of Police (Tas); Ex parte North Broken Hill Ltd* (1992) 1 Tas R 99 at 114. See also Hilson C, “Discretion to Prosecute and Judicial Review” [1993] *Criminal Law Review* 739.

95 See generally Baird M, “A Brief Overview of the Use of Administrative Penalty Arrangements, or Penalty Notices, for Environmental Offences in Australia and New Zealand” (2007) 13 LGLJ 14 at 17; Lipman, n 9 at 111.

96 Western Australian Government, *Compliance and enforcement policy (Draft for consultation)* (Department of Water, 2013).

follows the usual approach of policies of this kind, outlining an ‘enforcement pyramid’<sup>97</sup> that provides different levels of enforcement sanctions including:

- (a) Encouraging and assisting compliance (through incident investigations, education and advice);
- (b) Directing compliance (through infringement notices and directions); and
- (c) Sanctions (including administrative and criminal sanctions).

The draft policy states that factors including the nature and severity of the offence and the risk of harm to the resource will be used to determine which penalty should be pursued for any given breach.

### Improving use of the Administrative Measures

The key problem with the administrative measures is simply that they are not used as frequently as they should be. This could be addressed by the Department implementing a more robust enforcement policy, as discussed above. Administrative measures are less expensive and less complicated to implement than initiating a criminal prosecution and should be used on a regular basis to enforce minor breaches of the legislation.

One legislative reform that should be considered in regards to the administrative measures, however, relates to who has the power to administer these measures. Currently, the power to issue directions and suspend or cancel licences lies with the Minister.<sup>98</sup> The power to administer infringement notices is vested in the CEO and specific officers of the Department,<sup>99</sup> but it is generally acknowledged that the Minister could direct these officers in the exercise of their powers.<sup>100</sup> This politicises the decision to take enforcement action, especially where there is no culture of enforcement in place. This would be especially so during politically sensitive times such as an upcoming election year.

Arguably, both the right to issue infringement notices and directions should lie with officers of the Department and be subject to an express prohibition on ministerial instruction and direction.<sup>101</sup> This would ensure the use of these

97 See generally Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

98 *Rights in Water and Irrigation Act 1914* (WA) sch, 1 cl 25(1). See also s 26G(4).

99 *Rights in Water and Irrigation Regulations 2000* (WA), rr 52A–52B. The officers of the Department include: (a) the chief executive officer; (b) the Director, Regional Management and Water Information; (c) the Manager, Regional Integration Branch; (d) the Coordinator, Compliance and Enforcement Unit.

100 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404.

101 This argument relates to the directions power in ss 22, 26G(1) and sch 1 cl 18. The directions powers under ss 26G(2) and 26GB–26GF are not enforcement measures, but allow the Minister to alter existing rights under certain circumstances (for example during

measures would not be subject to political influence. The power to suspend or cancel a licence, however, should stay within the Minister's power. This is the most serious enforcement measure that may have political consequences when issued. Therefore, it is appropriate for this measure to remain within the power of the Minister.

This is potentially a problem in other states too, as there is no express prohibition in any of the other states, which vest administrative powers in either the Minister,<sup>102</sup> the Chief Executive Officer of the relevant Department<sup>103</sup> or authorised officers.<sup>104</sup>

## Improving Criminal Enforcement

The problems with the criminal enforcement are more substantial and it is clear that the provisions of the *RiWI Act* concerning criminal enforcement mechanisms require significant reform. The issues with the current criminal enforcement system can be summarised as follows:

1. there are gaps in the scope of the current offence provisions;
2. the penalties for the offences are too low to create adequate deterrence;  
and
3. there are difficulties with prosecuting offences.

## The Scope of the Offence Provisions

### 1 Offence for Breach of Licence Condition

Currently, it is only an offence to breach conditions relating to 'taking' water under s 5C of the *RiWI Act*. For other licence conditions to be enforced (such as metering conditions and conditions restricting use), the Minister must first issue directions ordering compliance with the conditions.<sup>105</sup> Failure to comply with directions is an offence.<sup>106</sup> This is a reactive form of enforcement that provides little incentive for a licensee to comply with conditions.

The new legislation should make it an offence to breach a licence condition. This is an offence in every other Australian jurisdiction.<sup>107</sup> The directions power could remain in the legislation as an alternative enforcement mechanism to be used where

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droughts). These powers should stay within the Minister's power, as they require more sensitive political judgment.

102 See for example *Water Management Act 2000* (NSW).

103 See for example *Natural Resources Management Act 2004* (SA).

104 See for example *Water Act 1989* (Vic).

105 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 18(1).

106 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 18(3).

107 *Water Resources Act 2007* (ACT), s 77F; *Water Act 2000* (Qld) s 812; *Water Management Act 2000* (NSW) s 91G; *Water Act 1992* (NT), s 46; *Natural Resources Management Act 2004* (SA), s 127(6)(ab); *Water Management Act 1999* (TAS), s 82(1)(b); *Water Act 1989* (Vic), s 64AF.

there is a minor breach of a condition that does not warrant prosecution. The new legislation should also make it an offence to use water contrary to authorisation to ensure the regulation of water use can be enforced. Under the proposed *Water Resources Management Bill*, implementation of the NWI unbundling will see a separate permit required to use water.<sup>108</sup> There will need to be a mechanism to enforce the terms of this permit and punish those who use water without a permit. This is an offence in every other Australian jurisdiction.<sup>109</sup>

## 2. Metering Offences

The offence provisions regulating metering are also in need of reform. Currently, it is an offence under the *RiWI Act* to fail to maintain a meter in good condition<sup>110</sup> and to fail to ensure the meter is operating accurately.<sup>111</sup> Under the *Rights in Water and Irrigation Regulations 2000* (WA) it is an offence to damage a meter and to install or alter a meter so that it does not accurately measure the quantity of water taken.<sup>112</sup> To ensure that all misconduct can be prosecuted, the new legislation could include provisions making it an offence to take water when meter equipment is not working<sup>113</sup> and to submit false meter readings to the Department.<sup>114</sup> It should also be an offence to fail to install a meter contrary to a licence condition<sup>115</sup> and to fail to submit meter readings contrary to a licence condition,<sup>116</sup> although these offences could be captured under the general provision making it an offence to breach a licence condition proposed above.<sup>117</sup>

## 3. Other Gaps

The Government could also consider including the following reforms in the new legislation:

- A provision that makes directors liable for offences committed by the corporation where they had knowledge of the offence or permitted the offence to be committed;<sup>118</sup>

108 Western Australian Government, n 13, p 11.

109 *Water Resources Act 2007* (ACT), s 77G(5); *Water Act 2000* (Qld), ss 809, 810; *Water Management Act 2000* (NSW), s 91A; *Water Act 1992* (NT) s 44(1); *Natural Resources Management Act 2004* (SA), ss 127(5)(i), 127(5a)(b); *Water Management Act 1999* (Tas), s 82(1)(c); *Water Act 1989* (Vic), ss 64K, 64J.

110 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 46(2)(a). Maximum penalty is \$2,000 for individuals and \$10,000 for corporations.

111 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 46(2)(b). Maximum penalty is \$2,000 for individuals and \$10,000 for corporations.

112 *Rights in Water and Irrigation Act Regulations 2000* (WA), r 43. Maximum penalty is \$2,000 for individuals and \$10,000 for corporations.

113 See for example *Water Management Act 2000* (NSW), s 91I.

114 See for example *Water Act 2000* (Qld), s 826; *Natural Resources Management Act 2004* (SA), s 214; *Water Act 1992* (NT), s 89; *Water Management Act 1999* (Tas), s 283.

115 See for example *Water Management Act 2000* (NSW), s 91J.

116 See for example *Water Management Act 2000* (NSW), s 91H.

117 Refer to part 2.2.1.1.

118 *Water Resources Act 2007* (ACT), s 104; *Water Act 2000* (Qld), s 828; *Water Management*

- A provision providing a general defence where a person exercised reasonable precautions and due diligence or had no control over the causes of the offence;<sup>119</sup> and
- A provision, or provisions, giving strong and clear powers to the Department to investigate offences.<sup>120</sup>

These provisions are common to environmental legislation and have been included in water legislation in other Australian jurisdictions.

#### 4. *Inadequate Penalties*

Another issue with the current criminal enforcement law is that the penalties for the offences in the *RiWI Act* are too low. For example, the penalty for unauthorised taking of water is only \$10,000 for an individual<sup>121</sup> and \$50,000 for a corporation.<sup>122</sup> This penalty does not reflect the seriousness of water related offences in a drying climate and is noticeably lower than the penalties for the equivalent offences in most other Australian jurisdictions.<sup>123</sup> For example, in NSW the penalty for taking water without authority, where the offence was committed with intention or negligence, is \$1.1million or 2 years imprisonment (or both) for a natural person, and \$2.2million for a corporation.<sup>124</sup>

The WA Government has recognised that penalties in the new legislation should be increased to a level commensurate with other Western Australian environmental legislation and other water legislation across Australia.<sup>125</sup> It is important that imprisonment be included in the maximum penalty for serious offences under the legislation such as taking water without authorisation and interfering with meters. This would also bring the penalties for water offences in line with the penalties for other environment crimes in WA such as pollution<sup>126</sup> and illegal vegetation

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*Act 2000* (NSW), s 363; *Natural Resources Management Act 2004* (SA), s 219; *Water Management Act 1999* (Tas), s 291. See also *Environmental Protection Act 1986* (WA), s 118(1).

119 *Water Act 2000* (Qld), s 812A; *Water Management Act 2000* (NSW), ss 60F, 91M; *Natural Resources Management Act 2004* (SA), s 218. See also *Environmental Protection Act 1986* (WA), s 74(1a).

120 *Water Resources Act 2007* (ACT), pt 10 div 10.2; *Water Act 2000* (Qld), ch 5 pt 1; *Water Management Act 2000* (NSW), ch 2 pt 2; *Natural Resources Management Act 2004* (SA), ch 2 pt 3 div 5; *Water Management Act 1999* (TAS), pt 12 div 2; *Environmental Protection Act 1986* (WA), pt VI. Cf *Rights in Water and Irrigation Act 1914* (WA), s 25H(1a); *Water Agencies (Powers) Act 1984* (WA), pt VI.

121 *Rights in Water and Irrigation Act 1914* (WA), s 5(c)(1).

122 *Sentencing Act 1995* (WA), s 40(5).

123 Refer to Table 1 in Appendix 1.

124 *Water Management Act 2000* (NSW), s 60A(1), (3). Maximum penalty is lower (\$247,500 for individuals and \$1.1 million for corporations) for strict liability offences. See s 60A(2), (4).

125 Western Australian Government, n 15, p 28.

126 *Environmental Protection Act 1986* (WA), ss 49(2)–(3). Maximum penalty is \$500,000 and/ or 5 years imprisonment for individuals and \$1 million for corporations (where the offence was committed with intention or negligence). Maximum penalty is \$250,000 and/

clearing.<sup>127</sup>

Western Australia could also consider introducing a tiered system of penalties for key offences in the Act, similar to those in the *Environmental Protection Act 1986* (WA) (*EP Act*)<sup>128</sup> and the *Water Management Act 2000* (NSW).<sup>129</sup> Currently, all offences in the *RiWI Act* are strict liability offences.<sup>130</sup> Adopting a tiered system would ensure that water users who have acted with intent or criminal negligence could be prosecuted for an appropriate penalty to reflect their level of wrongdoing. There is also the option of providing civil penalties in the new water management legislation as an additional civil enforcement mechanism. Civil penalties are financial penalties imposed otherwise than through the normal criminal process.<sup>131</sup> They are distinguished from administrative penalties imposed more mechanically by a regulator and from other enforcement tools such as infringement notices or licence revocation.<sup>132</sup> Civil penalties can be an extremely valuable enforcement mechanism, as they require only the civil standard of proof to determine liability. An example of a comprehensive civil penalty scheme can be found in the *Environmental Protection and Biodiversity Act 1999* (Cth) (*EPBC Act*).<sup>133</sup> This Act empowers the Federal Court to impose civil penalties for a contravention of certain provisions to which the scheme is deemed to apply.<sup>134</sup>

No other Australian jurisdiction has adopted such a comprehensive civil penalty scheme in their water management legislation. However, some jurisdictions give statutory authorisation to the respective courts to order penalties that are analogous to civil penalties. Under the Queensland and South Australian legislation, where a contravention of the legislation is established the court may order the defendant pay exemplary damages.<sup>135</sup> Under the South Australian Act, the court can also order the defendant pay a penalty based on the financial benefit they have gained, or could reasonably be expected to gain, as a result of the contravention.<sup>136</sup> Although not referred to as such, these remedies are analogous to civil penalties as they are payable into the consolidated revenue fund,<sup>137</sup> and are punitive in character.<sup>138</sup> It

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or 3 years for individuals and \$500,000 for corporations (for strict liability offences).

127 *Environmental Protection Act 1986* (WA), s 51C. Maximum penalty is \$250,000 for individuals and \$500,000 corporations.

128 See for example *Environmental Protection Act 1986* (WA), ss 49(2)–(3).

129 See for example *Water Management Act 2000* (NSW), ss 60C(1)–(2).

130 *Criminal Code* (WA), s 23; *R v Hutchinson* [2003] WASCA 323.

131 Michael Gillooly and Nii Lante Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13(2) *University of Tasmania Law Review* 269, 269.

132 Michael Woods and Richard Macrory, *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach* (Faculty of Laws, University College London, 2003) 11.

133 See also *Environmental Protection Act 1993* (SA).

134 *Environmental Protection and Biodiversity Act 1999* (Cth) s 482. See also Brendan Grigg, 'Environmental Civil Penalties in Australia: Towards Deterrence?' (2011) 28 *Environmental and Planning Law Journal* 36, 38.

135 *Water Act 2000* (Qld) s 789(2)(b); *Natural Resources Management Act 2004* (SA) s 201(1)(e).

136 *Natural Resources Management Act 2004* (SA) s 201(1)(d).

137 *Water Act 2000* (Qld) s 788(4); *Natural Resources Management Act 2004* (SA) s 201(1)(4).

138 It is not clear from the legislation whether this contravention must be established based on

is interesting to note that any person can apply for these penalties,<sup>139</sup> although the penalty can only be paid to the consolidated revenue fund regardless of who brings the application. This is compared to the civil penalties in the *EPBC Act*, where standing is limited to the Minister.<sup>140</sup> These additional remedies would be a useful addition to the new water resource management legislation in WA.

The question as to whether the WA water legislation should adopt a more comprehensive civil penalty scheme such as that found in the *EPBC Act* is an issue for further consideration that cannot be fully addressed within this paper. The author is skeptical of introducing a comprehensive civil penalty regime during the upcoming round of reforms, given how little use the Commonwealth Government has made of the *EPBC Act* scheme.<sup>141</sup>

## Prosecuting Offences

### 1. *Proving the offence was committed*

There are also potential problems with the *RiWI Act* when it comes to prosecuting offences. The Department has expressed the view that it can be difficult for prosecuting authorities to establish proof beyond reasonable doubt of all elements of an offence.

One way to address this is to include statutory presumptions in the legislation that certain offences, or elements of offences, are considered proved in the absence of evidence to the contrary.<sup>142</sup> There is currently a statutory presumption in the *RiWI Act* regarding meter readings, but it is so limited in scope that it is not very helpful.<sup>143</sup> It may also be useful to allow for the use of evidentiary certificates in legal proceedings to prove matters of an administrative nature, as some other jurisdictions have done.<sup>144</sup> This would remove the need for a licensing officer to appear in court to give evidence. These are common tools in environmental legislation, used to streamline cases where the matters to be proved are simple or technical issues.<sup>145</sup>

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the criminal or civil standard of proof.

139 *Water Act 2000* (Qld) s 784(1); *Natural Resources Management Act 2004* (SA) ss 201(5) (d), (6). (In South Australia a person without an interest in the proceedings must obtain the leave of the court).

140 *Environmental Protection and Biodiversity Act 1999* (Cth) s 481(1).

141 See generally Grigg, above n 134, 38; Lipman, n 9, pp 99–100.

142 *Water Act 2000* (Qld), s 812A(2); *Water Act 1992* (NT), ss 40(3), 44(2), 59(2), 62(2), 66(2), 103; *Natural Resources Management Act 2004* (SA), s 233(2)(d); *Water Management Act 1999* (TAS), ss 293–294; *Water Act 1989* (Vic), ss 300–301.

143 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 47.

144 See for example *Water Resources Act 2007* (ACT), s 103; *Water Act 2000* (Qld), s 921; *Water Management Act 2000* (NSW), ss 367, 367A; *Water Act 1989* (Vic), s 301(4). See also *Environmental Protection Act 1986* (WA), s 51R.

145 New South Wales, *Parliamentary Debates*, Legislative Council, *Water Management Amendment Bill 2008 Second Reading Speech*, 22 October 2008, 10341(Hon Penny



The Department asserts that another barrier to prosecuting the offence of taking water without a licence is that the meter use cards that record meter readings are hearsay evidence.<sup>146</sup> Although the meter use cards are prima facie hearsay evidence (as they are an out-of-court assertion trying to prove evidence of the truth of the facts asserted),<sup>147</sup> they clearly fall within the exceptions to the hearsay rule provided in the *Evidence Act 1906* (WA).<sup>148</sup>

It is also likely the meter use card would have strong probative value as evidence under the considerations listed in s 79D *Evidence Act 1906* (WA). The statutory presumption that meter readings are correct would also be helpful in establishing the probative value of the meter use card.<sup>149</sup> As would the fact that you cannot admit the meter itself into evidence, therefore the meter use card satisfies the best evidence rule.<sup>150</sup>

The Department asserts that another barrier to prosecuting offences using meter readings as evidence is that a licensee can object to the use of meter use cards in evidence based on the privilege against self-incrimination.<sup>151</sup> However, a condition requiring a licensee to submit meter readings impliedly overrules the privilege against self-incrimination. This is not expressly stated in the condition but it is necessary to imply that the privilege is overruled, as the Minister has the power to issue directions to order compliance with the condition, and failure to follow directions is an offence.<sup>152</sup> Therefore, this is not a barrier to prosecution. A practical problem does arise from prosecuting licensees based on information they supply to the Department honestly. Licensees may be tempted to submit false reports in order to avoid punishment. Thus, where metering obligations are placed on licensees, the Government will need to provide for audits to address the problem of false reporting and meter tampering.<sup>153</sup>

Ultimately, the answer may also lie with better technology. Telemetry meters transmit meter data to databases instantaneously and reduce the need for a person

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- 146 This comment was made by Department officers at the *Water Resources Law Workshop* held at University of Western Australia 16–18<sup>th</sup> February 2011.
- 147 Arenson K and Bagaric M, *Rules of Evidence in Australia: Text and Cases* (2<sup>nd</sup> ed, LexisNexis Butterworths, 2007) pp 408–451. See also Arenson K, “Unravelling the Hearsay Riddle: A Novel Approach” (1994) 16 SLR 342.
- 148 *Evidence Act 1906* (WA), s 79C.
- 149 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 47.
- 150 See generally *Owner v Bee Hive Spinning Co Ltd* [1914] 1 KB 105; Arenson and Bagaric, n 147, pp 377–378.
- 151 This comment was made by Department officers at the *Water Resources Law Workshop* held at University of Western Australia 16–18<sup>th</sup> February 2011.
- 152 See generally *EPA v Caltex* (1993) 118 CLR 477 at 536–537 (Deane, Dawson and Gaudron JJ); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 342–345 (Mason, Wilson and Dawson JJ). See generally Clifford P and Ivey S, *Problems with Defending Crimes Against the Environment, Environmental Crime* (Australian Institute of Criminology, 1995) pp 5–6 [www.aic.gov.au](http://www.aic.gov.au) viewed at 1 June 2011.
- 153 Economic Regulation Authority, n 86, p vii.

to physically go to the site to read the meter.<sup>154</sup> The Department has conducted a trial of telemetry metering on a property in Baldivis.<sup>155</sup> The trial was successful, but the technology is very expensive and, at this stage, not compatible with the Department's database systems.<sup>156</sup> Trials of telemetry metering are also being conducted in the eastern states.<sup>157</sup> This sort of technology, though expensive to install, would assist greatly with metering and compliance and alleviate some of the evidential issues with prosecuting offenders.

### Who has a Right to Prosecute?

Another issue with prosecuting offences is that currently only the Minister, or an officer of the Department authorised by the Minister, may institute proceedings.<sup>158</sup> As was discussed in relation to the administrative measures, this allows enforcement action to be subject to political influence.<sup>159</sup>

The *EP Act* previously required ministerial consent to a prosecution by the Chief Executive Officer (CEO) of the Department of Environment and Conservation.<sup>160</sup> This requirement was removed in 2002 to remove 'the perception of political interference in the prosecution process'.<sup>161</sup> Now the Minister is expressly prohibited from giving a direction or instruction to the CEO of the Department of Environment and Conservation 'in respect of the giving of a modified penalty notice or an infringement notice or the institution of a prosecution'.<sup>162</sup>

The new legislation should include an express prohibition against the Minister giving a direction or instruction to the CEO of the Department similar to the prohibition in the *EP Act*. An express prohibition is required as it is generally acknowledged that a Minister may give directions to the Department.<sup>163</sup>

The Government might also consider re-instituting the public right to prosecute an offence. Previously, the common law right to begin a prosecution was open to anyone, unless expressly restricted or removed by legislation.<sup>164</sup> This right

154 New South Wales Government, *NSW Water Metering Scheme – Murray Pilot* (Office of Water), [www.statewater.com.au](http://www.statewater.com.au) viewed at 1 June 2011.

155 Western Australian Government, *Western Australia's Achievements in Implementing the National Water Initiative: Progress Report* (Department of Water, 2008) pp 60–61, [www.water.wa.gov.au](http://www.water.wa.gov.au) viewed at 5 May 2011.

156 Western Australian Government, n 151.

157 See for example New South Wales Government, n 150.

158 *Rights in Water and Irrigation Act 1914* (WA), s 26J(1).

159 Refer to part 2.3.

160 *Environmental Protection Act 1986* (WA), s 114(1)(a) (as passed). See also *Palos Verdes Estates Pty Ltd v Carbon* (1992) 6 WAR 223.

161 Explanatory Memorandum, *Environmental Protection Amendment Bill 2002* (WA), cl 129, 34.

162 *Environmental Protection Act 1986* (WA), s 114(1)(c).

163 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404.

164 *Brebner v Bruce* (1950) 82 CLR 161.

was extinguished in WA in 2004.<sup>165</sup> A person acting in their private capacity can commence prosecutions only with express statutory authorisation.<sup>166</sup> There may be practical difficulties with private citizens initiating prosecutions. For example it is difficult for private citizens to acquire the evidence necessary to bring a case. There is also the potential for this right to be misused. However, the principle is an important one.<sup>167</sup> Re-instatement of the public right to criminal prosecution would ensure criminal prosecutions could be brought in the case of government inaction. It may be that a public body such as the Environmental Defenders Office acting for an interested third party could bring such a case.

### Funding Better Compliance and Enforcement

There is going to be a cost for a better compliance system and for the Department to take enforcement action. The Department receives funding from the WA Government consolidated revenue fund and occasional Commonwealth Government grants, but it appears the Department lacks sufficient funding to undertake any extensive programme of compliance monitoring or enforcement.<sup>168</sup> Funding issues could be addressed to some extent by including a provision in the legislation allowing for the Minister to recover the costs of investigating an offence from the offender following conviction.<sup>169</sup> What will be essential to funding compliance and enforcement, however, is the imposition of water resource management and planning charges.

Under the NWI Agreement, WA is obligated to identify ‘all costs associated with water planning and management’ and ‘the proportion of costs can be attributed to water access entitlement holders’.<sup>170</sup> In 2009 the WA Government requested the Economic Regulation Authority (ERA) undertake an inquiry into water resource management and planning charges. The ERA’s Final Report, published in March 2011, recommends a range of fees and charges to cover the cost of various tasks performed by the Department.

The Report recommends two sets of fees relevant to funding compliance and enforcement:

1. Charges for State run metering programs including:
  - a. An up-front fee for meter provision, installation and maintenance, (\$3,705);

<sup>165</sup> *Criminal Procedure Act 2004* (WA), s 20(5).

<sup>166</sup> *Criminal Procedure Act 2004* (WA), s 20(5).

<sup>167</sup> Pain N, Criminal Law and Environmental Protection, *Environmental Crime* (Australian Institute of Criminology, 1995) [www.aic.gov.au](http://www.aic.gov.au) viewed at 1 June 2011.

<sup>168</sup> Roberts A and Gardner A, “Challenges for the Management of Water Resources in Western Australia: A Legal Response to Findings of the Public Sector Performance Report 2003” (2004) 22 EPLJ 40 at 50.

<sup>169</sup> See for example *Water Management Act 2000* (NSW), s 353E.

<sup>170</sup> Council of Australian Governments, n 1, [67].

- b. A separate fee for meter reading (\$20);
  - c. An annual charge for data management and administration costs (\$90);<sup>171</sup> and
2. An annual charge of \$145 for water licensing policy and enforcement activities.<sup>172</sup>

The ERA Report does not define ‘enforcement activities,’ but presumably this refers to compliance surveys and the issuing administrative enforcement measures. It is not clear whether this also includes costs associated with criminal prosecutions.

The Report recommended that the metering fees be phased in over three years starting immediately. There is already power under the *RiWI Act* to prescribe fees for these purposes.<sup>173</sup> The Report recommended that the water licensing policy and enforcement fee be introduced following the new legislative reforms, as power to prescribe fees for these purposes will need to be included in the new legislation.<sup>174</sup> The Government is still considering the ERA Report. Several attempts to introduce water management fees in the past have been abandoned or disallowed by Parliament.<sup>175</sup> However, it is clear water resource management fees are necessary to fund the Department’s activities. The \$145 fee for policy and enforcement activities may need to be increased. This fee was calculated by dividing the total efficient costs for these activities during the financial year 2008/2009 by the number of total licences in force.<sup>176</sup> It has been argued that compliance and enforcement activity needs to be increased and so this fee would need to be adjusted to take into account the additional costs of improved compliance and enforcement.

## Conclusion

There is little merit in a regulatory system that is not enforced. The introduction of the NWI reforms will be an important milestone towards ensuring sustainable use of WA’s water resources. For these reforms to be effective, they need to be coupled with reform to the compliance and enforcement system so that water access rights under the NWI can be enforced.

Part One of this paper set out the current regulatory framework under the *RiWI Act* and explained the proposed NWI reforms. It was concluded that the NWI regime

171 Economic Regulation Authority, n 86, p 161.

172 Economic Regulation Authority, n 86, p 78.

173 *Rights in Water and Irrigation Act 1914* (WA), sch 1 cl 46(4).

174 Economic Regulation Authority, n 86, pp 27–28; Western Australian Government, *Submissions to Inquiry into Water Resource Management and Planning Charges Second Draft Report* (Department of Water, 20 September 2010) pp 13–14, [www.erawa.com.au](http://www.erawa.com.au) viewed at 2 September 2012.

175 Economic Regulation Authority, n 86, p 2.

176 Economic Regulation Authority, n 86, pp 4–75.

will demand rigorous compliance monitoring and enforcement of water access rights and that the current enforcement system needs to be strengthened.

Part Two identified issues with the compliance monitoring system, the Department's enforcement policy, the administrative measures, and the criminal enforcement provisions and proposed reforms to address these issues. With respect to the compliance monitoring system, more extensive metering and auditing of water entitlements will be essential to flag non-compliance under the NWI regime and to support the proposed water accounting system. The criminal enforcement law could be strengthened by closing gaps in the offence provisions, increasing the penalties and introducing provisions that make it easier to prosecute offences. While there is a cost for better compliance monitoring and enforcement action, this could be addressed by the Government introducing water resource management charges as recommended in the recent Report by the Economic Regulation Authority.

The drafting of the new water resources management legislation presents a good opportunity to reform the enforcement system. It may be argued that the enforcement reforms should be introduced at a later stage once water users have had an opportunity to familiarise themselves with the new system of water allocation under the NWI regime. There will need to be some form of 'grace' period to allow water users to adapt to the new system, and allow the Department to properly educate water users about different aspects of the new regime. However, many of these reforms are long overdue, and it is important that Government have the ability to enforce the law when it is appropriate.

It is no longer acceptable to allow people to take water illegally. The reforms to the compliance monitoring and enforcement system proposed in this article will be essential as WA faces increasingly drier climatic conditions and moves to implement the NWI regime. Clearly, legislative reforms will only be effective if they are fully utilised by the Department. Therefore, legislative reform will need to be backed by a more pro-active enforcement policy on behalf of the Department.

## APPENDIX 1

**Table 1: Penalty for the Offence of Taking Water Without or Contrary to Authorisation in the Australian Jurisdictions**

Jurisdiction	Penalty for an Individual	Penalty for a Corporation
<i>Water Resources Act 2007 (ACT)</i> s 77A	\$5,500 and/ or 6 months imprisonment	\$27,500
<i>Water Act 2000 (Qld)</i> s 808(1)(2)	\$166,500	\$832,500 <i>See Penalties and Sentencing Act 1992 (Qld) s181B(3)</i>
<i>Water Management Act (NSW)</i> s 60A	\$1,100,000 and/ or 2 years imprisonment or both (intention or negligence) \$247,500 (strict liability)	\$2,200,000 (intention or negligence) \$1,100,000 (strict liability)
<i>Water Act 1992 (NT)</i> ss 44, 59	<\$2000 >\$10,000 and/ or imprisonment	Same as for a natural person
<i>Natural Resources Management Act 2004 (SA)</i> s 127(1)	\$35,000 or \$25 / KL whichever is the greatest	\$7000 or \$25 / KL whichever is the greatest
<i>Water Management Act 1999 (Tas)</i> s 82(1)(a)	\$65,000	Same as for a natural person
<i>Water Act 1989 (Vic)</i> ss 33E, 63(1), 295	\$7, 500 and/ or six months imprisonment (first offence) \$14, 500 and/ or 12 months imprisonment (second offence) \$24, 500 and/ or 10 years imprisonment (where land, works or water has or have been seriously damage, or a person has suffered substantial economic loss)	Same as for a natural person
<i>Rights in Water and Irrigation Act 1914 (WA)</i> s 5C	\$10,000	\$50,000 <i>See Sentencing Act 1995 (WA) s 40(5)</i>