

ARTICLES

The Implementation of Tradeable Water Rights in Western Australia

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1. Introduction

On 25 February 1995, the Council of Australian Governments (COAG) agreed on “a strategic framework to achieve an efficient and sustainable water industry”¹. The State and Commonwealth governments committed themselves to reform in the water industry, particularly to promoting competition in an attempt to increase the value of water use². The purpose of this paper is to discuss one of the primary means of promoting competition within the industry; namely, the implementation of tradeable water rights. The initial focus of the paper is to provide a general overview of the concept of tradeable water rights. The problems arising under traditional Australian water legislation are outlined. This is followed by a brief discussion of the possible benefits of tradeable water rights.

The discussion then shifts to the introduction tradeable water rights in Western Australia. The proposed amendments to the *Rights in Water and Irrigation Act 1914 WA* relating to trading are identified and explained. This incorporates an evaluation of how resource security may be affected by the amendments and an analysis of the proposed process of transfer. The final part of the paper outlines the extent to which the proposed amendments implement what is seen as an essential precondition to the institution of tradeable water rights; namely, the proper provision of water for the environment.

2. Problems Arising Under Traditional Water Legislation

The enactment of the *Rights in Water and Irrigation Act 1914 (WA)* and similar legislation in other Australian states effected a transition from a common law property rights-based system of water resources to a system of Crown “ownership” of water resources³. Under the existing Act, water is managed by direct regulations, or what are commonly called command-and-control mechanisms. The behaviour of water users is primarily influenced and controlled by the Water and Rivers Commission as rights to water are almost⁴ entirely dependant on the Commission’s dispositions of statutory privileges in the form of licences⁵.

¹ Alex Gardner, “Water Resources Law Reform” (1998) 15(6) *Environmental and Planning Law Journal* 377-400 at 377

² Water and Rivers Commission, *Water Reform in Western Australia: Allocation and Transfer of Rights to Use Water Proposal for Discussion*, 1997, Water and Rivers Commission Report WRS1, 4 (available at http://www.wrc.wa.gov.au/water_reform/Wr1/WR1.html)

³ Gardner, op cit n1, at 379; *Rights in Water and Irrigation Act 1914 (WA)* s8(1), s26

⁴ Some common law rights to use water for domestic and personal use were preserved by statutory declaration: see *Rights in Water and Irrigation Act 1914 (WA)* s9 and 10

⁵ A licence is required to take surface water in a proclaimed surface water management area (s11), to take under ground water from any artesian well (s26A) and underground water from non artesian well in proclaimed ground water management areas (s26B). A licence is required to construct or alter an artesian or non-artesian well (s26A, s26B, and s26F). A person may not interfere with a watercourse on private or public land in a proclaimed surface water management area (s 17) or a watercourse on public land in a non-proclaimed area [25(1)] without authority under the Act.

Traditionally, there has been little or no charge involved in acquiring a water licence and this encourages land-holders to seek licences for low value uses, such as improved pastures, or simply with a view to increasing the value of their land⁶. In areas where water is scarce, embargoes must be placed on the issuing of new licences. This creates a situation where high value users of water, that is those users whose activities provide a high rate of return on water inputs, may miss out on water entitlements, while those already holding licences are using water for activities with a much lower rate of return⁷. Water can not be transferred between these users since under the current Act, licensed water rights are appurtenant to particular land and these rights can not be traded separately to land⁸. The existing statutory scheme clearly does not provide for the efficient allocation and use of water as a scarce resource.

According to economists, the solution to this problem of inefficiency is to move away from traditional command-and-control mechanisms towards *economic instruments*, such as tradeable resource rights. Such instruments rely on market forces and allow for decentralised decision making by resource users⁹. In keeping with the trend toward the use of economic instruments, the 1994 COAG framework for water reform requires, inter alia, the implementation of clearly specified water allocations or entitlements separated from land title and the institution of trading in water entitlements¹⁰. In response to the COAG requirements, the South Australian, Queensland and West Australian State governments have implemented legislative reform to introduce transferable water rights¹¹. In New South Wales and Victoria, where there is already a relatively long history of both temporary and permanent trading of surface water¹², recent water reforms have focussed on removing impediments to trading¹³.

⁶ Bond and Farrier, "Transferable Water Allocations – Property Right or Shimmering Mirage" (1996) 13 *Environmental and Planning Law Journal*, 213, at 214

⁷ Ibid

⁸ Richard Bartlett, "Transferability of Water Rights in Australia and the United States: Options and Recommendations" in R Bartlett, A Gardner and S Mascher, *Water Law in Western Australia: Comparative Studies and Options for Reform*, Centre for Commercial and Resources Law, UWA Law School 1997, 89, at 108; see *Rights in Water and Irrigation Act 1914 (WA)* s12; s13; s26D

⁹ Environment Australia, *Environmental Incentives*, Environmental Economics Research Paper No. 5, Chapter 12 (available at < <http://environment.gov.au/epcg/eeu/publications.intro.html> >

¹⁰ Water and Rivers Commission, *Water Reform in Western Australia Proposal for Discussion*, op cit n2, at 5

¹¹ See *Rights in Water and Irrigation Amendment Bill 1999 (WA)*; *Water Resources Act 1997 (SA)*; Poh-Ling Tan "Water Licences and Property Rights: the Legal Principles of Compensation in Queensland", (1999) 16 (4) *Environmental and Planning Law Journal*, 284

¹² NSW introduced temporary trading in 1983 and permanent trading in 1989: see Industry Commission, *Ecologically Sustainable Land Management*, April 1999, Chapter 12 (available at <http://bilbo.indcom.gov.au/inquiry/eslm.html>). Victoria introduced trading in December 1990: see Environment Australia, *Environmental Incentives*, op cit n9, Chapter 11

¹³ Industry Commission, *Ecologically Sustainable Land Management*, op cit n12, Chapter 12; Bartlett, op cit n8, at 115

3. Possible Benefits of Tradeable Water Rights

Tradeable water rights are said to lead to improved productivity. Where there is inadequate water to satisfy the requirements of those wishing to use water, market forces will ensure that water, as an input to production activities, is moved away from low value activities to high value activities; that is, activities with the highest rate of return on water inputs¹⁴. In relation to agricultural activities, a low rate of return is often due to environmental problems such as salinity and soil degradation. By moving activities from low to high value uses the market would, ideally, at the same time be moving activities out of areas badly affected by environmental problems and into areas more suitable for that particular activity¹⁵.

Tradeable water rights should lead to increased autonomy and flexibility of users to manage water¹⁶. For example, allocations of water that would otherwise not be used (dormant “sleeper” allocations) can be sold and put to economic use. This leads to economic growth as buyers are able to expand production or produce a higher value product and sellers earn a monetary return enabling them to boost cash flows for investment, land improvement or other activities¹⁷. Users whose activities are unprofitable can cease their activities and by trading their water entitlements, receive financial compensation to help them re-establish an alternative livelihood¹⁸.

Tradeable water rights will lead to a more efficient use of water as users are exposed to the market price of water¹⁹. Where water resources are scarce, this will be reflected in a high market price for water entitlements. The high cost of buying entitlements in the market would provide an economic incentive to licence holders to manage their existing entitlements more wisely.

4. Implementing Tradeable Water Rights in Western Australia

The proposed Act contains a single provision vesting natural waters in the Crown²⁰. It is an offence for a person to take water from any watercourse, wetland or underground water source unless that person holds a licence granted by the Commission in accordance with Schedule 1 of the proposed Act²¹. The majority of the amendments relating to trading in water rights are contained in the proposed Schedule 1.

¹⁴ Environment Australia, *Environmental Incentives*, op cit n9, Chapter 11; Industry Commission, *Ecologically Sustainable Land Management*, op cit n12, Chapter 12; Bartlett, op cit n8 at 91

¹⁵ Bjornlund and McKay “Can Water Trading Achieve Environmental Goals?”, Nov/Dec 1995, *Water*, 31

¹⁶ Industry Commission, *Ecologically Sustainable Land Management*, op cit n12, Chapter 12

¹⁷ Environment Australia, *Environmental Incentives*, op cit n9, Chapter 11

¹⁸ Bjornlund and McKay, op cit n15, at 32

¹⁹ Industry Commission, *Ecologically Sustainable Land Management*, op cit n12, Chapter 12

²⁰ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* [“the Blue Paper”] cl.5A

²¹ Ibid cl.5C; note that person can also take water if they have “riparian rights” (these are provided for in the Act), or are authorised to do so by a local by-law or another written law.

4.1 Who can apply for a Licence?

The current law restricts the persons who may hold a licence to the owner or occupier of the relevant land²². The limitation that such provisions would place on effective trading is illustrated by reference to experiences in New South Wales. That State was the first to make provision for the transfer of water rights, however, the general regime continues to be premised on the attachment of water rights to particular land²³. A licence is deemed to be held by and operate and enure for the benefit of the lawful occupier of the land to which the licence relates²⁴. It has been held that, under the NSW Act, a person can not be the holder of a licence, and therefore *can not transfer the licence*, unless they are in occupation of the land to which the licence relates²⁵.

In order for an effective trading system to operate water rights must be capable of being owned independently of land. Further, in order to prevent speculation, it is imperative that people who are able to hold a licence and participate in the market are clearly identified²⁶. This is achieved by Clause 3 of the proposed Schedule 1, which clearly sets out those persons who are eligible to hold a licence. Licences are not longer appurtenant to land and can be held by persons other than the owner or occupier of the land²⁷. It is hoped that Clause 3 will prevent the limitations that have been placed on trading under the New South Wales Act.

4.2 Resource Security

For trading to be effective, uncertainty about the security of water rights must be kept to a minimum. Some issues relating to resource security are discussed below.

4.2.1 Duration and Renewal of Licences

Under the existing Act, licences are granted for a fixed period, usually in the range of 5 to 10 years²⁸. The Water and Rivers Commission has to the power to renew licences and, whilst the normal practice is to renew licences when they expire, there is no guarantee that a replacement licence will be issued²⁹. In addition, the existing Act fails to provide any legislative guidance as to the factors to be taken into account by the Commission when exercising its discretion to renew a licence³⁰. Under the current law, water users are left uncertain as to their future. Effective trading would be hindered by the fact that the market value of the water allocation declines as the licence term expires.

²² *Rights in Water and Irrigation Act 1914 (WA)* s12(1), s13(1) and s26D

²³ Bartlett, op cit n8, at 109

²⁴ *Water Act 1912 (NSW)* s16(1)

²⁵ *Water Administration Ministerial Corporation v Local Land Board Holden at Wilcannia* (1995) 88 LGERA 278; Bond and Farrier, op cit n6, at 216-222; Although the *Water Act 1912 (NSW)* has been amended to deal with the particular factual situation that arose in the *Wilcannia* case, licences remain appurtenant to land: see *Water Act 1912 (NSW)* s16(1); s117K

²⁶ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, August 1998, Water Reform Series Report No WR 9, at 43 (available at <http://www.wrc.wa.gov.au/about/reform.html>)

²⁷ *Rights in Water and Irrigation Amendment Bill 1999 (WA)*. Schedule 1 cl.3

²⁸ *Rights in Water and Irrigation Act 1914 (WA)* s 13 and s26D; Water and Rivers Commission, *Water Reform in Western Australia Proposal for Discussion*, op cit n2, at 11

²⁹ Ibid

³⁰ see for example *Rights in Water and Irrigation Act 1914 (WA)* s13

One way of overcoming this problem is to allow for the early renewal of licences before they expire, which allows licence holders to sell the licence for its true market value³¹. The proposed amendments do not contain any express provisions allowing a licence holder to apply for *early renewal* of the licence³². It is submitted, however, that the Commission intends that such an application would be allowed under the proposed renewal provisions and that the application would be treated as an application for renewal³³. The renewal provisions increase resource security as they fetter the discretion of the Commission by providing that licences should be renewed except in certain specified situations³⁴. Further, where the Commission is proposing to refuse an application for renewal of a licence or to renew the licence subject to the inclusion of a condition that it considers is inconsistent with the terms of the application for renewal, the Commission must notify the applicant of its proposal. The applicant must be allowed to make written submissions to the Commission before the Commission makes its decision. The Commission is to have regard to these submissions when deciding the application³⁵. The applicant has a right to appeal the decision by the Commission³⁶.

Issuing indefinite licences can also increase resource security. The proposed Act provides that licences may be granted for a fixed *period or an indefinite duration*³⁷. The Commission has stated that licences of an indefinite duration will not be granted until there are adequate by-laws and management plans in place providing for modification of the licence terms during the tenure³⁸. The provisions relating to management plans and by-laws will be discussed below.

4.2.2 Conditions of Licences

Under the existing law, the Commission has a broad discretion to grant licences on such terms, limitations and conditions as it thinks fit and there is no legislative guidance as to sorts of conditions that may be imposed³⁹. The introduction of transferable water rights makes it important for the Act to be more specific about the types of conditions that may be applied to licences⁴⁰. Under the proposed Act, the Commission may, at its discretion, include in a licence any term, condition or restriction in addition to those prescribed in the regulations. However, in exercising this discretion the Commission is to have regard to certain specified factors⁴¹. These include, *inter alia*, whether the transfer is in the public interest, whether the transfer would have a detrimental effect on another person, whether the transfer is ecologically sustainable and environmentally acceptable and whether the transfer is in keeping with any relevant by-laws and management plans.

³¹ *Water Reform in Western Australia Proposal for Discussion*, op cit n2, at 11

³² see *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 Division 5

³³ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, op cit n 26, at 45

³⁴ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.22(2)

³⁵ *Ibid*, Schedule 1 cl.22(3); Schedule 1 cl.6

³⁶ *Ibid*, Part III Division 3B cl.26GG

³⁷ *Ibid* Schedule 1 cl.12(1)

³⁸ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, op cit n26, at 45

³⁹ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, op cit n26, at 46; *Rights in Water and Irrigation Act 1914 (WA)* s13; 26D

⁴⁰ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, op cit n26, at 47

⁴¹ *Rights in Water and Irrigation Amendment Bill (1999) WA* Schedule 1 cl.15(2) and Schedule 1 cl.7(2)

Furthermore, the Appendix to the proposed Schedule 1 contains a list of the matters to which conditions, restrictions and terms can relate. Where the Commission is proposing to grant a licence subject to the inclusion of a condition that it considers is inconsistent with the terms of the application for renewal, the Commission must notify the applicant of its proposal. The applicant must be allowed to make written submissions to the Commission before the Commission makes its decision. The Commission is to have regard to these submissions when deciding the application⁴². The licensee has the right to appeal if aggrieved as to any conditions imposed by the Commission⁴³.

4.2.3 Amendment of Licences

Under the existing Act, the duration and conditions attached to surface water licences can be varied at any time, during the term of the licence subject only to appeal⁴⁴. The Commission may give directions modifying ground water licence rights if it believes that the water is being wasted, improperly used or causing harm, or for the purpose of controlling the draw of ground water from the aquifer⁴⁵. The Commission may cancel a ground water licence if the holder is convicted of an offence of failing to comply with such a direction⁴⁶. Under the proposed Act, the Commission will have the power to amend, suspend or cancel licences by notice in writing given to the licensee⁴⁷. Resource security is to some extent increased, particularly in relation to surface water, in that the Commission may not exercise these powers except in certain specified situations⁴⁸. For example, the Commission is authorised to vary the licence if it is of the opinion that the licensee has consistently not taken the quantity of water that the licensee is entitled to take under the licence⁴⁹. This “use it or lose it” approach should encourage people to trade their excess water entitlements. In most cases⁵⁰, the Commission is to notify the licensee of its proposal to vary the licence and give the licensee the opportunity to make written submissions to the Commission. The Commission is to have regard to these submissions before making its final decision⁵¹. The licensee still has a right to appeal the decision of the Commission⁵².

⁴² Ibid, Schedule 1 cl.6

⁴³ Ibid, Part III Division 3B cl.26GG

⁴⁴ *Rights in Water and Irrigation Act 1914 (WA)* s13

⁴⁵ Ibid, s26G(1) and (2)

⁴⁶ Ibid s26(G)(3) and (4); Gardner, op cit n1, at 392

⁴⁷ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.24 and Schedule 1 cl.25; The power to “amend” includes the power to vary the duration of a licence, vary add or remove any term, condition or restriction included in the licence, or include any new term, condition or restriction in the licence: cl.24(2)

⁴⁸ Ibid, Schedule 1 cl.24(2) and Schedule 1 cl. 25(2);

⁴⁹ Ibid Schedule 1 cl.24(2)(d)

⁵⁰ The exceptions being: where the licence is amended with the consent of the licensee; where a licence is suspended or cancelled because the licensee is convicted of an offence under Act or has failed to comply with any term, condition or restriction included in the licence; where the Commission is of the opinion that the exercise of the power is necessary to prevent loss of life or property or serious injury to person or property; where the power is to be exercised in circumstances prescribed by the regulations: see Schedule 1 cl.26(2) and (3)

⁵¹ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.26(4), (5) and (6)

⁵² Ibid, Part III Division 3B s26GG

4.2.4 Compensation

Under the proposed Act, the Commission can vary or cancel a licence in a number of situations. However, compensation is only payable in one of these situations; that is, where the licence is varied, suspended or cancelled in the “public interest”⁵³. The Commission envisages that this compensation provision will operate when water users acting within their legal rights suffer an enforced reduction to their level of use caused by the grant of a relative increase to others⁵⁴.

4.2.5 Management Plans and By-laws

Management Plans

The ARMCANZ principles for the implementation of property rights in water state that all consumptive and non-consumptive water entitlements should be allocated and managed in accordance with comprehensive planning systems⁵⁵. Although there is *no statutory basis* for water resources planning under the existing law, the Water and Rivers Commission and its predecessor, the Water Authority, have over the last two decades developed quite a sophisticated system of water resource planning⁵⁶. The proposed Act will replace this system with a *statutory* water resource planning system⁵⁷. Plans may be prepared by the Commission upon the direction of the Minister or may be prepared by the Commission if in the opinion of the Commission it is desirable to do so⁵⁸. There will be three levels of water allocation management plans: regional, sub-regional and local, with local plans not to be inconsistent with the higher levels of plans⁵⁹.

Local By-laws

As well as providing for management plans, the proposed Act allows the Minister to make by-laws that are applicable in a locality or localities specified in the by-laws⁶⁰. By-laws may be made prescribing or providing for any matter that is necessary or convenient to be prescribed for the purpose of achieving the objects of the Act⁶¹. There is also specific provision for by-laws to be made in relation to licensing schemes⁶².

⁵³ Ibid Schedule 1 cl.39(1)

⁵⁴ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, at 16; Gardner, op cit n1, at 394

⁵⁵ Bartlett, op cit n8, at 120

⁵⁶ Alex Gardner, “Planning for Integrated Natural Resource Management” in Bartlett, Gardner and Mascher, op cit n8, 208 at 224

⁵⁷ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Part III Division 3D

⁵⁸ Ibid, cl.26GU

⁵⁹ Ibid cl. 26GV, cl.26GW, cl.26GX, cl. 26GY; see also Gardner, “Recent Developments in Western Australia: Water Law Reform”, (1999) 3 *Australian Environmental Law News*, 17

⁶⁰ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* cl.26L(1)

⁶¹ Ibid, cl.26L(2)(b)

⁶² Ibid, cl.26M

Effect on Resource Security

Plans and by-laws may impact on the resource security of licence holders. The content of sub-regional and local management plans may include, inter alia, the matters which will be taken into account by the Commission in considering the exercise of powers to renew, amend, suspend and cancel licences⁶³. Local by-laws may make provision for, inter alia, the conditions that may be attached to licences, the cancellation, variation and enforcement of conditions, the duration of licences and the renewal, cancellation, suspension and amendment of licences⁶⁴. An application for renewal of a licence is to be refused if the Commission is of the opinion that the renewal would be inconsistent with a relevant local by-law or a plan approved under Division 3D of the Act⁶⁵. Similarly, one of the situations in which the Commission is empowered to amend, suspend or cancel the licence is where there has been an alteration in a local by-law or plan⁶⁶. This reduction in resource security could hinder effective trading if it reduces confidence within the market. This may, however, be counteracted to some extent by the procedures that must be followed in the preparation, approval, modification and revocation of plans and by-laws.

The amendments make provision for the appointment of local water resources committees⁶⁷. So far as possible, the members of these local committees are to be drawn from persons who are residents of the locality, or are employed in or operate a business in the locality⁶⁸. A management plan under Division 3D may only be prepared, modified or revoked after consultation with any water resources committee that is in existence for the area to which the plan relates⁶⁹. It is also provided that the public must have the opportunity to make submission before the approval of a plan⁷⁰. The plan is approved by a Minister who is politically accountable (or responsible) for his/her decisions⁷¹. Similarly, a by-law relating to a particular locality may not be made, amended or repealed unless the responsible Minister has provided the local water resources committee with a draft of the proposed legislation and has allowed the committee to make representations⁷². It is hoped that these provisions will help to give the market confidence and facilitate effective trading.

4.3 The Process of Transfer

The process of transfer is critical to the success of securing a movement towards more efficient use of water. Professor Bartlett states that the process must properly give effect to the proprietary nature of water rights and accordingly not be attended by an inappropriate degree of discretion⁷³. In addition the process must recognise and allow consideration of the range of factors and interests that influence and are affected by the transfer⁷⁴. Finally, the process must not be overburdened by transaction costs⁷⁵.

⁶³ Ibid, cl.26GX(2)(c) and cl.26GY(2)(b)

⁶⁴ Ibid cl.26M

⁶⁵ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.22(2)

⁶⁶ Ibid, Schedule 1 cl.24(2)(f) and Schedule 1 cl.25(2)(b)

⁶⁷ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* cl.26GK

⁶⁸ Ibid cl.26GL(1)

⁶⁹ Ibid cl.26GZ

⁷⁰ Ibid cl.26GU(2);

⁷¹ Ibid cl.26GZE

⁷² Ibid cl.26N(2)

⁷³ Bartlett, op cit n8, at 119

⁷⁴ Ibid

⁷⁵ Ibid

The proposed Act allows the holder of a licence to transfer the licence to another person or transfer the licensee's water entitlement under the licence to a person who holds or is eligible to hold a licence of the same kind⁷⁶. A transfer of a licence or water entitlement may not be made without the approval of the Commission. The grant or refusal of approval to transfer is at the discretion of the Commission and will be treated like an application for a new licence⁷⁷. The process is not, however, attended by an inappropriate degree of discretion, as the Commission is obliged to have regard to a list of specified factors when considering the application⁷⁸. These include, inter alia, whether the transfer is in the public interest, whether the transfer would have a detrimental effect on another person, whether the transfer is ecologically sustainable and environmentally acceptable and whether the transfer is in keeping with any relevant by-laws and management plans⁷⁹. This reflects the ARMCANZ proposals, which favour a detailing of factors to be considered in the transfer of licences⁸⁰. The requirement to have regard to local by-laws and management plans means that effect will be given to any provisions in the plans or by-laws relating to the transfer of licences⁸¹.

It is important that the public interest is given effect to in the process of transfer⁸². As discussed, in considering a transfer, the Commission must have regard to whether a transfer is in keeping with any relevant management plan. It follows that the provisions relating to public participation in the preparation of management plans⁸³ will go a long way to providing for the ascertainment and implementation of the public interest in the process of transfer⁸⁴. In spite of this, the proposed process of transfer may be slightly lacking as to Professor Bartlett's second requirement, that is the recognition and consideration of the range of interests that are affected by the transfer. Certain persons are given the right to be notified of the proposed transfer, to make written submissions to the Commission and appear before the Commission to make further submissions⁸⁵. This is, however, dependent on provision for such right being made under a local by-law⁸⁶. It has been suggested that this limited recognition of the rights of third parties is undesirable and that it is preferable that there is provision for *all* interested persons to make submissions to the Commission⁸⁷.

⁷⁶ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.29(1)

⁷⁷ Ibid Schedule 1 cl.31(1) and Schedule 1 cl.31(3); As with an application for an new licence, there is a right of appeal by the licensee or the person to whom the licence would have been transferred: *cl.26GG*

⁷⁸ Ibid Schedule 1 cl.31(4); This is to be contrasted to the situation in Victoria which merely entails an application to and a discretionary determination by the Minister, who may but is not obliged to have regard to a list of factors: see Bartlett, *op cit* n8, at 120

⁷⁹ Ibid Schedule 1 cl.7(2)

⁸⁰ Bartlett, *op cit* n8, at 121

⁸¹ Local by-laws may make provision for the transfer of licences and may even prohibit the transferring of licences of a particular kind: see *Rights in Water and Irrigation Amendment Bill 1999 (WA)* cl.s26M and Schedule 1 cl.29(3). Management plans may make provision for the matters that will be taken into account by the Commission in considering applications for the Commission's approval of transfers of licences and water entitlements: see *Rights in Water and Irrigation Amendment Bill 1999 (WA)* cl.26GX and cl.26GY

⁸² Bartlett, *op cit* n8, at 119

⁸³ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* cl.26GU, cl.26GZA and cl.26GZB

⁸⁴ Bartlett, *op cit* n8, at 120 and 122

⁸⁵ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.35

⁸⁶ Ibid

⁸⁷ Bartlett, *op cit* n8, at 122; This weakness is also found in the process of transfer provided for in South Australia: see *Water Resources Act 1997 (SA)* s40.

There are several elements of the proposed Act that may hinder trading by increasing transaction costs. Before determining the application for transfer, the Commission may direct that an assessment of the effect of granting the application be made, at the expense of the applicant, by an expert appointed or approved by the Commission⁸⁸. To reduce the cost of gathering such information water entitlements should be allocated and managed based on “full basis wide hydrologic assessment of the resource”⁸⁹. The provision allowing certain parties to be notified of the application, to make submissions and appear before the Commission, either personally or by representative may also significantly increase transaction costs⁹⁰. Encouraging negotiated resolution of disputes may reduce such costs⁹¹. Improving the information base upon which transfers and objections to transfers are founded can also reduce transaction costs⁹². The proposed introduction of a publicly accessible licence register will contribute to such an improvement⁹³.

The process proposed under the new Act is similar to the process of transfer provided for in South Australia. In that state, applications for the transfer of water allocations are made to the Minister⁹⁴. The Minister must base the decision to grant or approve the application on the relevant allocation plans, the public interest and any other requirements prescribed by the regulations⁹⁵. The South Australian process is superior to the proposed WA process to the extent that it provides that the transfer “must be consistent” with the relevant management plan⁹⁶. The proposed WA Act affords more discretion to the Commission in that it merely provides that the Commission is “to have regard to” whether the transfer is in keeping with management plans⁹⁷. Professor Bartlett contends that the process of transfer adopted in South Australia is the most effective process for water transfers⁹⁸. If this contention is correct, it follows that the proposed process of transfer in Western Australia should prove reasonably effective, owing to the fact that it is similar to the South Australian process.

5. The Provision of Water for the Environment

The proper provision of water for the environment is seen as an essential precondition to the creation of tradeable property rights in water⁹⁹. Discussed below are several ways in which the proposed Act facilitates environmental protection throughout the transfer process.

⁸⁸ *Rights in Water and Irrigation Amendment Bill 1999* Schedule 1 cl.33

⁸⁹ Bartlett, op cit n8, at 120

⁹⁰ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.35; Bartlett, op cit n8, at 119

⁹¹ Bartlett, op cit n8, at 119

⁹² *Ibid*

⁹³ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Division 3E

⁹⁴ *Water Resources Act 1997 (SA)* s38 and s39

⁹⁵ *Ibid*, s41

⁹⁶ *Water Resources Management Act 1997 (SA)* s41

⁹⁷ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.7(2)

⁹⁸ Bartlett, op cit 8, at 120

⁹⁹ Gardner, op cit n1, at 396; Gardner, op cit n59, at 17

5.1 Management Plans and Local By-laws

Management Plans

As stated above¹⁰⁰, under the existing law there is no statutory basis for the planning system that has been developed by the Water and Rivers Commission. As a result, some doubt has been expressed about the legal capacity of the Commission to consider ecological and environmental protection factors in the performance of its functions¹⁰¹. It is, therefore desirable that a *statutory* water resource planning system with express allocation of environmental water provisions is created¹⁰². As discussed above, provision for a statutory water resource planning system is made in Part III Division 3D of the proposed Act¹⁰³. Any allocation of water to the environment under a plan must be taken into account in the determination of an application for transfer, since the Commission is to have regard to whether the transfer is in keeping with relevant management plans¹⁰⁴.

There is express provision allowing each level of plan to make provision for water for the environment. The purpose of the regional management plan is to guide the general management “by the Commission” of water resources in the region in relation to¹⁰⁵

- (a) the definition of water resources values, *including environmental values*, and protection of these values
- (b) the use of water resources; and
- (c) the integration of water resources planning and management with other land use planning and management.

The purposes of the sub-regional management plans are to guide the management by the Commission of water resources in the sub-region, including¹⁰⁶

- (b) how rights in respect of water are to be allocated to meet various needs, *including the needs of the environment*

The purposes of local management plans are to guide the management by the Commission of water resources in the area(s), to which it applies, including¹⁰⁷

- (a) how rights in respect of water are to be allocated, and water may be taken and used, to meet various needs *including the needs of the environment*.

¹⁰⁰ see discussion above at 4.2.5

¹⁰¹ Gardner, op cit n56, at 226

¹⁰² Gardner, op cit n59, at 17

¹⁰³ see discussion above at 4.2.5

¹⁰⁴ *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.7.2 and Schedule 1 cl.31(4)

¹⁰⁵ *Ibid*, cl 26GW(2)

¹⁰⁶ *Ibid* cl.26GX(2)

¹⁰⁷ *Ibid* cl.26GY(2)

The proposed legislation gives no greater definition of how the Commission will determine the environmental allocations of water¹⁰⁸. The policy that will be applied by the Commission is described in a "Draft Environmental Water Provisions Policy for Western Australia" released in February 1999. The policy describes current practice in environmental water allocations and proposes 18 principles as the foundation of an improved process for future environmental allocations¹⁰⁹.

Local By-laws

It is envisaged that by-laws may be made which define the requirements to achieve, inter alia, the environmental management objectives of the Act¹¹⁰. For example, by-laws may relate to matters such as the means for promoting efficient use of water and measures for mitigating the adverse impacts of water use on water resources and the environment¹¹¹. When determining an application for transfer, the Commission is to have regard to whether the transfer is in keeping with such local by-laws¹¹².

5.2 The Variation of Entitlements

The provisions under the existing law relating to the variation of entitlements are discussed above¹¹³. The problem with the current law, especially in relation to surface water, is the absence of a legally transparent policy framework for the Commission to make decisions that vary licence entitlements in the interests of sustainable water use¹¹⁴. In the context of tradeable water rights, such a framework is very important since the rights will be relatively long term and secure¹¹⁵. The proposed law contains express provision for the Commission to amend or cancel the licence in the interests of environmental protection and sustainable water use. For example, the Commission is authorised to vary the licence if in the opinion of the Commission, the exercise of the power is necessary or desirable to protect the water resources to which the licence relates or to protect the associated environment from unacceptable damage¹¹⁶. Further, the Commission is authorised to vary the licence where the licensee has applied for approval of the transfer of the licence or water entitlement under the licence and the exercise of the power is necessary or desirable to give effect to the transfer¹¹⁷. This power allows the Commission to take into account the environmental impacts of a transfer and vary the licence accordingly. For example, a licence to take ground water may be transferred to a property further away from an important wetland and the volume of the allocation may be able to be increased without affecting the wetland. In other transfer situations, however, it may be necessary for the Commission to reduce the allocation in the interests of the environment¹¹⁸.

¹⁰⁸ Gardner, op cit n59, at 18

¹⁰⁹ Ibid; the Policy is available at <<http://www.wrc.wa.gov.au/about/reform.html>>

¹¹⁰ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, op cit n26, at 25

¹¹¹ Ibid

¹¹² *Rights in Water and Irrigation Amendment Bill 1999 (WA)* Schedule 1 cl.7(2) and Schedule1 cl.31(4)

¹¹³ see discussion above at 4.2.3

¹¹⁴ Gardner, op cit n1, at 392

¹¹⁵ Ibid at 397

¹¹⁶ *Rights in Water and Irrigation Amendment Bill (1999) WA* Schedule 1 cl.24(2)(b)(ii) and (iii)

¹¹⁷ Ibid Schedule 1 cl.24(2)(i)

¹¹⁸ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, op cit n26, at 54

6. Conclusion

The proposed amendments help to facilitate trading in a number of ways. Licences are no longer appurtenant to land. Resource security is to some extent increased in that licence holders can apply for early renewal of their licences and, once there are adequate management plans and by-laws in place, may be able to obtain an indefinite licence. Further, the Act is more specific in relation to the types of conditions that might be imposed on licences and the situations in which the Commission may amend, suspend or cancel a licence. The provision for compensation in certain cases may also help to increase the resource security of water users. The fact that plans and by-laws may not be prepared, varied or revoked without consultation with local water committees and are ultimately approved by a responsible Minister should promote confidence in the market and, therefore, facilitate trading. The process of transfer should prove reasonably effective, provided that there is sufficient public participation in the preparation of management plans, third party rights are sufficiently provided for in by-laws and water entitlements are allocated and managed in a way that keeps transaction costs associated with transfers to a minimum. It is hoped that throughout the trading process, there will be sufficient allocation of water to the environment through the operation of management plans, local by-laws and the exercise of the Commission's power to vary licences.

It is clear that while the proposed Act facilitates trading, the process is regulated to a large extent. This stems from the nature of the good being traded. Water is not simply a manufactured commodity but is a vital community resource with values that go beyond those allotted by players in a market economy¹¹⁹. In the trading process, it is essential that third party interests, the public interest and the environment are protected and it is unrealistic to think that water markets could ever be unregulated. The crucial issue is how much regulation the system can bear before market forces are distorted to the point that they become ineffective in achieving their object of more efficient water use. In the administration of the trading process, the challenge facing the Water and Rivers Commission is that facing all environmental regulators today; namely, how to achieve the effective balancing of economic, social and environmental considerations.

¹¹⁹ Bond and Farrier, *op cit* n6, at 216