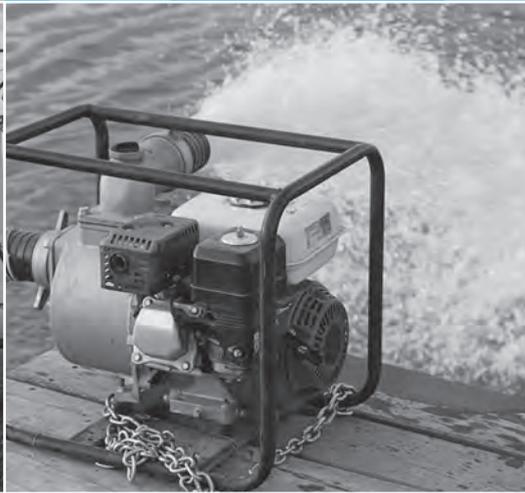




QUEENSLAND
ombudsman

The Water Licences Report



*An investigation into the
administration of water licence
decision-making under Chapter 2,
Part 6 of the Water Act 2000*

May 2014

Report of the Queensland Ombudsman

The Water Licences Report

An investigation into the administration of water licence decision-making under Chapter 2,
Part 6 of the *Water Act 2000*

May 2014

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8 May 2014

The Honourable Fiona Simpson MP
Speaker
Parliament House
George Street
BRISBANE QLD 4000

Dear Madam Speaker

In accordance with s.52 of the *Ombudsman Act 2001*, I hereby furnish to you my report, *The Water Licences Report: An investigation into the administration of water licence decision-making under Chapter 2, Part 6 of the Water Act 2000*.

Yours faithfully

A handwritten signature in black ink, appearing to read "Phil Clarke".

Phil Clarke
Queensland Ombudsman

Enc.

Foreword

This report presents the findings of an investigation into the administration of water licences under Chapter 2, Part 6 of the *Water Act 2000* (Water Act) by the Department of Natural Resources and Mines (the department).

The investigation followed the 2012 Land Court decision of *Gallo and Williams v Chief Executive, Department of Environment and Resource Management [2012] QLC 0015* (*Gallo and Williams*). The *Gallo and Williams* decision found that water licences in part of the Atherton Subartesian Area, known colloquially as ‘the Barron’, were allocated contrary to the relevant legislative scheme.

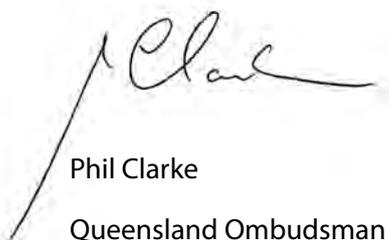
Water is a limited and increasingly pressured resource. Competing interests for available water mean that it should be managed in a way that is sustainable and as efficiently as possible. The Water Act includes specific provisions to achieve these objectives. It requires that water should be allocated in a way that indefinitely protects the physical, economic, social and environmental wellbeing of Queenslanders.

This report identifies a significant lack of focus upon granting water licences in the way set out in the legislation. This lack of focus was at times unreasonable, and at others, contrary to law.

Although the Parliament is currently considering a proposed amendment to the Water Act to retrospectively validate most water licences, the validation provision does not change the administrative practices adopted by the department over the last 13 years. This report contains opinions and recommendations to assist it to improve water licence administration in the future.

The Queensland Government’s intention is to convert water licences to tradeable water allocations as soon as possible. Particularly, the recommendations in this report seek to assist the Director-General of the department to move towards this goal in a way that ensures water is efficiently allocated between consumptive and environmental uses.

I would like to thank all departmental staff who participated in the investigation and particularly pay tribute to my staff for their hard work and professionalism in conducting the investigation and preparing the report.



Phil Clarke
Queensland Ombudsman

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Dictionary

the Barron	'Management Area B.' One of the two Management Areas in the Atherton Subartesian Area created by the <i>Barron Water Resource Plan (2002)</i> . The water licences considered in the case of <i>Gallo and Williams</i> were in Area B
Barron WRP	<i>Barron Water Resource Plan (2002)</i>
department	Department of Natural Resources and Mines (formerly DERM)
DERM	Department of Environment and Resource Management (now Department of Natural Resources and Mines)
Executive Director	The department's Executive Director of Water Policy
<i>Gallo and Williams</i>	<i>Gallo and Williams v Chief Executive, Department of Environment and Resource Management</i> [2012] QLC 0015
general file review	A review of the decision-making in relation to 189 water licence applications under s.206 of the Water Act across Queensland between 2005 and 2010
local sustainable water management strategies	Strategies and policies referred to in s.210(1)(g) and s.210(1)(h) of the Water Act
ROP	Resource Operations Plan
s.206 water licence application	An application required to be dealt with as an application made under s.206 of the Water Act
s.211(3) information notices	Information notices required under s.211(3) of the Water Act, which are notices about the consideration and outcome of a s.206 water licence application
specific file review	A review of the decision-making in relation to 18 water licence applications under s.206 of the Water Act about water in the Burnett Basin between 2005 and 2010
Water Act	<i>Water Act 2000 (Qld)</i>
work practice	A written administrative guideline the aim of which is to provide direction as to the interpretation and application of legislative provisions
WRP	Water Resource Plan

Executive summary

Background

Water is a limited and increasingly pressured resource. Competing interests for available water mean that it should be managed in a way that is sustainable and as efficiently as possible. The *Water Act 2000* (Water Act) includes specific provisions to achieve these objectives. It requires that water should be allocated in a way that indefinitely protects the physical, economic, social and environmental wellbeing of Queenslanders.

The right to take or interfere with water is administered by the Department of Natural Resources and Mines (the department). This is principally done through the issuing of water licences and water allocations. Water licences are administered under Chapter 2, Part 6 of the Water Act. According to the Water Act, these water licences must be allocated in a way that advances the efficient use of water. Water licences may be converted to tradeable water allocations which can then be traded directly between stakeholders within a relevant catchment. Water licences generally attach to the land on which the subject water is to be used, whereas water allocations can be transferred between uses and land holdings.

The department is currently undertaking a review of the Water Act. I understand the Queensland Government's current policy intention is to convert water licences to tradeable water allocations as soon as practicable.

An investigation was commenced, on my own initiative, after a request from the department following the 2012 Land Court decision of *Gallo and Williams v Chief Executive, Department of Environment and Resource Management* [2012] QLC 0015 (*Gallo and Williams*). The *Gallo and Williams* decision found that water licences in an area of Queensland known as 'the Barron' (part of the Atherton Subartesian Area) were allocated contrary to the decision-making criteria set out in the relevant legislation. In fact, the Land Court found that they were allocated on the basis of a locally derived formula that had no apparent regard for the mandated criteria.

While the majority of water is assigned under water allocations, as at June 2012, there were over 26,000 water licences in Queensland, which licensed the taking of more than two million megalitres of water. This was about half of the volume of water assigned under water allocations at the same time. In October 2013, the department's Executive Director, Water Policy advised that about 40% of water entitlements in Queensland were tradeable. Water licences account for most of the remainder. Therefore, I considered an investigation into water licence decision-making was appropriate because they represent a significant component of the volume of water regulated by the Water Act. Further, past unreasonable water licence decisions not only affect members of the public now, but their effects will continue to be felt in the conversion of water licences to tradeable water allocations.

I note that the Queensland Parliament is currently considering a proposed amendment to the Water Act to retrospectively validate most water licences that have been previously issued. I understand the government is taking this step to provide certainty to water licence holders following 'a review of historical administrative decisions made under the Water Act which found that many water licence decisions were potentially deficient in considering one or more of the decision-making criteria prescribed by the Act.'

This report was substantially complete at the time the proposed validation provision was introduced. Under s.16(1)(a) of the *Ombudsman Act 2001* (Ombudsman Act), a decision of a Minister or Cabinet is not within my jurisdiction. However, regardless of the validation provision, this report considers past administrative practices relating to water licences in Queensland. The validation provision does not change the administrative practices adopted by the department over the last 13 years. This report contains opinions and recommendations to assist the department to improve water licence administration in the future.

Jurisdiction, investigation scope and objective

As the department is a public sector agency, the Ombudsman may investigate its administrative actions.

The principal objective of the investigation was to determine whether water licences in areas of Queensland other than the Barron have also been administered contrary to legislative requirements.

During the investigation, investigators:

- analysed the various legislative schemes applicable across Queensland

- reviewed the department's administration of 207 water licence applications
- reviewed the department's work practice documents and documents about the department's action in the Barron following the *Gallo and Williams* decision
- reviewed questionnaire responses and documents (particularly local sustainable water management strategies) from a number of regional departmental officers
- interviewed the department's Executive Director, Water Policy.

In December 2013, the Director-General of the department was provided with a proposed report which he responded to on 28 January 2014. In this report, I have responded to the Director-General's commentary on the proposed opinions and recommendations.

I would like to thank the department for its cooperation during this investigation.

Findings

The *Gallo and Williams* decision disclosed water licence decision-making in the Barron that was contrary to law. The investigation found that similar water licence decision-making had occurred in one other area of Queensland, namely the Burnett Basin. The investigation also found that across Queensland, there was a significant failure to properly consider mandatory criteria set out in the Water Act when granting licences. I formed opinions that this lack of focus on decision-making criteria was at times unreasonable, and at others, contrary to law. Further, the investigation found that several local sustainable water management strategies contained allocation formulas (like the one applied in the Barron that had the effect of overriding criteria set out in the Water Act).

I find that the department has failed to administer water licences in the way required by the legislation. I am concerned that, even though the Water Act has been in place for 13 years, the department does not have the necessary procedures to provide guidance to delegated decision-makers about considerations required by the legislation. This investigation found that local sustainable water management strategies have been developed regionally and contain significant deficiencies stemming primarily from the absence of any central approval and monitoring mechanism. Prior to this investigation, there was no quality assurance mechanism to check they were appropriate.

To date, water licences have not been allocated in a way that advances the efficient use of water. In light of the government's intention to convert water licences to tradeable water allocations, and noting the past failings in the administration of water licences, this report contains recommendations aimed at ensuring that water licences are not used as a basis for new water allocations without a 'de novo' (fresh) consideration of whether the allocation advances the efficient and sustainable use of water. I consider such an approach could be achieved on a whole-of-catchment basis.

Recommendations

The recommendations I have made are:

Recommendation 1

For s.206 water licences and s.206 water licence applications in the Burnett Basin to which the Burnett Basin Water Resource Plan applies:

- (a) any conversion to a new water entitlement or
- (b) any consideration of water licence applications in circumstances where the water resource is over-allocated

should be accompanied by a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water.

Recommendation 2

The Director-General introduce a work practice in relation to s.206 water licence applications that provides direction about:

- (a) how to properly consider the s.210(1) criteria, including the provisions of Water Resource Plans
- (b) how to properly consider whether the decision advances the sustainable management and efficient use of water under ss.10 and 12 of the Water Act
- (c) how to properly consider submissions to s.206 water licence applications
- (d) what enquiries must be undertaken to properly decide a s.206 water licence application.

Recommendation 3

In relation to water licences issued in an area of Queensland:

- (a) any conversion to a new water entitlement or
- (b) any consideration of water licence applications in circumstances where the water resource is over-allocated

should be accompanied by a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water.

Recommendation 4

The Director-General introduce a work practice to guide the development of local sustainable water management strategies, in relation to s.206 water licence decisions, including direction about how those documents should:

- (a) set out local information that informs the consideration of the mandatory s.210(1) criteria and that advances the sustainable management and efficient use of water
- (b) prescribe the process necessary to properly consider all relevant provisions as part of water licence decisions.

Recommendation 5

The Director-General centrally approve and monitor local sustainable water management strategies.

Recommendation 6

The Director-General ensure that the practice of imposing a general hold or administrative moratorium on water licence applications ceases.

Recommendation 7

Except for those applications held under a statutory moratorium, the Director-General take steps to identify and decide s.206 water licence applications that are being held and not considered and ensure the timely progression of water licence decisions.

Recommendation 8

The Director-General ensure a s.206 water licence application is ordinarily publicly advertised within a reasonably contemporaneous period of the consideration of the application and decision.

Recommendation 9

The Director-General introduce a work practice about when and how the departmental water licence amendment 'safeguard' provision in s.218 of the Water Act should be applied.

Chapter 1: Introduction

1.1 Background

This report summarises the findings of an investigation into whether water licences in Queensland have been granted by the Department of Natural Resources and Mines (the department) in accordance with the requirements and objects of Chapter 2, Part 6 of the *Water Act 2000* (Water Act). The objects of the Water Act as they relate to water licences are ‘to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water.’¹ Relevantly, ‘sustainable management of water’ includes the ‘fair, orderly and efficient allocation of water among the community.’² These objects reflect a general movement in all Australian states towards implementing water resource planning schemes which prioritise the efficient and sustainable use of water.

An investigation was commenced, on my own initiative, after a request from the department following the 2012 Land Court decision of *Gallo and Williams v Chief Executive, Department of Environment and Resource Management* [2012] QLC 0015 (*Gallo and Williams*).

In *Gallo and Williams*, the Land Court found that the department had failed to consider the efficient use of water when granting water licences in an area of the Atherton Tablelands known as Management Area B, in the Atherton Subartesian Area (referred to as ‘the Barron’ in this report) between 2002 and 2006. In brief, the Water Act imposed a general obligation upon decision-makers to consider efficiency of water use.³ Additionally, the *Water Resource (Barron) Plan 2002* (Barron WRP) explicitly required water licence decision-makers to consider the efficiency of the proposed use of water when assessing water licence applications.⁴ *Gallo and Williams* also identified a potential lack of focus by the department on another object of the water licensing chapter of the Water Act, namely the fair allocation of water.

In *Gallo and Williams*, Member PA Smith considered that he had no way of knowing if the maladministration evident in water licence decisions in Area B extended to other areas across Queensland.⁵ In light of this, and ‘given that water is such a precious commodity for this State’, Member Smith made an order that his decision be brought to the attention of the Premier and the Minister for Natural Resources and Mines.⁶ Subsequently, the Acting Director-General of the department asked me to undertake an ‘external review of the integrity of the implementation of the water resource planning process.’⁷

I note that the Queensland Parliament is currently considering a proposed amendment to the Water Act to retrospectively validate most water licences that have been previously issued.⁸ I understand the government is taking this step to provide certainty to water licence holders. Particularly, the Honourable AP Cripps MP, Minister for Natural Resources and Mines, stated that the proposed validation provision was:

... required to provide certainty for the thousands of current water licence holders in Queensland by removing any doubt about the validity of water licensing decisions that relate to existing water licences. This follows a review of historical administrative decisions made under the Water Act which found that many water licence decisions were potentially deficient in considering one or more of the decision-making criteria prescribed by the Act. Unfortunately, this review has cast doubt on the legal validity of water licensing decisions made under the Water Act. The validation of licences will not apply to any decisions that are currently the subject of review or court processes initiated within six months of the decision.⁹

This report was substantially complete at the time the proposed validation provision was introduced. Under s.16(1)(a) of the *Ombudsman Act 2001* (Ombudsman Act), a decision of a Minister or Cabinet is not within my jurisdiction. However, regardless of the validation provision, this report considers past administrative practices

1 Section 10(1), Water Act. *Gallo and Williams v Chief Executive, Department of Environment and Resource Management* [2012] QLC 0015 at [8].

2 Section 10(2)(c)(vi), Water Act.

3 Section 10(1), Water Act.

4 *Water Resource (Barron) Plan 2002*, s.51(2)(b).

5 *Gallo and Williams* at [91].

6 *Gallo and Williams* at [97], Order 6.

7 Letter from the Acting Director-General of DNRM to this Office dated 9 August 2012.

8 Clause 132, *Land and Other Legislation Amendment Bill 2014* introduced on 19 March 2014.

9 First Reading Speech for the Land and Other Legislation Amendment Bill 2014 on 19 March 2014, accessed at http://www.parliament.qld.gov.au/documents/hansard/2014/2014_03_19_DAILY.pdf on 20 March 2014, p.713.

relating to water licences in Queensland. The validation provision does not change the administrative practices adopted by the department over the last 13 years and this report contains opinions and recommendations to assist it to improve water licence administration in the future.

1.2 Issues for investigation

The primary objects of the investigation were to determine:

- whether the maladministration evident in the water licence decision-making process identified in *Gallo and Williams* was isolated to water licences in the Barron or is a systemic issue across Queensland
- whether the department's system for the allocation of water licences advances the efficient use and fair allocation of water as required by the Water Act.¹⁰

Importantly, the focus of this investigation is water licence applications made under s.206 of the Water Act, as that was the category of water licence decision-making Member Smith raised concerns about in *Gallo and Williams*.

As part of this investigation, the following issues were considered:

- the water planning framework in Queensland (Chapter 2)
- how water licences fit within Queensland's water planning framework and the factors to be taken into account by a decision-maker when assessing a water licence application under s.206 of the Water Act (Chapter 3)
- the implications of water licence decision-makers failing to take into account the Water Act's requirements when granting water licences as outlined in *Gallo and Williams* (Chapter 4)
- whether the Barron situation exists elsewhere in Queensland (Chapter 5)
- the methodology for a general file review of a sample of 189 water licence decisions made by the department (Chapter 6)
- the findings of the sample of water licence decisions and consideration by the department's decision-makers of efficiency of water use as required by s.10 of the Water Act or a Water Resource Plan (WRP) and of the mandatory criteria in s.210 of the Water Act (Chapter 7)
- the development and approval of local sustainable water management strategies¹¹ (Chapter 8)
- other aspects of the department's consideration of s.206 water licence application decision-making under the Water Act (Chapter 9)
- findings and opinions that may inform the Water Act review (Chapter 10).

1.3 Jurisdiction and investigation methodology

The Queensland Ombudsman is an officer of the Queensland Parliament empowered to investigate administrative actions of Queensland public sector agencies following a complaint or on my own initiative. As Queensland government departments are 'agencies' for the purposes of the Ombudsman Act, it follows that I may investigate the administrative actions of the department in relation to water licence decision-making under the Water Act.

The investigation included:

- analysis of the department's documents, including local sustainable water management strategies, policies and work practices
- review and analysis of legislation, including Water Resource Plans (WRPs), which more closely regulate water in local areas and Resource Operations Plans (ROPs), which implement the regulation in the WRPs
- research about the rationale underpinning Queensland's water legislation
- a file review of 189 water licence decisions from across Queensland between 2005 and 2010
- questionnaire responses from 20 local departmental officers
- an interview with the department's Executive Director of Water Policy

¹⁰ This question comes from the relevant part of the objective of Chapter 2 of the Water Act, namely s.10(1), *Water Act 2000*.

¹¹ As referred to in ss.210(1)(g) or 210(1)(h), *Water Act*.

- obtaining legal advice from a senior barrister, Mr Stephen Fynes-Clinton, relating to the interpretation of provisions of the Water Act, and matters related to the investigation (dated 1 December 2013)
- providing the Director-General a proposed report dated 6 December 2013
- considering the Director-General's response dated 28 January 2014.

A period of five years commencing in 2005 was selected as the scope for the investigation because:

- it was five years after the commencement of the Water Act and therefore the department could reasonably be expected to have an appropriate command of the administration of the Water Act by that time
- the period was long enough to capture any organisational changes that may have occurred in the administration of the Water Act
- there was a good balance of water licence decisions governed solely by the Water Act and also water licence decisions regulated more closely by a WRP.

Chapter 2: The Water Act's water planning framework

2.1 Introduction

The purpose of this chapter is to outline the origin of the Water Act and its regionally focused water planning framework.

2.2 Water Act 2000

2.2.1 Water planning reform and the genesis of the Water Act 2000

The Water Act reflects major reforms to the water industry throughout Australia in the 1990s¹² resulting from a recognition of the growing stress on Australia's water resources due to environmental factors as well as the over-allocation of water.¹³ Prior to the reforms of the 1990s, there was little water resource planning and no consideration was given to allocating water to the environment in Queensland and across Australia.¹⁴ The decades following World War II were an 'era of perceived water abundance'¹⁵ during which consumptive use of water increased significantly¹⁶ and over-allocation of water occurred in parts of Queensland and elsewhere in Australia.¹⁷

The Water Act introduced in 2000 aimed to implement Queensland's commitments made under the Council of Australian Governments' (COAG's) 1994 Water Resources Policy agreement.¹⁸ The Second Reading Speech for the Water Act explained:

... (t)he Water Bill 2000 is the most comprehensive overhaul of water legislation since the early 1900s. In those times there was little competition for water, little impact on the environment and no way to measure river flows to ensure that there was sufficient water for the environment ... The challenge has been to develop a modern water law aimed at improving the security of supply for future users and ensuring that future water developments are sustainable while also protecting the health of our rivers and catchments.

The Water Act gives effect to the aims of the 1994 COAG agreement by requiring that the relevant Minister must 'plan for the allocation and sustainable management of water to meet Queensland's future water requirements, including, for example, for the protection of natural ecosystems and security of supply to water users.'¹⁹ The Water Act also provides, at the discretion of the Minister, for the creation of regionally based statutory water plans known as Water Resource Plans²⁰ which identify the water available in catchments, provide a framework for sustainably managing water and reversing degradation to natural ecosystems, as well as the establishment of tradeable water entitlements.²¹

The increased focus on water planning and consideration of the environment in the Water Act is demonstrated by the substantial difference in the considerations that a water licence decision-maker must take into account when granting a water licence²² under the Water Act (discussed in detail in Chapter 3 and throughout this report) compared to a decision-maker under the previous *Water Resources Act 1989* (Water Resources Act).²³

Under the Water Resources Act, the decision-maker's considerations when assessing an application for

12 COAG *National Strategy for Ecologically Sustainable Development*, AGPS, Canberra, 1992; COAG, Communique from the Meeting of 25 February 1994, Canberra, 1994; COAG, Communique from the Meeting of 11 April, 1995, Canberra, 1995 cited in PL Tan, 'Water licences and property rights: the legal principles for compensation in Queensland', *Environmental Planning & Law Journal*, vol. 284, part 16, 1999, p.284.

13 PL Tan, 'Water licences and property rights: the legal principles for compensation in Queensland', *Environmental Planning & Law Journal*, vol. 284, part 16, 1999, p.284.

14 A Gardner et al, *Water Resources Law*, Lexis Nexis Butterworths (Reed International Books), Australia, 2009, p.274 and p.276.

15 A Gardner et al, *Water Resources Law*, Lexis Nexis Butterworths (Reed International Books), Australia, 2009, p.274 referencing JM Powell, *Watering the Garden State: Water, Land and Community in Victoria 1834-1988*, Allen & Unwin, 1989, pp.222-225.

16 K Stoeckl et al, *Australian Water Law*, Thomson Reuters (Professional) Australia Ltd, Sydney, 2012, p.v.

17 A Gardner et al, *Water Resources Law*, Lexis Nexis Butterworths (Reed International Books), Australia, 2009, p.276 referencing PL Tan 'Conflict over water resources in Queensland: all eyes on the Lower Balonne', *Environmental Planning Law Journal*, vol. 17, 2000, pp.545-568.

18 Felicity C Coffey, 'Assessment of Water Resource Plans under the Water Act 2000 Qld: ecological outcomes and environmental flow objectives in the context of the precautionary principle and sustainable management', *Environmental and Planning Law Journal*, vol. 410, 2001, p.410.

19 Section 35(1), Water Act.

20 Section 38(1), Water Act.

21 Section 38(3), Water Act.

22 Following the making of an application under s.206 of the Water Act.

23 Section 43, *Water Resources Act 1989*.

a water licence related primarily to the availability and sufficiency of water to supply the applicant and neighbouring water users.²⁴ However, under the Water Act, water licence decision-makers must consider a wide range of factors, including provisions of region-specific statutory water planning instruments²⁵ and local sustainable water management strategies for the sustainable management of water.²⁶ They must also consider other information required by the Water Act regarding the effect of taking or interfering with water on natural ecosystems²⁷ or on the physical integrity of watercourses, lakes, springs or aquifers²⁸ and the public interest,²⁹ as well as the overall aims of the chapter that governs water licences: advancing the efficient use and sustainable management of water.³⁰

Chapter 2 of the Water Act sets out the water planning framework for Queensland and governs the granting and regulation of water licences. The purpose of Chapter 2 of the Water Act is summarised in s.10(1) of the Water Act as being 'to **advance sustainable management** and **efficient use of water** and other resources by establishing a system for the planning, allocation and use of water' [emphasis added].³¹

2.2.2 Decisions must advance the sustainable management and efficient use of water

Section 12 of the Water Act requires that any entity performing a function under Chapter 2 of the Water Act must do so in a way that advances the purposes of the chapter. This means that making a decision about a water licence application, a power which is provided for under Chapter 2 of the Water Act, must be made with regard to advancing the efficient use and sustainable management of water.

The meanings of 'efficient use' and 'sustainable management' of water are described in ss.10(2) and (3) of the Water Act.

Section 10(3) of the Water Act explains that 'efficient use of water':

- (a) incorporates demand management measures that achieve permanent and reliable reductions in the demand for water; and
- (b) promotes water conservation and appropriate water quality objectives for intended use of water; and
- (c) promotes water recycling, including, for example, water reuse within a particular enterprise to gain the maximum benefit from available supply; and
- (d) takes into consideration the volume and quality of water leaving a particular application or destination to ensure it is appropriate for the next application or destination, including, for example, release into the environment.

Section 10(2) of the Water Act explains that 'sustainable management' of water is management that:

- (a) allows for the allocation and use of water for the physical, economic and social wellbeing of the people of Queensland and Australia within limits that can be sustained indefinitely; and
- (b) protects the biological diversity and health of natural ecosystems; and
- (c) contributes to the following—
 - ...
 - (vi) providing for the fair, orderly and efficient allocation of water to meet community needs;

²⁴ Section 43, *Water Resources Act 1989*.

²⁵ Water Resource Plans and Resource Operation Plans.

²⁶ Section 201(1)(g), *Water Act*.

²⁷ Section 210(1)(e), *Water Act*.

²⁸ Section 210(1)(f), *Water Act*.

²⁹ Section 210(1)(i), *Water Act*.

³⁰ Sections 10 and 12, *Water Act*.

³¹ Section 10(1), *Water Act* and *Gallo and Williams* at [8].

2.3 Instruments implementing the Water Act's water resource planning provisions

2.3.1 Regional water planning across Queensland

The Water Act requires that the Minister must 'plan for the allocation and sustainable management of water to meet Queensland's future water requirements including, for example, for the protection of natural ecosystems and security of supply to water users' (s.35(1) of the Water Act). The Water Act provides for water resource planning through the creation of two types of plans. First, the overarching catchment-based WRPs which provide the broad principles of water allocation within a catchment³² and secondly, ROPs which implement the WRPs.³³ The Water Act also makes reference to local sustainable water management strategies for the sustainable management of water.³⁴ Although the department is more likely to have regard to a local sustainable water management strategy if the particular water, the subject of the application, is not regulated by a WRP and ROP, there is no prohibition on the decision-making being guided by such a strategy in addition to adhering to a WRP and ROP.

WRPs and ROPs have been drafted and implemented by the department for some, but not all, catchment areas across Queensland. Where they exist, these instruments govern the grant and trade of water allocations and may provide guidance to water licence decision-makers in assessing water licence applications.

2.3.2 Water Resource Plans

WRPs are subordinate legislation under the Water Act prepared for a certain region at the discretion of the government.³⁵ The Water Act provides that the Minister may prepare a WRP for any part of Queensland to 'advance the sustainable management of water'.³⁶ The department describes WRPs as providing 'the management framework for water resources, outlining outcomes, objectives and strategies for achieving a sustainable balance between water for industry, irrigators, town water supply and the environment'.³⁷

WRPs apply to priority catchment areas across Queensland³⁸ where surface water is most at risk³⁹ (see Figure 1). There are currently 23 WRPs in operation in Queensland. WRPs cover most of the surface area of Queensland⁴⁰ (although not all water within a WRP area is necessarily regulated)⁴¹ and are reviewed at least every 10 years.⁴² The department is responsible for developing and monitoring WRPs.

32 A Gardner et al, *Water Resources Law*, Lexis Nexis Butterworths (Reed International Books), Australia, 2009, p.297.

33 Section 95, Water Act.

34 Section 210, Water Act.

35 A Gardner et al, *Water Resources Law*, Lexis Nexis Butterworths (Reed International Books), Australia, 2009, p.227.

36 Section 38(1), Water Act.

37 Queensland Government, Department of Natural Resources and Mines, 'The Planning Process', accessed at <http://www.dnrm.qld.gov.au/water/catchments-planning/planning-process> on 30 October 2013.

38 Baffle, Barron, Border Rivers, Boyne, Burdekin, Burnett, Calliope, Cooper, Condamine and Balonne, Fitzroy, Georgina and Diamantina, Gold Coast, Great Artesian Basin, Gulf, Logan, Mary, Mitchell, Moonie, Moreton, Pioneer, Warrego and Paroo and Bulloo and Nebine, Wet Tropics and Whitsunday. See Queensland Government, 27 June 2012, 'Catchments', <http://www.nrm.qld.gov.au/wrp/catchments.html> accessed on 25 October 2013.

39 Australian Government, National Water Commission, Canberra, 'Australian Water Markets Report 2010-2011(section 4.1)', http://archive.nwc.gov.au/_data/assets/pdf_file/0003/18975/NWC_6958_Water-markets-2010-11-Section4.1.pdf accessed on 30 October 2013 at pp. 62-3.

40 Email from the department to the Queensland Ombudsman dated 28 September 2012.

41 For example, many WRPs do not apply to groundwater.

42 Second Reading Speech for the Water Bill on 22 June 2000, accessed at <http://www.parliament.qld.gov.au/documents/Hansard/2000/000622ha.pdf#xml=http://www.parliament.qld.gov.au/internetsearch/isysquery/a50df590-2a2e-408c-b8f4-a1934536454a/4/hilite/> on 30 November 2013; and K Stoeckl et al, *Australian Water Law*, Thomson Reuters (Professional) Australia Ltd, Sydney, 2012, p.43.

Figure 1: The 23 Water Resource Plan catchment areas

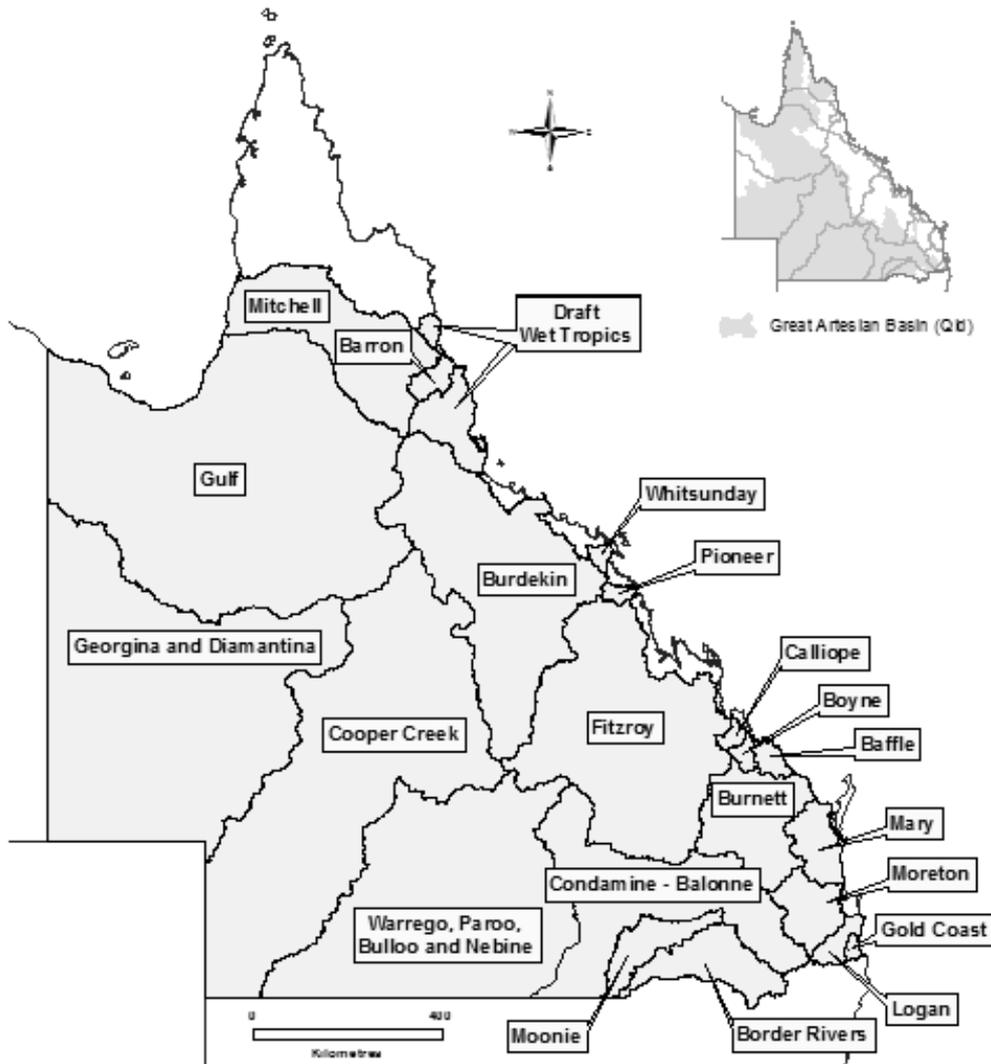


Figure 1 is a map dated 20 November 2013 accessible on the department's website.⁴³ Since the date of the map, the *Water Resource (Wet Tropics) Plan 2013* has been passed. Therefore, the Wet Tropics WRP is no longer 'draft', as stated on the map.

A WRP is prepared for the following purposes:⁴⁴

- to define the available water in a particular catchment
- to provide a framework for sustainably managing and taking water
- to identify priorities and mechanisms for dealing with future water requirements
- to provide a framework for establishing water allocations and reversing degradation that has occurred in natural ecosystems.

WRPs may contain sections that require water licence decision-making to be conducted in certain ways.

More specifically, drafting WRPs involves identifying the availability of water in the subject catchment and the impacts on existing users and the natural environment if additional water is allocated.⁴⁵ WRPs then provide a strategic framework for the transparent and sustainable sharing of available water between environmental

⁴³ Queensland Government, 20 November 2013, 'Catchment areas', accessed at <http://www.dnrm.qld.gov.au/water/catchments-planning/catchments> on 25 March 2014.

⁴⁴ Section 38(3), Water Act.

⁴⁵ Section 38, Water Act.

needs and consumptive use,⁴⁶ as well as for non-consumptive uses, including fisheries and tourism.⁴⁷ WRPs must state the desired ecological and other outcomes for the sustainable management of the water within the catchment area and the strategies to achieve those outcomes.⁴⁸ WRPs must be drafted using the best scientific information available and community consultation.⁴⁹ The Minister for Natural Resources and Mines is required under the Water Act to prepare an annual report on each WRP.⁵⁰

2.3.3 Resource Operations Plans (ROPs)

ROPs are statutory instruments established under the Water Act⁵¹ to facilitate the implementation of WRPs' environmental and consumptive objectives in the relevant area.⁵² A ROP may apply to a whole WRP area or part of a WRP area.⁵³ The department describes ROPs as implementing 'the outcomes and strategies specified in the water resource plan. Each resource operations plan also specifies the day-to-day rules and management arrangement for water users and infrastructure operators.'⁵⁴

ROPs may also provide for:

- environmental management rules
- water sharing rules
- water allocation change (i.e. transfer)⁵⁵ rules
- seasonal water assignment rules
- the operating rules for any water infrastructure to which the ROP is intended to apply.⁵⁶

2.3.4 Local sustainable water management strategies

In assessing water licence applications, aside from WRPs and ROPs, the Water Act recognises the possible existence of:

- strategies and policies for the sustainable management of water in the area to which the application relates (see s.210(1)(g) of the Water Act)
- the sustainable resource management strategies and policies for the catchment, including any relevant coastal zone and regional aquifer systems (see s.210(1)(h) of the Water Act).

In this report, these two classes of documents are called 'local sustainable water management strategies'.

These documents are not legislation. They are generally developed in local licensing offices. The investigation received a sample of these documents in response to a questionnaire of local departmental officers.

2.4 Summary

At the time it was enacted, the Water Act was the culmination of a comprehensive overhaul of water legislation aimed at improving the security of supply for future users and ensuring that future water developments were sustainable while also protecting the health of rivers and catchments. National water reform played its role in influencing the move to more sustainable management of water in Queensland.

46 Section 38, Water Act. Queensland Government, Explanatory Note to the Water Bill 2000, p.3, accessed at <https://www.legislation.qld.gov.au/Bills/49PDF/2000/WaterB00Exp.pdf> on 1 November 2013.

47 Australian Government, National Water Commission, Canberra, 'Australian Water Markets Report 2010-2011(section 4.1)', at pp. 62-3, accessed at http://archive.nwc.gov.au/_data/assets/pdf_file/0003/18975/NWC_6958_Water-markets-2010-11-Section4.1.pdf on 30 October 2013.

48 Section 46(1)(e) and (f), Water Act.

49 Section 39(1)(b), Water Act.

50 Section 53, Water Act; see Queensland Government, Department of Natural Resources and Mines, 'Annual Report for Water Resource Plans', accessed at <http://www.dnrm.qld.gov.au/water/catchments-planning/planning-process/annual-report-wrp> on 19 November 2013.

51 Chapter 2, Part 4, Division 2, Water Act.

52 Queensland Government, Explanatory Note to the Water Bill 2000, p.3, accessed at <https://www.legislation.qld.gov.au/Bills/49PDF/2000/WaterB00Exp.pdf> on 1 November 2013.

53 Section 95, Water Act.

54 Queensland Government, Department of Natural Resources and Mines, 'The Planning Process', accessed at <http://www.dnrm.qld.gov.au/water/catchments-planning/planning-process> on 30 October 2013.

55 A Gardner et al, *Water Resources Law*, Lexis Nexis Butterworths (Reed International Books), Australia, 2009, p.297.

56 Section 96, Water Act.

Underpinning the Water Act is a regionally based resource planning framework consisting of 23 catchment-based WRPs, and ROPs, further supported by local sustainable water management strategies, each of which may be relevant to decision-making on water licence applications.

Chapter 3: Water entitlements under the Water Act

3.1 Introduction

The purpose of this chapter is to outline the main types of water entitlements that exist under the Water Act, the types of water licence applications and the factors that bear upon decisions on such applications. The reasons for focusing on water licences in this report, and why other entitlements are excluded from the report, are also explained.

3.2 Water entitlements

Taking, supplying or interfering with water without authorisation under the Water Act is prohibited.⁵⁷ The Water Act provides for a number of different types of entitlements to take or interfere with water. The two main entitlements available under the Water Act are water licences and water allocations. These water entitlements are subject to the provisions of any existing WRPs, ROPs and local sustainable water management strategies.

3.2.1 Water licences

Chapter 2, Part 6 of the Water Act governs the granting and regulation of water licences. Water licences⁵⁸ are entitlements to take or interfere with surface water or groundwater,⁵⁹ which are attached to the land.⁶⁰ The holder of a water licence must be the owner of the land⁶¹ and, except in certain circumstances, the water must be used on the land from which it is taken.⁶² Water licences are for a nominated volume of water per year, although historically licences have also been issued on other bases, such as the irrigable area of the land.⁶³ Nominated purposes for a water licence include stock, domestic, irrigation, industrial use (including mining) and storage of water,⁶⁴ although some WRPs are now permitting licences to be issued with the purpose 'any'.

Water licences are an old style of water entitlement (based on a historical common law right of the occupier or owner of the land to take water).⁶⁵ Until recently, water licences were usually granted for a period (usually between 2 and 10 years)⁶⁶ and could be renewed upon application to the department before expiry. However, in 2013 the Water Act was amended to facilitate the extension of the expiry of current and future water licences until 2111.⁶⁷ The department advised that as at 16 June 2012, there were 26,668 water licences in existence. The department did not provide a breakdown of the volume of water held under water licences, but advised that 2,534,980 megalitres (ML) was covered by entitlements other than water allocations (i.e. water licences and interim water allocations).

The different types of water licences, and the factors decision-makers must take into account when assessing a water licence application, are discussed in more detail below.

3.2.2 Water allocations and interim water allocations

The Water Act also provides for the creation of water allocations. Water allocations are not attached to the land, do not expire, and can be traded separately within the water trading rules applicable in the WRP area.⁶⁸ Water allocations are granted either under a process set out in a relevant ROP⁶⁹ or by conversion of a water licence to

57 Section 808, Water Act.

58 The Water Act defines a 'water licence' as a licence granted under Chapter 5, Part 6, Division 2 (ss. 206-229E).

59 Section 204, Water Act.

60 Section 213, Water Act.

61 Section 213, Water Act; K Stoeckel et al, *Australian Water Law*, Sydney, Thomson Reuters (Professional) Australia Ltd, 2012.

62 Section 215, Water Act.

63 For example, see *Gallo and Williams*.

64 K Stoeckel et al, *Australian Water Law*, Thomson Reuters (Professional) Australia Ltd, Sydney, 2012, p.128.

65 K Stoeckel et al, *Australian Water Law*, Thomson Reuters (Professional) Australia Ltd, Sydney, 2012, p.11; and DE Fisher, 'Water Law' LBC Information Services, 2000 at pp.218-9.

66 Australian Government, Department of the Environment, 'Overview of Water Entitlements and Trading in Queensland', excerpted from 'Report on the Development of Water Rights and Trading in the People's Republic of China, 2006, p.195, accessed at <http://www.environment.gov.au/system/files/pages/e304a019-82c1-4dd0-943b-71b5a8b1fcae/files/wet-phase1-part3.pdf> on 29 October 2013.

67 See s.292C of the *Land, Water and Other Legislation Amendment Act 2013* which inserted s.213A into the Water Act.

68 Australian Government, Department of the Environment, 'Overview of Water Entitlements and Trading in Queensland' excerpted from 'Report on the Development of Water Rights and Trading in the People's Republic of China, 2006, p.198, accessed at <http://www.environment.gov.au/system/files/pages/e304a019-82c1-4dd0-943b-71b5a8b1fcae/files/wet-phase1-part3.pdf> on 30 October 2013.

69 Section 122, Water Act.

a water allocation under a ROP.⁷⁰ Water allocations are subject to any relevant WRP.⁷¹ The department advised that, as at 16 June 2012, 4,266,191 ML of water was covered by water allocations. In its advice, the department did not provide details of the number of water allocations.

Relying on the department's volume figures as at 16 June 2012, it is estimated that currently the volume covered by water licences is a little more than half the volume covered by water allocations. Therefore, water licences continue to regulate the taking of a significant volume of water in Queensland.

An interim water allocation is an entitlement to be supplied with a volumetric share of water by the operator of a water supply scheme which delivers water from infrastructure, such as a dam.⁷² An interim water allocation may or may not attach to the relevant land. The department did not provide a breakdown of the number of interim water allocations in existence, nor the volume of water held under such entitlements. However, it appears that in the 2011-12 financial year, there may have been as few as 836 interim water allocations existing in Queensland, totalling 182,429 ML of water.⁷³

Currently around 40% of water entitlements in Queensland are tradeable water allocations.⁷⁴ At interview on 17 October 2013, the department's Executive Director of Water Policy confirmed the current government intends to convert water licences and interim water allocations to tradeable water allocations as soon as possible.⁷⁵ The Executive Director understood that the then Queensland Government's intention at the time of the introduction of the Water Bill 2000 was that efficient use of water should be a precursor to water trading (see section 7.2 of this report).

3.3 Types of water licence applications

The Water Act provides three main ways water licences can be granted. The various types of water licence applications under the Water Act, the provisions which govern them and the types excluded from this report are set out in Figure 2.

70 Section 121, Water Act.

71 Section 123, Water Act.

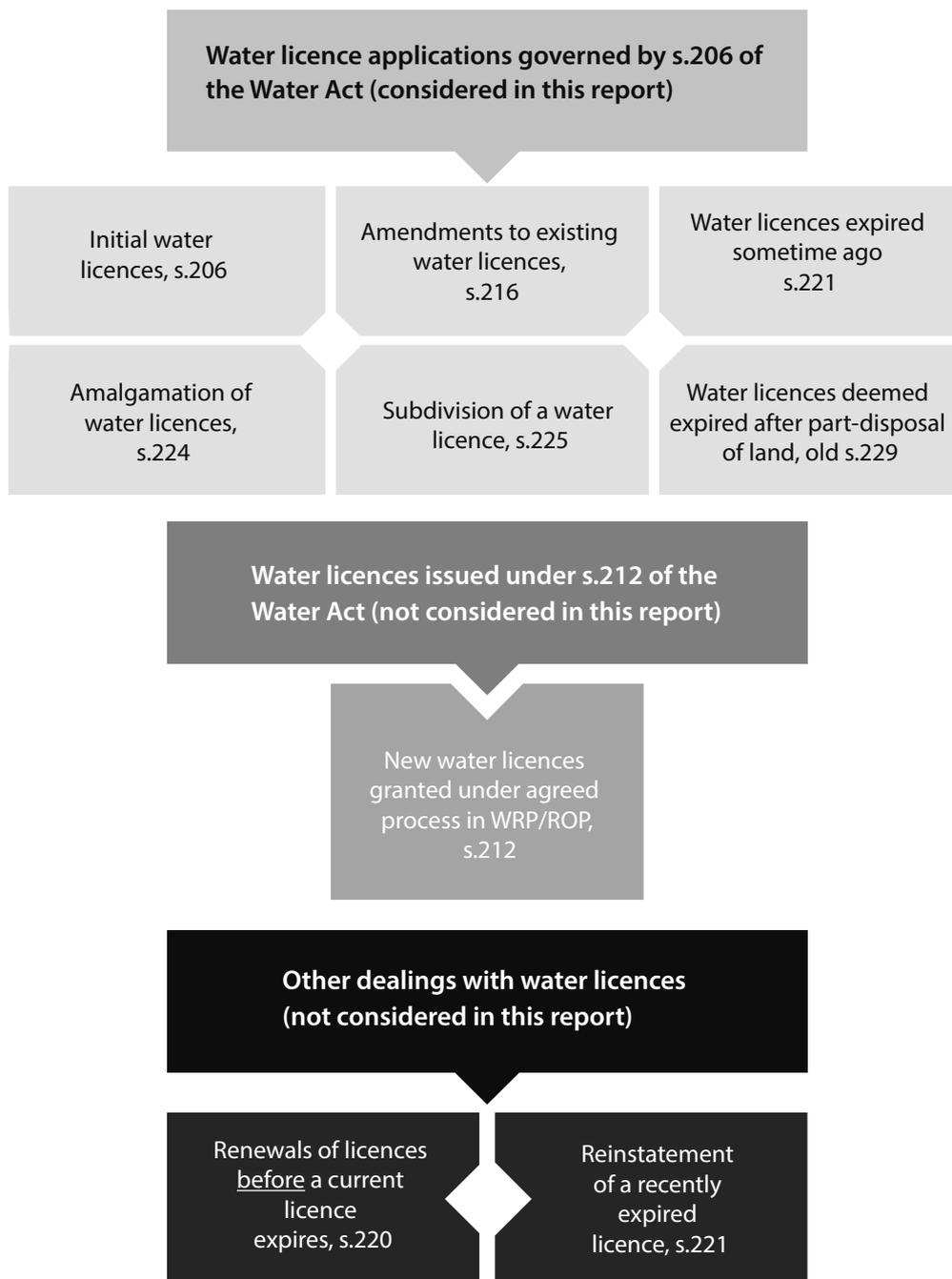
72 See Water Act, ss.190 to 199; Queensland Government, Department of Environment and Resource Management, July 2010, 'Trading Interim Water Allocations', accessed at http://www.nrm.qld.gov.au/water/trading/pdf/wat_trad_interim.pdf on 30 October 2013.

73 Australian Government, National Water Commission, Canberra, 'Australian water markets report 2011-12', page 73, accessed at http://nwc.gov.au/_data/assets/pdf_file/0006/29193/Section-4-QLD.pdf on 1 November 2013.

74 Queensland Ombudsman meeting of 10 September 2013 with the department.

75 Interview with the Executive Director on 17 October 2013, transcript II 1104-7.

Figure 2: Water application types considered (and excluded from) this report



3.3.1 Section 206 of the Water Act - Standard water licence application process

Most water licence applications are made following s.206 of the Water Act. Between 2005 and 2010, the s.206 water licence application process applied to the six types of water licence applications:

- initial water licences
- water licences that had been expired for sometime⁷⁶
- amendments to existing water licences under s.216 of the Water Act, which in turn required the water licence amendment application to be dealt with as though it was an application for a licence under s.206 of the Water Act⁷⁷
- amalgamation of water licences under s.224 of the Water Act, which in turn required the amalgamation application to be dealt with as though it was an application for a licence under s.206 of the Water Act⁷⁸

⁷⁶ Those that are outside the reinstatement timeframe under s.221, Water Act.

⁷⁷ Section 216, Water Act.

⁷⁸ Sections 224 and 224(3), Water Act.

- subdivision of a water licence under s.225 of the Water Act, which in turn required the application to be dealt with as though it was an application for a licence under s.206 of the Water Act⁷⁹
- deemed expiry of a licence following part-disposal of land.⁸⁰ Under s.229 of the Water Act (as it existed until 24 November 2011) a water licence was deemed to have expired on the day the owner disposed of part of the land to which the water licence was attached.⁸¹ In that case one or more owners of the land to which the expired licence related could apply for a replacement licence within 60 days of its expiry, or after 60 days with the approval of the chief executive.⁸² In that case, the application was to be dealt with as if it was an application for a subdivision of a water licence under s.225 of the Water Act. Section 225(3) provides that such applications are dealt with under ss.206 to 215 of the Water Act as if they were an application for a licence.

This investigation considered whether the terms of ss.216, 224, 225 and the former s.229 (about deemed expiry for part-disposal of land) of the Water Act all required those applications to be decided as if they were fresh applications under s.206 of the Water Act.

The legal advice of Mr Fynes-Clinton confirms that s.206 water licence applications for an amendment of a water licence (under s.216 of the Water Act), a subdivision or amalgamation of a water licence (under ss.224 and 225 of the Water Act) and a new licence after part-disposal of land (under the former s.229 of the Water Act) are required to be considered under the s.210(1) criteria. Mr Fynes-Clinton confirms that in connection with these applications, decision-makers are also required to consider whether the approval of the application would advance the purposes of Chapter 2 of the Water Act. As to what level of consideration of previously existing licences was relevant, Mr Fynes-Clinton advised 'the considerations under ss.10 and 210 will necessarily be informed by the facts of what previously occurred'. He further stated:

This is not to suggest that the mere fact that the previous entitlements existed and that the new entitlements merely replace them 'guarantees' an approval. Proper consideration under ss 10 and 210 is required.

Further, in regard to applications for amalgamation of water licences (under s.224 of the Water Act) and subdivision of water licences (under s.225 of the Water Act), between 2005 and 2010 the department had a work practice called WM-107 Amalgamating and Subdividing Water Licences and Interim Water Allocations (version 2). It stated:

An application for amalgamation or subdivision of a licence must be made in the approved form, accompanied by the prescribed fee **and dealt with as if it were an application for a new licence**. Therefore all the procedural requirements specified in sections 206 – 215 of the Act apply ...[my emphasis].

The present version of that work practice (version 3) also contains a statement to the same effect.

In summary, the terms of the legislation and this work practice confirm that the types of applications in the bulleted list above are required to be considered in accordance with ss.206 to 215 of the Water Act.

The process for making a s.206 water licence application and the factors decision-makers must take into account when assessing a s.206 water licence application are considered in detail later in this chapter. Section 206 defines the standard process for applying for a water licence.

3.3.2 Section 212 of the Water Act - Applications under an agreed process in a WRP or ROP

Section 212 of the Water Act provides that water licences can be granted under an agreed process under a WRP or ROP without the need for an application to be made under s.206 of the Water Act. Consideration of water licences granted in accordance with s.212 of the Water Act is outside the scope of this investigation. The department was unable to provide investigators with a breakdown of the number of water licence applications considered under s.206 of the Water Act compared with an alternative WRP or ROP process. However, investigators viewed electronic records of all water licence decision-making by the department

⁷⁹ Sections 224 and 225(3), Water Act.

⁸⁰ Section 229, Water Act; this deeming provision was removed in Act No. 40 of 2011 (24 November 2011). See current s.211A.

⁸¹ Section 229(2), Water Act as it existed until 24 November 2011.

⁸² Section 229(3), Water Act as it existed until 24 November 2011.

for the purpose of selecting the general file review sample. Investigators formed the view that water licence decision-making under s.206 of the Water Act was the dominant mode of water licence decision-making in the period between 2005 and 2010.

3.3.3 Other exclusions from investigation scope

As the investigation scope focused on the standard application process in s.206 of the Water Act, it did not examine the following decision types:

- renewals of licences before a current licence expires, which are considered under s.220 of the Water Act⁸³ without the need for an application to be made under the standard process. However, as a result of an amendment to the Water Act in 2013, it is unlikely that the renewal provisions in s.220 of the Water Act will ever be used again.⁸⁴
- reinstatement of water licences which have recently expired, which are considered under s.221 of the Water Act⁸⁵ without the need for a water licence application to be made under the standard process.

3.4 Sources of water for water licences

A water licence may be required under the Water Act to take or interfere with surface water, overland flow water or groundwater.⁸⁶

A water licence is required to take or interfere with surface water (described in the Water Act as water in a watercourse, lake or spring)⁸⁷ for purposes including:

- stock or domestic use on lands that do not adjoin a watercourse, lake or spring
- irrigation
- industrial use
- the storage of water behind a weir
- the impounding of water behind a storage structure
- the storage of water in excavations that are within or connected to a watercourse.⁸⁸

Surface water is mostly regulated by WRPs.

Groundwater is called 'underground water' in the Water Act and is defined to include artesian and subartesian water.⁸⁹ Taking or interfering with artesian water requires a water licence.⁹⁰ Taking or interfering with subartesian water requires a licence (other than for stock and domestic purposes) in circumstances where the water comes from:

- a declared subartesian area or groundwater management area under the Water Regulation 2002⁹¹
- a subartesian management area or a groundwater management area under a WRP
- a subartesian management area under a wild river declaration.⁹²

Surface water and groundwater systems are frequently connected.⁹³ Groundwater in Queensland is less

83 Section 220(1), Water Act.

84 See s.292C, *Land, Water and Other Legislation Amendment Act 2013* which inserted s.213A into the Water Act; see interview with Executive Director (17 October 2013), lines 1682-1687.

85 Section 220(1), Water Act.

86 Section 204, Water Act; Queensland Government, Department of Natural Resources and Mines, 'Water Licences', accessed at <http://www.nrm.qld.gov.au/water/management/pdf/general-water-licensing.pdf> on 30 October 2013.

87 Schedule 4, Water Act; Queensland Government, Department of Natural Resources and Mines, 'Water Licences', accessed at <http://www.nrm.qld.gov.au/water/management/pdf/general-water-licensing.pdf> on 30 October 2013.

88 Queensland Government, Department of Natural Resources and Mines, 'Water Licences', accessed at <http://www.nrm.qld.gov.au/water/management/pdf/general-water-licensing.pdf> on 30 October 2013; although some WRPs now permit water licences to be issued for the purpose 'any'.

89 Schedule 4, Water Act; Queensland Government, Department of Natural Resources and Mines, 'Water Licences', accessed at <http://www.nrm.qld.gov.au/water/management/pdf/general-water-licensing.pdf> on 30 October 2013.

90 Queensland Government, Department of Natural Resources and Mines, 'Water Licences', accessed at <http://www.nrm.qld.gov.au/water/management/pdf/general-water-licensing.pdf> on 30 October 2013.

91 Under the *Water Regulation 2002*.

92 Queensland Government, Department of Natural Resources and Mines, 'Water Licences', accessed at <http://www.nrm.qld.gov.au/water/management/pdf/general-water-licensing.pdf> on 30 October 2013.

93 K Stoeckl et al, *Australian Water Law*, Thomson Reuters (Professional) Australia Ltd, Sydney, 2012, p.457.

regulated by WRPs. Between 2005 and 2010, there were 20 WRPs in operation; however, only seven WRPs regulated groundwater across the whole WRP area:

- Barron WRP (enacted in 2002)
- Great Artesian Basin WRP (enacted in 2006)
- Gulf WRP (enacted in 2007)
- Mitchell WRP (enacted in 2007)
- Moreton WRP (enacted in 2007)
- Pioneer Valley WRP (groundwater added in 2009)
- Whitsunday WRP (enacted in 2010).

During that period, there were three other WRPs that only applied to small targeted groundwater areas:

- Burnett Basin WRP (added in 2009)
- Georgina and Diamantina WRP (enacted in 2004)
- Mary Basin WRP (enacted in 2006).

3.5 Making a water licence application under s.206 of the Water Act

An application for a water licence to take or interfere with water must be made to the chief executive⁹⁴ in the approved form,⁹⁵ supported by sufficient information to enable the chief executive to decide the application⁹⁶ and accompanied by the fee prescribed under the Water Regulation 2002.⁹⁷ The application form during the period 2005 to 2010 required the applicant to provide:

- their details
- the lot and plan numbers for the land on which the water is to be used
- the source and location of the water
- a sketch of the source and location where the water is proposed to be taken and used
- by ticking the appropriate boxes, the purposes that apply to the proposed taking of water
- a description of the proposed water requirement/scheme including the crop type, proposed area, maximum weekly application, maximum monthly volume, the time of year required and the volume required for purposes other than crops
- the amount of water being applied for
- other comments
- a declaration that the information provided in the application is true and correct.

The chief executive may request that the applicant give additional information about the application or that information provided be verified by a statutory declaration.⁹⁸ Most water licence applicants are required to publish a public notice about the application.⁹⁹ Interested parties have at least 30 days to make submissions regarding the application to the department.¹⁰⁰

Water licence applications are usually assessed by staff at the department's regional offices. The department is required to assess the application in accordance with the factors outlined in sections 3.6 to 3.8 of this report. The officer assessing the water licence application prepares an investigation report. If the delegated decision-maker is satisfied that the application should be granted, the water licence is granted for a period with or without conditions.¹⁰¹ The delegated decision-maker may also partially grant or refuse the application.¹⁰² The applicant (and in some cases, a submitter) has the right to have the outcome of the water licence application

94 This decision-making power has been delegated to various positions.

95 Section 206(5)(a), Water Act.

96 Section 206(5)(b), Water Act.

97 Section 206(5)(c), Water Act. See section 14 and schedule 16, item 46 of the Water Regulation 2002.

98 Section 207, Water Act.

99 Sections 208 and 209, Water Act.

100 Section 208, Water Act.

101 Section 211, Water Act.

102 Section 211, Water Act.

reviewed and may appeal to the Land Court about the decision.¹⁰³ The department keeps a public register of water licences.¹⁰⁴

3.6 Factors to be considered when assessing a water licence application made under s.206 of the Water Act

The *Gallo and Williams* decision found that when assessing a water licence application made under s.206 of the Water Act, the water licence decision-maker ought to take into consideration the following factors:

- advancing the purpose of Chapter 2 of the Water Act, being the ‘sustainable management’ and ‘efficient use’ of water pursuant to ss.10 and 12 of the Water Act¹⁰⁵
- the mandatory considerations set out in s.210(1) of the Water Act including (where applicable) any relevant provisions of WRPs and ROPs (see s.210(1)(c) of the Water Act) and local sustainable water management strategies (see ss.210(1)(g) and (h) of the Water Act).

Departmental advice indicates that in deciding a s.206 water licence application, the decision-maker ought to consider the s.10 objects of the water licensing chapter, including ‘sustainable management’ and ‘efficient use’.

3.7 Decision-making consideration: advancing the purpose of Chapter 2 of the Water Act

The objects and purpose of an Act are important for the interpretation of how discretionary powers of decision-makers may be exercised under legislation.¹⁰⁶ The *Acts Interpretation Act 1954*, s.14A (1) provides that:

In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.¹⁰⁷

Section 12 of the Water Act expressly reflects this principle of interpretation by requiring that the exercise of powers under Chapter 2 of the Water Act must be done in a way that advances the purpose of that chapter. That is, the Water Act provides that water licence decision-makers must make decisions in a way that advances the purposes of Chapter 2 of the Water Act.

The purpose of Chapter 2 of the Water Act is summarised in s.10(1) as being ‘to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water’. As noted earlier, s.10(2) provides that ‘sustainable management of water’ includes ‘providing for the fair, orderly and efficient allocation of water to meet community needs’ (see s.10(2)(c)(vi) of the Water Act).¹⁰⁸ In *Gallo and Williams* the Land Court held that this referred to fairness in the sense that water licence applications from a particular local area are assessed in generally the same manner.

The department has accepted that the Water Act provides a clear statutory requirement under s.12 that the process for deciding an application for a water licence should be undertaken in a way that advances the efficient use of water.

¹⁰³ Queensland Government, Department of Natural Resources and Mines, ‘Water Licences’, accessed at <http://www.nrm.qld.gov.au/water/management/pdf/general-water-licensing.pdf> on 30 October 2013.

¹⁰⁴ Section 1009, Water Act; Queensland Government, Department of Natural Resources and Mines, ‘Water Licences’, accessed at <http://www.nrm.qld.gov.au/water/management/pdf/general-water-licensing.pdf> on 30 October 2013.

¹⁰⁵ For discussion on this point, see *Gallo and Williams* at [8], [10], [47], [72], [74], [80] and [85].

¹⁰⁶ A Gardner et al, *Water Resources Law*, Lexis Nexis Butterworths (Reed International Books), Australia, 2009, p.48.

¹⁰⁷ Quoted in A Gardner et al, *Water Resources Law*, Lexis Nexis Butterworths (Reed International Books), Australia, 2009, p.48.

¹⁰⁸ Section 11, Water Act sets out the ‘principles of ecologically sustainable development’ which appear in the s.10(2) explanation of ‘sustainable management of water’. As noted by Member Smith in *Gallo and Williams* at [9], s.11 is ‘a statutory statement of what is otherwise known at the precautionary principle.’

3.8 Decision-making consideration: criteria in s.210(1) of the Water Act

Section 210(1) of the Water Act sets out the criteria below which delegated decision-makers must consider in deciding s.206 water licence applications:

- (a) the application and additional information given in relation to the application
- (b) if notice of the application has been published—all properly made submissions made about the application
- (c) any water resource plan, resource operations plan and wild river declaration that may apply to the licence
- (d) existing water entitlements and authorities to take or interfere with water
- (e) any information about the effects of taking, or interfering with, water on natural ecosystems
- (f) any information about the effects of taking, or interfering with, water on the physical integrity of watercourses, lakes, springs or aquifers
- (g) strategies and policies for the sustainable management of water in the area to which the application relates
- (h) the sustainable resource management strategies and policies for the catchment, including any relevant coastal zone and regional aquifer systems
- (i) the public interest.

Each of these criteria is mandatory and each must be considered by water licence decision-makers when deciding whether to grant a water licence.

The terms of s.210 make clear that where a WRP, ROP and/or local sustainable water management strategy applies to the application, the terms of those documents are also required to be considered (ss.210(1)(c) and 210(1)(g) and (h) of the Water Act).

By way of example, the Barron WRP contained a provision, s.51(2)(b), that required water licence decision-makers 'must have regard to the efficiency of the proposed water use practices'. This issue is discussed further in Chapter 4.

3.9 Summary

The two main entitlements available under the Water Act are water licences and water allocations.

Water licences can be applied for under s.206 of the Water Act or under alternative processes. An application is required for a water licence where a licence has not existed previously, and also for an amendment to a water licence, subdivision of a water licence, amalgamation of a water licence, where a water licence had expired sometime previously, and where (during the investigation period) the water licence was deemed to have expired upon part-disposal of land. Essentially, each of the application types comes back to a standard process under s.206 of the Water Act.

This investigation considered decision-making in s.206 water licence applications. Section 206 water licence applications must be decided in a way that advances the efficiency of water use and sustainable management aims of the water licensing chapter of the Water Act. They also must consider the mandatory criteria in s.210 of the Water Act. Where a WRP adds additional mandatory criteria to consider, those criteria must also be considered.

As mentioned, over time most water licences will likely be converted to tradeable water allocations.¹⁰⁹ However, I considered an investigation into water licence decision-making was appropriate because they still represent a significant component of the volume of water regulated under the Water Act. Past unreasonable water licence decisions not only affect members of the public now, but their effects will continue to be felt in the conversion of water licences to tradeable water allocations.

¹⁰⁹ Australian Government, National Water Commission, Canberra, 'Australian Water Markets Report 2010-2011 (section 4.1)'; p.64, accessed at http://archive.nwc.gov.au/_data/assets/pdf_file/0003/18975/NWC_6958_Water-markets-2010-11-Section4.1.pdf on 30 October 2013; see also interview with the Executive Director of the department on 18 October 2013, transcript II 1080.

Chapter 4: Efficiency and fairness in the Barron

4.1 Introduction

This chapter considers the failure of the department's decision-makers in making decisions in the Barron, as outlined in *Gallo and Williams*, and the department's response to that decision.

4.2 *Gallo and Williams* – failure to consider efficient use and fair allocation of water

Section 51(2)(b) of the Barron WRP (as it was in November 2006, being the time of the original decisions examined in *Gallo and Williams*) required water licence decision-makers to have regard to the efficiency of the proposed water use practices, namely:

(2) In deciding the application, the chief executive must have regard to—

...

(b) the efficiency of the proposed water use practices; and

...

In *Gallo and Williams* the Land Court found that between 2002 and 2006 the department failed to follow the requirements of the Water Act when considering water licence applications made in the Barron under s.206 of the Water Act. In particular, the department failed to consider efficient use of water as described in s.10(3) of the Water Act and s.51(2)(b) of the Barron WRP as well as the fair allocation of water (as described in s.10(2)(c)(vi) of the Water Act as part of an aspect of 'sustainable management of water').

The Barron experience

Failure to consider efficiency of proposed water use

Between 2002 and 2006, water licence applications in the Barron were decided on the basis of an entitlement of 5 ML per hectare of the area of land specified in the application.¹¹⁰ There was no real consideration or close scrutiny to verify whether all or part of the land proposed to be irrigated was even irrigable.¹¹¹ In some instances, water licences were granted on this basis even when the applicant not only failed to indicate a proposed use for the water applied for, but actually stated that they had no current intention to use any of the water granted.¹¹²

The Land Court therefore found that the department had granted at least one water licence in the Barron between 2002 to 2006 without regard to the efficient use of water as required by s.51(2)(b) of the Barron WRP and ss.10 and 12 of the Water Act. Evidence given at the hearing was also to the effect that this situation was the general practice in the region.

Lack of focus on fair allocation of water

A moratorium on considering new applications or existing applications in the Barron was imposed in 2005 following concerns that the level of demand in the Barron may be unsustainable.¹¹³ Water licence applications that had not yet been considered at the commencement of the moratorium (such as *Gallo and Williams*' applications)¹¹⁴ were eventually decided, but received much less water than they had applied for.

The court was of the view that had *Gallo and Williams*' applications been considered prior to the moratorium then they would have received the amount of water that they applied for.¹¹⁵ Member Smith

¹¹⁰ *Gallo and Williams* at [68] and [18] referring to the respondent's evidence at subparagraph 36.

¹¹¹ *Gallo and Williams* at [68] and [18] referring to the respondent's evidence at subparagraphs 36 and 50(a).

¹¹² *Gallo and Williams* at [68].

¹¹³ *Gallo and Williams* at [39]. The BWRP was amended in 2009 to the effect that no additional water allocations will be made in Area B.

¹¹⁴ Made in 2003 and 2005 respectively.

¹¹⁵ *Gallo and Williams* applied for 990 ML and 750 ML of water per annum respectively and received 130 ML and 80 ML respectively, see *Gallo and Williams* at [69].

held this amounted to unfair treatment to the later applicants in the Barron and did 'not meet the basic principles of fairness as required by the legislation'.¹¹⁶ This is because s.10(2)(vii) of the Water Act required the 'fair orderly and efficient allocation of water to meet community needs'. Member Smith explained that the expectation of the legislature was that decision-makers would assess all applications for licences under a particular plan for a particular area under the same legislative framework in essentially the same manner, and thus ensure a fair allocation of the precious resource of water.¹¹⁷

In light of the department's failure to follow the requirements of the Water Act, Member Smith suggested 'that the interest of fairness and proper usage of a scarce commodity ... all water licences granted post 2002 with respect to Area B should simply be set aside and the allocation of water licences start afresh according to law'.¹¹⁸ However, Member Smith conceded he had no power to make any such orders and that even if he did, the principles of natural justice meant existing licence holders must have an opportunity to put submissions or evidence before the court.¹¹⁹

Member Smith also noted that under the Water Act, the government may, if circumstances warrant it (such as in severe drought conditions), by notice restrict the amount of water that all licence holders are entitled to. Where there is unfair distribution of water due to prior poor water licence decision-making, any further blanket reduction in entitlements (e.g. by 50%) would further unfairly prejudice some water licence holders, which is an outcome clearly contrary to the intent of the legislation.¹²⁰

4.3 Department's response to Gallo and Williams

The department has taken steps to address the concerns raised in *Gallo and Williams*.

4.3.1 Internal review of 2002 to 2006 water licence decision-making

The department reviewed a sample of the Barron water licence decisions between 2002 and 2006.

I understand the department is aware that proper consideration was not given to the efficiency of the proposed water use practices and that as a consequence, the decisions may therefore be liable to be set aside. This conclusion was distinct from the issues of fairness raised in *Gallo and Williams*.¹²¹

4.3.2 Targeted review of the Barron WRP

On 28 March 2013, the Minister for Natural Resources and Mines announced a targeted review of the Barron WRP and Barron ROP (the Barron Targeted Review).¹²² The review particularly targets issues in relation to groundwater resources in the Barron. The review proposes to incorporate and address outcomes of the internal review as well as issues raised in *Gallo and Williams*.

Through the public consultation associated with its review, the department aims to attain a level of public satisfaction with the amounts of individual water licences in the Barron.¹²³

4.4 Decision-making in the Barron contrary to law

The findings in *Gallo and Williams* and the department's internal review provide evidence that water licence decision-makers failed to follow the requirements and objects of the Water Act in the Barron between 2002 and 2006, as decision-makers failed to consider the efficiency of the proposed water use pursuant to ss.10

¹¹⁶ *Gallo and Williams* at [80].

¹¹⁷ *Gallo and Williams* at [80].

¹¹⁸ *Gallo and Williams* at [90].

¹¹⁹ *Gallo and Williams* at [90].

¹²⁰ *Gallo and Williams* at [82] and [83].

¹²¹ Memorandum dated 5 June 2013 from the Director-General of the department to the Minister for Natural Resources and Mines.

¹²² Queensland Government, 7 June 2013, 'Barron Catchment', accessed at <http://www.nrm.qld.gov.au/wrp/barron.html> on 1 November 2013.

¹²³ Memorandum dated 5 June 2013 from the Director-General of the department to the Minister for Natural Resources and Mines.

and 12 of the Water Act and in particular the mandatory consideration in s.51(2)(b) of the Barron WRP.

Where a section of a WRP requires mandatory consideration of the efficiency of the proposed water use (or a similar consideration), I consider the failure to consider it is administrative action that was contrary to law. In the circumstances questions are raised about the validity of such decisions.

In the proposed report provided to the department for comment, I proposed to form an opinion about the administration of s.206 water licence applications in the Barron.

Department's response - proposed opinion 1

The Director-General advised:

Accepted.

As noted in the proposed report, the department has reviewed water licensing decisions in the Barron Water Resource Plan area and is taking steps to rectify past failures in the decision making processes. This will occur through a targeted review of the existing Barron Water Resource Plan and Resource Operations Plan.

Opinion 1

Based on the range of evidence in this investigation, there was significant failure to properly take into account efficiency of the proposed water use in deciding water licence applications in the Barron between 2002 and 2006. The failure amounts to administrative action that was contrary to law under s.49(2)(a) of the Ombudsman Act because consideration of the efficiency of the proposed water use was a mandatory consideration under the then s.51(2)(b) of the Barron WRP.

4.5 Summary

The *Gallo and Williams* decision raised concerns about whether the maladministration in respect of s.206 water licence decision-making in the Barron between 2002 and 2006 reflected systemic issues in water licence decisions throughout Queensland.¹²⁴ The department has reviewed water licence decision-making in the Barron and accepted that decisions were made contrary to law. The department is taking steps to rectify the issue through the targeted review.

¹²⁴ *Gallo and Williams* at [88] and [91].

Chapter 5: Does the Barron situation exist elsewhere?

5.1 Introduction

One of the primary objects of this investigation was to determine whether the maladministration evident in the water licence decision-making process for water licences in the Barron is a systemic issue across Queensland. In other words, the investigation was interested in establishing whether the method of water licence decision-making established as deficient in *Gallo and Williams* and by the department's Barron internal review occurred in other regions.

5.2 Methodology

Investigators reviewed the WRPs and ROPs in force between 2005 and 2010 for specific sections that required decision-makers to have regard to the efficiency of water use in the consideration of s.206 water licence applications. Investigators located reference to the concept of water use efficiency in 113 sections, of which 110 were not relevant to the consideration of s.206 water licence applications and therefore were not relevant to this investigation. Instead, they either related to 'water allocations'; were sections that had the effect of standardising licences upon commencement of a WRP under s.217 of the Water Act; or related to an alternative process for allocation of previously unallocated water.

In addition to the then s.51(2)(b) of the Barron WRP, investigators found three sections that added a further mandatory consideration to s.206 water licence application decision-making. These were s.22 of the Boyne River Basin WRP, s.26 of the Burnett Basin WRP and s.73 of the Mary Basin WRP. Investigators aimed to review a sample of decisions to which those sections applied. No relevant decisions were made in the Boyne River Basin¹²⁵ and Mary Basin¹²⁶ between 2005 and 2010. However, relevant decisions were made in the Burnett Basin.

Particularly, s.26 of the Burnett Basin WRP (in Part 5, Division 1, entitled 'General strategies for achieving outcomes') provides:

- (1) In making a decision about the allocation of water in the plan area, the chief executive must consider the following—

...

- (b) the availability of an alternative water supply for the purpose including the **more efficient use of water already available**; [emphasis added]

...

Therefore, s.26 of the Burnett Basin WRP requires a decision-maker, in addition to the mandatory s.210 criteria, to specifically have regard to 'the more efficient use of water already available'.

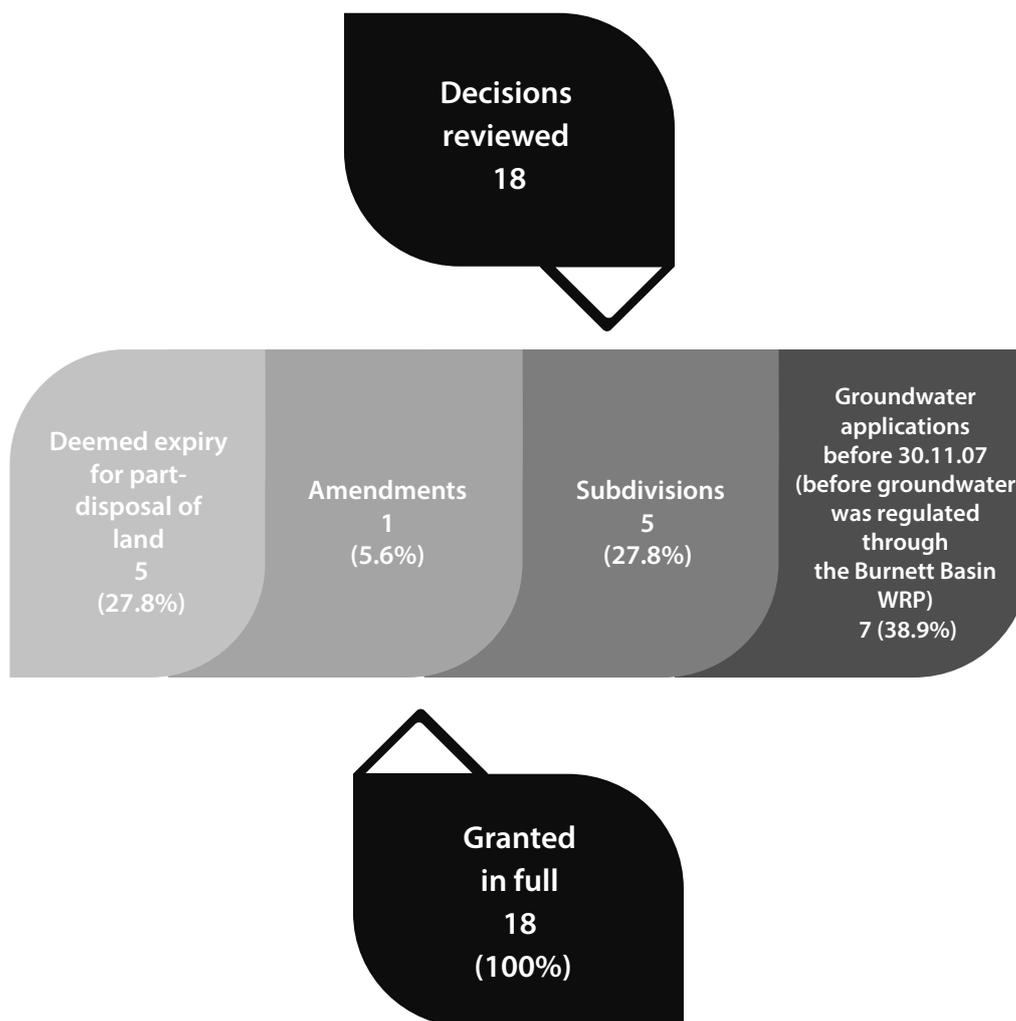
The investigation drew a small sample of s.206 Burnett Basin water licence decisions for the purpose of determining whether the decision-making had regard to the mandatory efficiency consideration in s.26 of the Burnett Basin WRP. Investigators pre-screened the department's electronic records of all water licence decisions in the Burnett Basin between 2005 and 2010.

¹²⁵ During the period, the Boyne River Basin decision-makers issued water licences on a basis that did not require the consideration of the relevant WRP section.

¹²⁶ The Mary Basin WRP section applied to a small geographical area, and no decisions had been made in that area during the investigation period.

Figure 3 summarises the characteristics of the specific file review sample.

Figure 3: Characteristics of the specific file review sample



5.3 Findings

Investigators reviewed 18 Burnett Basin decisions. Seven of those decisions were excluded from the sample on the basis they were groundwater licence decisions made before the Burnett Basin WRP applied to groundwater (that is, before 30 November 2007). Of the remaining 11 decisions, none identified that s.26 of the Burnett Basin WRP was relevant to the application. Therefore, none considered the 'more efficient use of water already available'.¹²⁷ One of the decisions did not even identify that the Burnett Basin WRP applied to the application. These results show a lack of focus on the provisions of the Burnett Basin WRP, particularly s.26. I note that the seven excluded groundwater applications also did not consider whether the decision advanced the efficient use of water under ss.10 and 12 of the Water Act.

Investigators put this result to the Executive Director at interview on 17 October 2013, seeking his response as to the implications of that result. The Executive Director responded by email on 18 October 2013 stating:

In relation to the 18 licence decisions in the Burnett between 2005-2010 ... my examination has confirmed that none of the 18 decisions involved the allocation of water and therefore section 26 of the Burnett WRP did not apply. Unlike the relevant decisions under the Barron WRP, where additional water was indeed allocated, all of the decisions in the Burnett related to water allocated under pre-existing entitlements.¹²⁸

¹²⁷ Burnett Basin WRP, s.26.

¹²⁸ Email from the Executive Director, 18 October 2013.

As has been discussed in section 3.3.1 of this report, the terms of the legislation¹²⁹ require that the Burnett Basin applications (comprising applications for subdivision of a water licence, applications for amendment of an existing water licence and applications following deemed expiry for part-disposal of land) be considered in accordance with ss.206-215 of the Water Act.

In response to the Executive Director's email, I sought legal advice from Mr Fynes-Clinton as to whether s.206 water licence applications (that were not initial applications for a water licence in the Burnett Basin) were required to consider 'the availability of an alternative water supply for the purpose including the more efficient use of water already available' under s.26 of the Burnett Basin WRP (in addition to the purposes of Chapter 2 of the Water Act and the s.210(1) considerations).

In his advice Mr Fynes-Clinton concluded that s.26 of the Burnett Basin WRP applied to decisions about water that had already been previously allocated under a pre-existing entitlement. However, Mr Fynes-Clinton found the interpretation somewhat challenging. He stated:

I have found this a difficult provision to interpret. Does it apply only to decisions about issuing a new water "allocation" as such? Or is the grammatical relationship between the "water allocation" (a particular right granted under the Act and Plan) and "allocation" as used in this section merely coincidental?

There is no doubt that the WRBBP distinguishes between water allocations as such, and licences and permits which are covered by the defined term "authorisation" defined in Schedule 9.¹³⁰

On the other hand, subsection (2)(a) excludes certain specified decisions about licences, and would be otiose if s 26 applied only to the issue of water allocations, as such.

An interpretation that includes licence decisions (granting a right to take water) in the coverage of s 26 has a deal of contextual support.

First, the opening words of s 25 refer generally to decisions about "management or allocation"; the section excludes decisions about permits, but otherwise clearly includes licence decisions within the scope of "management or allocation" under that section.

Second, if the narrower meaning were intended, it would have been easy for the drafter to use words such as those which commence ss 27 to 30, and to refer expressly to a decision to "grant a...water allocation".

Third, ss 30 and 31 provide further indication that licence decisions are fully within the scope and contemplation of Part 5 of the Plan.

On balance, and with some hesitation, I consider the better view to be that "allocation" in s 26, which is not defined in Schedule 9 or in the Act, has an ordinary meaning as referring to any decision giving rise to a right to take water which could not lawfully be taken until and unless that decision is made. It therefore applies to decisions on licence applications under s 206 of the Act, and other applications which call up s 206 and following provisions. I consider that it also applies to reinstatement of expired licences under s 221 of the Act, given that, absent a decision to issue a new licence to replace the expired one, there would be no further or future right to take water.

In summary, Mr Fynes-Clinton advised that those decisions 'are properly viewed as decisions about "allocation" of water within the meaning of s.26. Matters might be different if s.26 was a defined term with a narrower meaning than its plain meaning.'

Based on Mr Fynes-Clinton's advice, I consider that the 11 Burnett Basin decisions that were required to consider the Burnett Basin WRP failed to consider the mandatory consideration in s.26 of the Burnett Basin WRP.

In the proposed report provided to the department for comment, I proposed to form an opinion about the standard of s.206 water licence decision-making in the Burnett Basin.

¹²⁹ Supported by the terms of the work practice 'WM-107 Amalgamating and subdividing water licences and interim water allocations (version 2)'.
¹³⁰ Although 'authorisation' is broad enough to include a water allocation.

Department's response – proposed opinion 2

The Director-General advised:

This opinion cannot be accepted based on the information contained in the proposed report. In this context, I observe that you have not provided this Department with a full copy of the advice of 1 December 2013 provided to the investigators by Mr Stephen Fynes-Clinton, JC [sic]. It would be of assistance if a copy of this advice could be provided to the Department for consideration.

Based on the information in the report and the previous discussions that the investigators had with the Department's Executive Director, Water Policy, all of the 11 water licence decisions that the report suggests were made unlawfully were about subdividing existing water licences, amending existing water licences (with no increase in the amount of water that the licensee was entitled to take under the amended licence) and the reinstatement of licences that had expired due to administrative reasons such as the separate sale of part of the land to which the original water licence applied.

The report contends that dealing with these water licence applications equates to the allocation of water within the meaning of section 26 (s26) of the *Water Resource (Burnett) Plan 2002 (Burnett WRP)*. This contention appears to be based on an excerpt from Mr Fynes-Clinton's advice that the "plain" meaning of the term "allocation of water" as used in the [sic] s26 of the Burnett WRP clearly extended to include decisions about water that had already been previously allocated under a pre-existing water entitlement. The logic associated with such a conclusion is not apparent from the little information provided in the report in relation to Mr Fynes-Clinton's advice.

As per the advice that was provided to the investigators by the Department's Executive Director, Water Policy, the view that has been taken by the Department is that the term allocating water was about new grants of water entitlements (i.e. dealing with available unallocated water) rather than administrative dealing in relation to pre-existing entitlement. I submit that this view is a more reasonable interpretation of s26. This view is supported by the clearer wording used in water resource plans that followed the Burnett WRP, including the Pioneer and Barron WRPs, which were both finalised in 2002. Section 25 of the Barron WRP and Section 26 of the Pioneer WRP are, like the Burnett WRP, both headed "*Matters chief executive must consider*". The provisions of these sections of the Barron and Pioneer Plans are equivalent to those of the Burnett Plan – and significantly include replicate wording of subsections 26(1)(a) &(b) of the Burnett Plan. However, the wording used in 26(1) of the Pioneer WRP and section 25(1) of the Barron WRP is more explicit about the intent of the [sic] how the section is to be applied. These sections state: "*In preparing and implementing a process for dealing with unallocated surface water under a resource operations plan, the chief executive must consider.*"

I therefore suggest that there has been no unlawful application of the requirements of section 26 of the Burnett WRP. Instead, the provision has been applied by decision makers in the intended manner in dealing with reserves of unallocated water that were available under the Plan. These provisions (as per the Pioneer and Barron WRPs) were never intended to relate to dealings associated with pre-existing water entitlements.

The department relies upon the wording of certain sections of the Barron WRP and Pioneer Valley WRP to argue an alternative interpretation of s.26 of the Burnett Basin WRP and 'suggests' that the Burnett Basin WRP decisions were lawful.

I reject the department's contention that the wording of other WRPs is somehow significant. Each WRP applies to the circumstances of the particular catchment for which it was written. If, as the department contends, it adopted different wording in the Barron WRP and Pioneer Valley WRP to remove a deficiency in the earlier Burnett Basin WRP, the Burnett Basin WRP could have then been amended to adopt the alternative wording. However, it was not.

The department's view is not compelling. In any event, even if the correct interpretation is that s.26 of the Burnett Basin WRP did not apply to the consideration of s.206 water licence applications, the decisions still required consideration of the efficient use of water in accordance with s.10 and s.12 of the Water Act. None of them did.

Opinion 2

There has been significant failure in applicable Burnett Basin s.206 water licence decisions between 2005 and 2010 to properly consider the criteria in s.26 of the Burnett Basin WRP. This is administrative action that was contrary to law under s.49(2)(a) of the Ombudsman Act because the legislation required consideration of these matters.

Having determined that the failure to consider efficiency of use in making water licence decisions, pursuant to the Burnett Basin WRP, amounts to administrative action that was contrary to law, the difficult question that is then posed is: what consequences should flow from this?

Mr Fynes-Clinton confirmed that there was a correlation between the failure to consider s.26 of the Burnett Basin WRP and the failure to consider s.51(2)(b) of the Barron WRP found to have occurred in *Gallo and Williams*, in the sense that 'a requirement to consider the most efficient use of water already available and restrictions on the volume to be taken necessarily requires consideration of the efficiency of the proposed use'. However, in relation to the consequences that flow from a decision-maker's failure to consider s.26 of the Burnett Basin WRP, Mr Fynes-Clinton advised that:

A simplistic proposition that the decision is invalid or liable to be set aside by a court merely because of failure by the decision-maker to consider a relevant consideration (or merely because of considering an irrelevant matter) is wrong. Each case would require a specific factual enquiry to establish whether the consideration in question, if properly applied, could have materially affected the decision-making outcome, and as to whether the discretionary balance favours depriving the licence holder of its rights as they appear on the face of the licence due to error by the decision-maker, including whether there was any element of fault by the applicant.

Generally, for the reasons given above, I consider that it would require either an egregious error where it is very clear that there would have been a different decision but for the error, or some form of material contribution to the error by the applicant before the balance would shift in favour of declaring invalidity. Beyond that, a detailed inquiry into the full facts and application-specific decision making process for each individual application would be required.

A failure to apply s.26 of the Burnett Basin WRP does not automatically render a licence liable to be set aside. Therefore, it is arguable that this factor alone may not necessarily warrant the department reviewing all previous licences issued. However, what causes me particular concern in relation to this significant failure are the following two potential situations:

- if there has been an over-allocation of a water resource, thereby excluding potential prospective licence holders from obtaining a water licence
- the intention of the government to convert water licences to water allocations as soon as possible.

In the first situation, the rights of future applicants may be prejudiced by the administrative failures associated with the previous grants (as occurred in *Gallo and Williams*). In the second situation, by a future act the conversion to water allocations of water licences creates substantial tradeable allocations that may only be altered with potential payment of compensation. In many cases these allocations may well be based on previously deficient licence decisions.

Therefore, I consider that the department's conversion of particular water licences to water allocations must be accompanied by a de novo consideration of whether the allocation advances the sustainable management and efficient use of water.

In the proposed report provided to the department for comment, I proposed to form an opinion about the consideration of the efficiency of water allocation in the Burnett Basin before allocating certain further water entitlements.

Department's response – proposed opinion 3

The Director-General advised:

It is not accepted that the Department has any obligation to demonstrate that the holders of water licences in the Burnett Basin (or any other part of Queensland) are “making the most efficient use of that water”.

The Government will consider making further amendments to the Water Act to make this issue perfectly clear.

The level of efficiency that is achieved will depend on a number of factors including: commodity prices, cost of production, the financial and personal circumstances of individual water users, water availability and demand factors, seasonal conditions, business development plans of the landholder, uptake of technologies, skills and information available to water users, the age and condition of existing water infrastructure, etc. It is not realistic to suggest that water efficiency outcomes can be achieved by public officials' [sic] making administrative decisions about an individual's existing water entitlement based on that official's perception of what is or isn't efficient. Instead, the approach that has been adopted in achieving the objective of the Act relating to the efficient use of water has been to introduce water markets. There is ample evidence that placing a value on any commodity or resource (eg through establishing a market) is the most effective way to change practices and facilitate more productive and efficient use of that commodity or resource. In this sense, efficiency is derived from the water catchment as a whole, not aggregated as a 'property-by-property' assessment from a public servant.

I am concerned by the statement that 'It is not realistic to suggest that water efficiency outcomes can be achieved by public officials' [sic] making administrative decisions about an individual's existing water entitlement based on that official's perception of what is or isn't efficient'. The department has an obligation to consider water licence applications in a way that advances the efficient use of water by virtue of s.10(1) and s.12 of the Water Act, as explained in this report. It has had this obligation since the enactment of the Water Act in 2000. In my view, the department's contention is akin to an admission that the department is unable to properly administer the legislative scheme of the Water Act.

Further, in the case of the Burnett Basin WRP, the department has an obligation to consider 'the availability of an alternative water supply including the more efficient use of water already available'.

Opinion 3

There is no evidence that the water licences in the Burnett Basin have been allocated in a way that advances the efficient use of that water because the decision-makers that were required to consider s.26 of the Burnett Basin WRP, failed to consider 'the availability of an alternative water supply for the purpose including the more efficient use of water already available'.

In the proposed report provided to the department for comment, I proposed to make a recommendation about the consideration of the efficiency of water allocation in the Burnett Basin before allocating certain further water entitlements.

Department's response – proposed recommendation 1

The Director-General advised:

The premise on which this recommendation is based is not accepted.

The Water Resource Plan (Burnett) 2002 is currently being reviewed, with a new draft Plan currently undergoing public consultation.

The revised draft plan includes strategies that ensure water entitlements, be they converted from existing water licences or new entitlements, are consistent with the purpose of Chapter 2 of the Water Act. The primary manner in which this will occur is through the introduction of further tradeable water allocations, primarily in the Burnett Coastal Groundwater management area.

The Department does not accept the premise that efficiency is a prerequisite to the introduction of trading. Rather, the introduction of trading is a key strategy to deliver efficient use of water at a catchment scale.

...

The Executive Director ... made it very clear that the current Government had a strong focus on the widespread introduction of water trading and that increasing tradability was a key objective associated with the current Government's review of the Water Act.

My recommendation does not interfere with the intention to convert water licences to water allocations to allow water trading. I note that the revised draft Burnett Basin WRP 'includes strategies that ensure water entitlements, be they converted from existing water licences or new entitlements, are consistent with the purpose of Chapter 2 of the Water Act'.

This report has found that in the past, the allocation of s.206 water licences has not been done in a way that advances the efficient use of water. In addition, similar to the Gallo and Williams decision, there are significant doubts about the fairness of the allocation of water between consumptive users. There are also significant doubts about whether water has been sustainably allocated between consumptive uses and the environment. The department refers to water licences being 'converted' to tradeable water entitlements. This term appears to connote a formulaic change based on the water licence entitlement, rather than a de novo consideration about whether that entitlement will advance the efficient use of water. In the context of the report's findings, this is concerning. Any creation of a new water entitlement should be accompanied by a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water. This could be achieved on a whole-of-catchment basis during the process of amendment of the WRP.

Recommendation 1

For s.206 water licences and s.206 water licence applications in the Burnett Basin to which the Burnett Basin Water Resource Plan applies:

- (a) any conversion to a new water entitlement or
- (b) any consideration of water licence applications in circumstances where the water resource is over-allocated

should be accompanied by a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water.

5.4 Summary

This investigation considered whether the maladministration evident in the water licence decision-making process identified in the assessment of water licences in the Barron is a systemic issue across Queensland. It found that between 2005 and 2010, only three other WRPs required a mandatory consideration of efficiency of water use. Of those three, investigators found that in the Burnett Basin, s.206 water licence applications have been decided without the mandatory consideration of efficiency of water use required by s.26 of the Burnett Basin WRP. I have formed an opinion and made a recommendation aimed at improving the administration of water licences in the Burnett Basin.

Chapter 6: Methodology - general file review sample

6.1 Introduction

The second primary object of this investigation was to determine whether the department’s system for the issuing of water licences advances the efficient use and fair allocation of water as required by the Water Act. This object was achieved through undertaking a general file review of 189 s.206 water licence decisions.

6.2 Sample

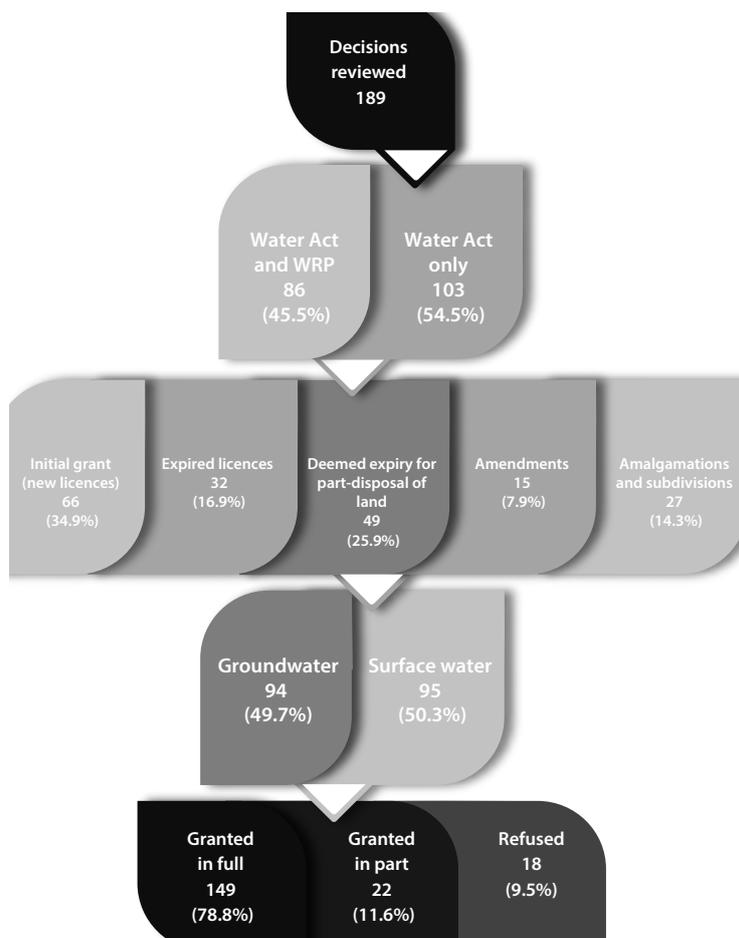
The investigation drew a sample of 240 s.206 water licence decisions between 2005 and 2010. For this purpose, the department generated a list of new licences to take water and a list of amended licences to take water.

Investigators selected the sample by pre-screening the entries in those lists on the department’s electronic records system. The general file review sample included water licence decisions across Queensland, in a wide variety of geographical areas. The number of decisions examined in each area was selected as a proportion of the total number of decisions made in that area in the period 2005 to 2010.

Of the 240 decisions selected, investigators reviewed 211 decisions. Twenty-two of the decisions reviewed were excluded from the sample as either having insufficient information available to review the decision, or the full review of the decision indicated that it was not in fact a s.206 water licence application decision. Therefore, the general file review comprised 189 decisions on applications under s.206 of the Water Act.

Figure 4 summarises the characteristics of the general file review sample.¹³¹

Figure 4: Characteristics of general file review sample



¹³¹ Due to the effects of rounding, the percentages expressed in Chapters 6 and 7 are a guide only and do not in all relevant cases combine to total 100%.

The general file review examined a balance between water licence decisions to be made solely under the Water Act and water licence decisions in which a WRP also applied. The breakdown is as follows:

- 103 decisions (54.5%) – consideration of Water Act only
- 86 decisions (45.5%) – consideration of Water Act and WRP.

The general file review examined decisions made in 19 regional departmental offices, including:

- Ayr – 29 (15.3%)
- Toowoomba – 19 (10.1%)
- Mareeba – 18 (9.5%)
- Rockhampton – 16 (8.5%)
- Bundaberg – 14 (7.4%)
- Warwick – 13 (6.9%)
- Woolloongabba – 13 (6.9%)
- Mackay – 12 (6.3%)
- Gympie – 10 (5.3%)
- Goondiwindi – 9 (4.8%)
- Longreach – 9 (4.8%)
- South Johnstone – 8 (4.2%)
- Gatton – 5 (2.6%)
- Emerald – 5 (2.6%)
- Mundubbera – 4 (2.1%)
- Coorparoo – 2 (1.1%)
- St George – 1 (0.5%)
- Cloncurry – 1 (0.5%)
- Roma – 1 (0.5%).

The general file review sample of 189 decisions was made up of decisions where licences had not existed previously, and also decisions where a licence had existed previously, including:

- amendments of existing licences under s.216 of the Water Act
- applications where a licence existed previously but it had expired sometime ago¹³²
- applications where the previous licence was deemed to expire following part-disposal of land (s.229 of the Water Act - this deeming provision was removed in 2011)¹³³
- applications for amalgamation and subdivision of licences (ss.224 and 225 of the Water Act).

Of the 189 decisions:

- 66 (34.9%) were for initial grants of water licences (i.e. no licence had existed previously)
- 15 (7.9%) were for amendments of water licences
- 49 (25.9%) were consequent upon deemed expiry for part-disposal of land
- 32 (16.9%) were for licences where a licence had existed previously
- 27 (14.3%) were for amalgamations or subdivisions.

The general file review sample of 189 decisions comprised:

- 94 decisions about groundwater
- 95 decisions about surface water.

The majority of s.206 water licence applications were granted in full. Specifically, 78.8% (149) of the applications were granted in full, 11.6% (22) were granted in part and 9.5% (18) were refused.

¹³² Compare with s.221 of the Water Act relating to reinstatements of recently expired licences (see Chapter 3).

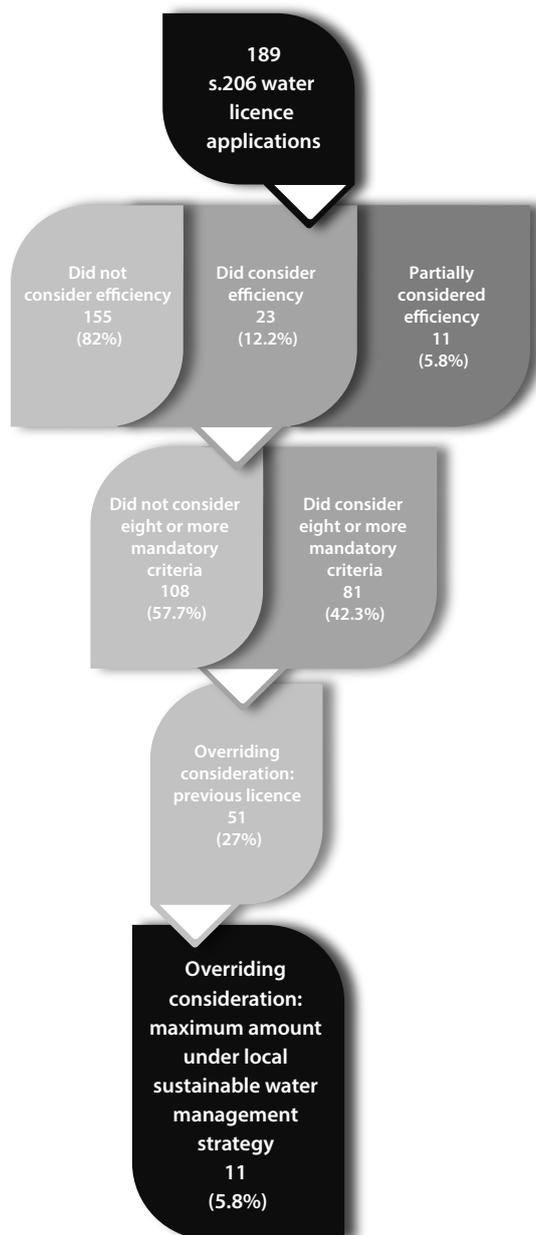
¹³³ By the *Water and Other Legislation Amendment Act 2011*.

Chapter 7: Findings - Failure to consider efficient use of water and s.210(1) criteria

7.1 Introduction

As mentioned, investigators conducted a general file review of 189 s.206 water licence applications from across Queensland to determine the extent to which decision-making advanced the purpose of Chapter 2 of the Water Act, through the consideration of the efficient use of water and/or the proper application of the mandatory criteria in s.210(1) of the Water Act. Figure 5 summarises the findings of the general file review.

Figure 5: Findings of the general file review



7.1.1 Efficiency of water use

In deciding the relevant water licence applications, 82% (155) of the general file review decisions did not consider the efficiency of water use. Significant lack of attention was paid to efficiency of use in applications where there had been a deemed expiry for part-disposal of land – of these applications, 89.8% did not consider efficiency of use. There was also a significant lack of consideration of efficiency of water use in applications where there had previously been a licence that had expired – of these applications, 84.4% did not consider

efficiency of use. Applications for subdivision or amalgamation of water licences also showed a significant lack of consideration of efficiency of use – 85.2% did not consider efficiency of use. There was slightly better demonstration of consideration of efficiency of use in applications for initial water licences – significantly though, 72.7% did not consider efficiency of use.

7.1.2 Overriding considerations

As mentioned, s.210(1) contains nine mandatory criteria that must be considered in deciding s.206 water licence applications. The investigation considered how often those nine criteria were properly considered. Only 2.6% of the sample considered all nine of the criteria in s.210(1)(a) to s.210(1)(i) of the Water Act.

However, 42.3% of the sample considered eight or more of the mandatory criteria. Poorer performance was noted in relation to groundwater applications – with just 39.4% of decisions considering eight or more mandatory criteria.

Further, the investigation found that 27% of decisions were driven by an overriding consideration to grant the licence for the same entitlement as had been previously granted, but had expired. Also, 10.6% of groundwater decisions were determined by a simple calculation of the ‘maximum entitlement’ expressed in a local sustainable water management strategy for the allocation of groundwater. In other words, these decisions showed a lack of consideration of existing water entitlements, information about the effects on natural ecosystems, information about the effects on the physical integrity of watercourses, lakes, springs or aquifers, and/or the public interest.

7.1.3 Deemed expiry, expiry, subdivision, amalgamation and amendment applications

Applications where water licences had existed sometime previously were granted much more readily than applications for an initial water licence. Specifically, 81.3% of applications involving licences that had existed sometime previously were granted in full. In contrast, only 66.7% of initial water licence applications (namely, those that did not involve a previously existing licence) were granted in full.

7.2 Proper consideration of efficient use of water

The Water Act in s.10(3) explains what ‘efficient use of water’ means. There are practical considerations that decision-makers can, and should, take into account. At interview on 17 October 2013, the Executive Director explained that the previous government that introduced the Water Act believed that conversion to tradeable water allocations should ideally take place when water licence holders are making efficient use of the water allocated to them.¹³⁴

The department’s own training material defines efficiency as:

What is “water use efficiency”?

- Making water resources go further
- Reducing demand
- Effective design and management
- Increasing productivity per ML
- Increasing profitability per ML.¹³⁵

The training program material then goes on to identify water efficiency considerations for irrigation in the rural sector, including dealing with evaporation and seepage losses and the efficient use of equipment and practices to reduce over-watering of crops.

In summary, efficient use of water refers to organising water consuming activities to ensure maximum benefit from the least amount of water.

However, there is no work practice guidance available to departmental officers about how to make s.206 water licence decisions in a way that advances the efficient use of water.

¹³⁴ This was based on the Executive Director’s understanding of the views of the former Minister who introduced the *Water Bill 2000* (Qld).

¹³⁵ Introductory Level Training, Topic 15: Water Use Efficiency.

Having regard to the above, investigators looked for evidence of the consideration of these types of matters. For example, in the area of crop irrigation, one would expect there to be evidence of the consideration of the area actually required to be irrigated, the method of irrigation, whether the irrigation is necessary and the consideration of alternative sources of water for the requested purpose. The review found a general absence of evidence of the consideration of such factors.

7.3 Mandatory s.210(1) criteria

As mentioned, there are nine mandatory criteria¹³⁶ that must be considered in deciding a s.206 water licence application.

Under s.210(1)(a) to s.210(1)(c), the decision-maker must consider the application form (which is an approved form). The decision-maker must also consider the additional information given in relation to the application, which may be as a result of a request by the department to the applicant under s.207(1) of the Water Act. If the application has been published under s.208 of the Water Act, the decision-maker must consider all properly made submissions. The decision-maker must also consider the provisions of relevant WRPs and ROPs. These are relatively clear considerations of an application.

Greater uncertainty exists as to what constitutes proper consideration of s.210(1)(d) of the Water Act. Section 210(1)(d) requires the decision-maker to consider existing water entitlements and authorities; however, it does not provide any guidance as to how they are to be considered and for what purpose. The s.10 object of Chapter 2 of the Water Act suggests that the purpose of that consideration is to determine the level of surrounding water allocation (e.g. by volume), the basis upon which it is allocated (e.g. pumping or water harvesting) and what water resource it is allocated from (e.g. a river or aquifer). Section 210(1)(d) is silent as to the geographical area over which to consider existing water entitlements and authorities. It may be appropriate to consider existing entitlements and authorities that draw from the same water resources the applicant has access to. For example, if an applicant has access to a river and an aquifer, the decision-maker might be required to consider existing entitlements and authorities that draw from both that river and aquifer.

There is also some uncertainty as to what constitutes proper consideration of ss.210(1)(e) and 210(1)(f) of the Water Act. Particularly, the requirement is to consider 'any information' about the effects on natural ecosystems and the integrity of the water resource. One questionnaire respondent suggested that the extent of enquiry into these matters is, in their view, a risk management decision. Another questionnaire respondent pointed out that the effects on natural ecosystems and the integrity of the water resource can vary significantly over short geographical areas, and in some areas, little information exists for consideration of these criteria. I understand the motivation for these two questionnaire responses is based on a lack of available information to assess the impact of the application. However, in my view, there are certain minimum enquiries that should be undertaken to discharge the decision-maker's responsibility to consider the ss.210(1)(e) and 210(1)(f) criteria. Information about the impacts of the grant that the decision-maker could obtain and consider include existing departmental records, further information from the applicant, and/or further enquiry or a site visit.

Sections 210(1)(g) and 210(1)(h) require consideration of local sustainable water management strategies. These are non-statutory documents. Also, the development of these documents is inconsistent and the existence of many of these documents is not overt (see Chapter 8).

Section 210(1)(i) requires consideration of the public interest. However, there is no guidance as to what the consideration of the public interest requires.

The investigation found the mandatory s.210(1) criteria most lacking in consideration by decision-makers were the effects on natural ecosystems, the effects on the integrity of water resources, and the public interest.

¹³⁶ As mentioned, a WRP may add others.

7.4 Examples of failure to consider efficiency of use and mandatory s.210(1) criteria

The following sections give examples of decisions that failed to consider the efficient use of water and/or failed to consider one or more of the mandatory s.210(1) criteria. For each example, I have identified the specific considerations that I believe were absent from the decision.

7.4.1 Granting the maximum amount of water under the relevant local sustainable water management strategy

Eleven (5.8%) decisions in the general file review sample¹³⁷ granted the maximum amount of water that the relevant local sustainable water management strategy would allow, without considering whether the applicant actually only reasonably required a lesser amount. I consider these decisions failed to advance the efficient use of water because they failed to assess what amount of water the applicant actually required and whether there was an alternative source of water available.

Ten of these decisions were applications for groundwater licences. This was also the decision-making approach adopted in the groundwater licence decision-making examined in *Gallo and Williams*. In *Gallo and Williams* a departmental officer gave evidence that, between 2002 and 2006, applications for groundwater licences were each granted the same 'entitlement' per hectare of land, if the applicant could demonstrate that their pump was capable of pumping that much water.

The eleven decisions also failed to address one or more of the mandatory s.210 criteria being, in order of prevalence, failure to consider:

- the public interest - 9 (81.8%)
- the effects on natural ecosystems - 7 (63.6%)
- the effects on the integrity of the water resource - 6 (54.5%)
- existing water entitlements and authorities - 6 (54.5%)
- submissions - 1 (of the 2 that received submissions, 50%).

Case Study 1

An applicant applied for an **initial grant** of an annual entitlement of 500 ML for purposes of an intensive stock feedlot for 10,000 head. The department undertook an assessment of the applicant's need for the proposed water use by receiving advice from the Department of Primary Industries that a feedlot of 10,000 head would reasonably require 240 ML per year. The investigation report stated that the 'assessment of this application and the granting of a water licence is in line with legislation, departmental policies and management guidelines aimed at the sustainable management of underground water resources in this area'. However, the report immediately went on to determine the entitlement based on the formula contained in the non-statutory groundwater guidelines for the area. Particularly, those guidelines¹³⁸ stated that the maximum entitlement will be the lesser of:

- the volume applied for
- annual volume equivalent to 0.1 ML per hectare
- 150 ML per annum
- annual volume demonstrated and determined through the provision of pump testing data.

The department calculated that the volume of 123 ML, based on pump testing data, was the lesser of the four volumes. Neither the investigation report nor the information notice considered that the entitlement may be less than the 'maximum entitlement'. The licence was partially granted for 123 ML.

¹³⁷ Noted in Toowoomba, Ayr and Mareeba.

¹³⁸ In this report, a 'local sustainable water management strategy'.

I consider the decision failed to properly consider the mandatory s.210(1) criteria, as it instead allocated the water based on the formula contained in the non-statutory guidelines (see Chapter 8, about the deficiencies in these 'local sustainable water management strategies'). The decision also failed to properly consider the existing water entitlements and authorities (s.210(1)(d)) because the investigation report identified some existing entitlements but did not weigh that information in the decision. The effects on the natural ecosystems (s.210(1)(e)) and the effects on the integrity of the water resource (s.210(1)(f)) were also not considered. The only comments recorded on these issues were 'No known information regarding the effects of taking or interfering with, water on natural ecosystems' and 'No known information regarding the effects of taking or interfering with, water on physical integrity of watercourses, lakes, springs or aquifers. There are zero monitoring bores within 5 km which are supplied by the [aquifer]'. Investigators noted that similar precedent sentences appeared on many other investigation reports produced by the same departmental office. If it is true that there is no known information about these matters for most of the area surrounding that office, then it is concerning that the department has not moved to gain that knowledge.

In any event, I consider that the non-statutory local sustainable water management strategy was an overriding consideration. There was also no evidence that the public interest (s.210(1)(i)) was considered.

Case Study 2

An applicant wanted to increase their licence from 120 ML to 292 ML 'because of drought – deregulation in dairy industry – low prices etc. causing us to reassess options and full entitlement'. The decision centred around the calculation of the maximum entitlement by multiplying the bore pump output (referred to as 'supply') by 2,000 hours. Throughout the investigation report, the maximum entitlement was assumed to be the only entitlement. The licence was issued for 141 ML.

The applicant requested an internal review of the decision, saying the calculation was not correct and according to the local sustainable water management strategy, they were entitled to a greater amount.

It is clear from the internal review report that the licence was not considered in accordance with the legislative scheme. Particularly, the internal review report noted that the relevant local sustainable water management strategy allowed a maximum entitlement of a certain number of megalitres per hectare. It then stated: 'This maximum entitlement is available when the applicant can either a) prove a supply capable of producing the maximum entitlement and b) have a requirement for the maximum volume'. The report then noted that the applicant had used only an average of 30 ML per year in the last five water years. The report then states:

If the applicant cannot provide justification for a maximum entitlement through either proving supply or a usage requirement, [the] entitlement policy ... then defaults to the use of a formula that provides an average irrigation usage of 2000 hours of pumping a year.

...

The use of this entitlement policy has been consistent for over 20 years in the Toowoomba area.

The internal reviewer then proceeded to calculate and grant a greater entitlement of 162 ML, based on a higher rate of pump supply. The reviewer did not consider whether the applicant needed all that water, or whether some of that water might be more efficiently used elsewhere in the catchment. Further, the original investigation report noted that the water level of the aquifer measured at a nearby monitoring bore had dropped 14 metres since 1976. The reviewer did not weigh that information in making their decision.

The 'entitlement policy'¹³⁹ pre-dated the commencement of the Water Act in 2000. The internal review report demonstrates that s.206 water licence applications in the Toowoomba area have been decided in a way that does not have proper regard to the requirements of the Water Act, including the requirement

¹³⁹ In this report, referred to as a 'local sustainable water management strategy'.

to make decisions in a way that is likely to advance the efficient use of water.

Particularly, the application did not receive a proper consideration of the efficiency of the proposed water use, because it did not consider how much water the applicant actually needed. The decision also failed to properly consider the existing water entitlements and authorities (s.210(1)(d)) because the investigation report identified some existing entitlements but did not weigh that information in the decision. The effects on the natural ecosystems (s.210(1)(e)) and the effects on the integrity of the water resource (s.210(1)(f)) were not properly considered, as the local sustainable water management strategy was an overriding consideration. There was also no evidence that the public interest (s.210(1)(i)) was considered.

It appears that a significant factor that contributed to the above failings is the poor quality local sustainable water management strategies about groundwater management, which often express entitlements in a formulaic fashion without linking decision-making to the requirements in s.210(1) of the Water Act (discussed further in section 8.3.1 of this report).

In the proposed report provided to the department for comment, I proposed to form an opinion about the practice of granting the maximum water entitlement the relevant local sustainable water management strategy will allow without considering the s.210(1) criteria.

Department's response – proposed opinion 4

The Director-General advised:

The premise on which this opinion is based is not accepted.

Just because a decision is made to grant a licence with an annual volume that equates to the maximum volume of water that can reasonably be expected to be available from a source (e.g. based on bore pump test information), doesn't mean that the decision is unreasonable or not in accordance with the requirements of section 210(1) of the Water Act.

It is reasonable to accept that decision makers would undertake a less intensive investigation if, based on their professional knowledge and local experience, they were of a view that the application was consistent with good practice for the local area where there is low to moderate levels of existing water development. A more intensive assessment in relation to the criteria in section 210 of the Water Act clearly would be appropriate in circumstances where the level of take proposed is higher than what such knowledge and local experience would suggest is sustainable or if there is significant existing water development.

To stress the point that I am making, it is important to understand that delegated decision makers usually will have local knowledge as to the typical (efficient) water requirements for proposed applications (e.g. irrigation needs for crops commonly grown in an area) and will have an understanding of matters such as the volume of water that can be typically sourced from a particular local stream or aquifer. Where this information is documented in a "local management strategy", I submit that it is more that [sic] reasonable for that information to be used as part of the consideration of section 210(1) criteria. In the case studies that you have highlighted, the primary failing would seem to be one of poor documentation rather than a clear case of unlawful decision making.

The department contends that where this investigation found water licences were granted for the maximum water entitlement the relevant local sustainable water management strategy would allow, it merely appeared that there had been inadequate consideration of relevant matters because of poor documentation of the decision-making process.

However, the department has not offered any evidence to support that contention. By contrast, the evidence in both the Gallo and Williams decision and this investigation indicates that decision-makers have been allocating water licences on the basis of a water allocation formula contained in the local sustainable water management strategy rather than on the basis required by the Water Act. The Gallo and Williams decision found there was a formulaic entitlement contained in a local sustainable water management strategy that was applied without exception for a lengthy period. This investigation found this practice extends beyond Barron. Departmental documents relating to Case Study 2 contain statements that clearly demonstrate this.

In any event, even the failure to properly document the basis of the decision is of significant concern. The department is required by law to document its decision-making considerations in s.211(3) information notices.

Opinion 4

The practice of granting the maximum water entitlement the relevant local sustainable water management strategy will allow is unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act because the granting of licences on this basis does not demonstrate the proper consideration of the criteria in s.210(1) of the Water Act and consideration of whether the proposed decision advances the sustainable management and efficient use of water under ss.10 and 12 of the Water Act.

7.4.2 Granting of not more than previously granted

Another example of the failure to make decisions in a way that advances the efficient use of water is the practice, where a licence was previously held but expired sometime previously, of granting an amount of water purely on the basis that the amount requested was not more than the amount of the previous entitlement. Twenty-seven per cent (51) of the general file review decisions were made in this way. Such decision-making does not advance the efficient use of water primarily as it does not consider whether the applicant only reasonably required a lesser amount than the previous entitlement. It also does not consider whether there is an alternative source of water available. Further, it does not consider whether factors have changed since the entitlement was last held, including the use of the land (e.g. crop type), the yield of the water resource (which may have declined), and the surrounding entitlements (e.g. are there other entitlements that did not exist when the entitlement was last held?). It is also of particular concern when the previous grants have been made under the former legislative regime.

This investigation found that the predominant practice was to regard s.206 water licence applications in which there had been a pre-existing licence as a 'licence replacement'.¹⁴⁰ To be clear, these were s.206 water licence applications and not water licence reinstatements under s.221 of the Water Act. In his advice Mr Fynes-Clinton confirmed that s.206 water licence decisions, where licences had previously existed, were required to consider the s.210(1) criteria, although information about what has occurred in the past will also be relevant to the decision. The Water Act does not use the terminology 'replacement'. Decisions that referred to the application as a licence replacement were completed without any meaningful consideration of the s.210(1) criteria and particularly failed to consider, in order of prevalence:

- the public interest – 24 (47.1%)
- existing entitlements and authorities – 14 (27.5%)
- effects on natural ecosystems – 12 (23.5%)
- effects on the integrity of the water resource – 12 (23.5%).

¹⁴⁰ For example, a decision made in the Woolloongabba Office, dated 8 November 2010.

Case Study 3

A licence expired upon part-disposal of land and was reapplied for about one year later. The investigation report noted that because the application was received outside the timeframe for a simple reinstatement of the licence, the application was required to be considered as a new water licence application.

The department received two submissions to the effect that the licence should not be granted as the irrigation was depleting the water resource and that granting licences on the basis of the land area was not promoting the efficient use of water.

As part of the consideration of the submissions, the investigating officer stated that the licence that previously existed was originally issued in 1991. The investigating officer stated: 'Therefore this water licence was incorporated in the allocations of the Water Resource Plan and the reinstatement of this licence is not increasing the allocations from [the relevant creek]'. The investigating officer confirmed the previously existing licence had remained current from its issue in 1991 until its lapse in 2006.

In other words, the investigating officer assumed that as the volume of the previously existing licence had been included in the WRP catchment volume, there was no difficulty with granting the same volume back again. This approach does not take into account relevant matters, including changes in surrounding water entitlements since the date of the last grant, and changes in the water resource yield, between incorporation in the WRP allocations and the application.

As mentioned, the original licence was issued under the previous Water Resources Act. Consideration of water licence applications under that previous Act did not require consideration of the efficient use of water. Neither the department's investigating officer nor the decision-maker appreciated that the previous and now proposed entitlement had never received a de novo consideration of whether the proposed entitlement was likely to advance the efficient use of water in accordance with the Water Act.

The investigation report noted that the water level in the watercourse had dropped to below the 0.5 metre mark several times. The decision-maker granted the entire entitlement back to the applicant as it was before expiry, with a condition that water must not be taken when the level of the watercourse drops below 0.5 metres.

This investigation found the decision did not consider efficiency of water use, as it did not consider how much water the applicant actually reasonably required to carry out their irrigation on the remaining land, having regard to the amount of crop land lost in the disposal, the remaining crop type and irrigation methods.

I recognise that the imposition of the condition on the licence showed some concern for the effects on the integrity of a watercourse. In this case, this investigation found that some consideration had been given to all of the mandatory s.210 criteria. The department's investigating officer appears to have confused the objections of private submitters with the public interest, by simply concluding that the public interest has been satisfied by consideration of the submissions in response to the public notification of the application. This may be as a result of the absence of a work practice about how to consider the public interest (see section 7.4.6 of this report). However, the granting back of the entire entitlement despite the disposal of land did not properly weigh up the information gathered under the s.210(1) criteria and properly apply that information to make a decision that was likely to advance the sustainable management and efficient use of water.

In summary, even in cases where a licence has existed previously, decision-makers must consider the amount of water that the applicant reasonably requires to carry out their activities efficiently. Decision-makers must also make certain minimum enquiries in relation to each of the s.210 criteria. It is not appropriate to dispense with enquiries on the basis that the application is for a 'licence replacement'. As I have stated above, this practice is particularly concerning where the original grant was made under previous legislation.

In the proposed report provided to the department for comment, I proposed to form an opinion about the practice of considering only that the applicant is not applying to take more water than previously granted.

Department's response – proposed opinion 5

The Director-General advised:

The premise on which this opinion is based is not accepted.

Just because a decision is made to grant a licence with the volume applied for doesn't mean that the decision is unreasonable or not in accordance with the requirements of section 210(1) of the Water Act.

It is reasonable to accept that decision makers would undertake a less intensive investigation in circumstances where the applicant is not seeking access to more water, but is simply looking to use the water to which they are already entitled for another purpose. A more intensive assessment in relation to the criteria in Section 210 of the Water Act clearly would be appropriate in most circumstances where the applicant is seeking to take more water than they have previously been entitled to take.

In those instances where there has been a pre-existing water entitlement, it is entirely reasonable that the delegated officer, in making their decision, will draw on his or her personal knowledge of the effects of the use of that water entitlement on the various matters to be considered under section 210(1).

The department contends that where an applicant 'is simply looking to use the water to which they are already entitled for another purpose', a less intensive investigation is reasonable. However, there is no basis to dispense with the consideration of the requirements of s.10, s.12 and s.210 of the Water Act. These sections of the Water Act make clear to me that a water licence 'entitlement' is decided after, among other things, considering the purpose to which the water is to be used. This is because allocation of water should be done in a way that advances the efficient use of water. The entitlement is therefore subject to change if the purpose changes. Departmental documents relevant to Case Study 3 clearly demonstrate that the licence was granted on the inappropriate assumption that since the licence had been granted previously, it was appropriate to grant it back.

Further, whatever knowledge and information the delegated officer draws on, I reiterate that the department is required by law to document its decision-making considerations in s.211(3) information notices.

Opinion 5

The practice of considering only that the applicant is not applying to take more water than previously granted is unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act because the granting of licences on this basis does not properly consider the criteria in s.210(1) of the Water Act and whether the proposed decision advances the sustainable management and efficient use of water under ss.10 and 12 of the Water Act.

7.4.3 Granting back expired licences that put stress on the water resource

Seven of the decisions discussed in section 7.4.2 of this report ultimately granted back a previously existing entitlement despite the fact that the water resource was under significant stress. It appears that the licences were issued because the department considered there was a historical entitlement. These decisions did not advance the efficient use of water, because they did not consider whether the applicant actually required a lesser amount to carry out their activities using efficient practices, nor did they consider whether another water source was available to meet the applicant's needs.

These decisions also failed to properly consider some s.210(1) criteria. Particularly, in order of prevalence:

- the public interest – 4 (57.1%)
- existing entitlements and authorities – 1 (14.3%)

- effects on natural ecosystems – 1 (14.3%)
- effects on integrity of water resource – 1 (14.3%)
- policies for the catchment – 1 (14.3%).

Three of these cases did consider all the mandatory criteria but failed to weigh the considerations and make the decision that advanced the sustainable management and efficient use of water, as those decisions knowingly put the water resource into stress without proper justification.

While 'historical entitlement' may be a relevant consideration for a s.206 water licence application, it cannot be relied on to the exclusion of the information gathered under the s.210(1) criteria to make a decision that does not advance the sustainable management and efficient use of water.

Case Study 4

A previous licence was for irrigation (and domestic supply and stockwatering) of 8.1 ha. The licence expired in 2000 due to part-disposal of the land. The application was received in 2002 and was decided in 2007, seven years after it expired.

The investigation report calculated the amount of water available to allocate to the applicant, having regard to the upstream and downstream water licences and making provision for some environmental flow in the catchment. The investigation report considered the amount of water available to allocate to the applicant was about half the amount requested.

Prior to the latest expiry, the licence had last been granted in 1991. Neither the department's investigating officer nor the decision-maker appreciated that the entitlement had never been considered in accordance with the criteria in the Water Act, including whether the entitlement was likely to advance the efficient use of water.

The application was granted for 8 ha, just 0.1 ha short of the previous entitlement. The details and effect of the part-disposal of land was not considered. This information was simply absent from the investigation report. Instead, what was considered was that:

The application does not seek to **gain any further benefit than that which was authorised** under [the previous licence] and the applicant would have a reasonable expectation that the entitlement to [sic] be fully reinstated. The application could be approved on the basis that approval of the application will not impact upon existing water entitlements beyond the impact that existed when [the previous water licence] existed. [emphasis added]

Although the investigation report appeared to indicate that the water licence was granted for about twice the amount of water that was actually available, the Executive Director explained at interview on 17 October 2013 that, in reality, there would be some flow in the creek. Further, he said the grant was made with the acknowledgement that there would be a lower reliability of supply than that which had previously been enjoyed. The Executive Director confirmed that it was the view of the decision-maker that if the applicant had not previously held a water entitlement, the water licence would have been granted with a lower entitlement.

I consider that the overriding consideration in this decision was that the applicant was not going to receive any more than they were previously entitled to. I consider the decision-maker failed to properly weigh the s.210(1) criteria and arrive at a decision that advanced the sustainable management and efficient use of water. Particularly, the decision granted to the applicant an entitlement to more water than was sustainably available in the catchment.

I understand that in the situation of a past entitlement, the decision-maker may feel under pressure to grant a licence in the same terms as previously existed, as the licence holder may feel that they are entitled to it. However, under the Water Act water licence decision-making must be undertaken in a way that advances the sustainable management and efficient use of water and in my view it is not appropriate to apply the previous entitlement as an overriding consideration.

In the proposed report provided to the department for comment, I proposed to form an opinion about the

practice of granting, through a s.206 water licence application, water licences in the same terms as water licences that have previously expired especially when the grant has the effect of putting stress on the relevant water resource.

Department's response – proposed opinion 6

The Director-General advised:

The premise on which this opinion is based is not accepted.

Just because a decision is made to grant a licence with the volume and other conditions being the same as those associated with an expired pre-existing water licence that the applicant held doesn't mean that the decision is unreasonable or not in accordance with the requirements of section 210(1) of the Water Act.

It is reasonable to accept that decision makers would undertake a less intensive investigation in circumstances where the applicant is simply seeking to reinstate a water licence that is the same as the expired licence that they have previously held and used. It is acknowledged that a more intensive assessment in relation to the criteria in Section 210 of the Water Act clearly would be appropriate in most circumstances where the applicant is seeking to take more water than they have previously been entitled to take.

It is also apparent that the investigators have confused over allocation with a circumstance where the water user can expect to have a low reliability of supply. The term "over allocation" applies when the level of take of water is, on a long-term basis, more than can be sustained without adverse impacts on other water users, including the environment. This is as distinct from the scenario described in case study 4 of the report, where the investigating officer decided to reinstate a pre-existing entitlement in a circumstance where the reliability of supply would be limited due to the small catchment that existed upstream of the applicant's proposed pump site and other upstream existing use in part of the catchment. In this case, the decision maker decided to grant the application recognising that the applicant had previously held an entitlement and was familiar with (and presumably accepting of) the low reliability that he or she could expect under that licence. Importantly, the decision maker did not consider that there were adverse implications of the decision for any other water user, including the environment.

(The paraphrasing of the Executive Director's advice in relation to case study 4 is not consistent with the detailed explanation that he provided to investigators in the recorded interview on 17 October 2013 (refer lines 1839 to 1958).

The department disputes that investigators correctly understood the circumstances of Case Study 4. I now understand that the granting of the application placed stress on the catchment, such that it appeared the application should have been granted for an amount about half of that requested. The full amount was granted simply because the application was for a licence that had previously existed. That was an inappropriate consideration and the decision did not advance the sustainable management and efficient use of water.

Opinion 6

The practice of granting, through a s.206 water licence application, water licences in the same terms as water licences that have previously expired without proper consideration of how the availability and use of water has changed since the applicant's last water licence was granted is unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act. This practice does not demonstrate the proper consideration of the criteria in s.210(1) of the Water Act and consideration of whether the proposed decision advances the sustainable management and efficient use of water under ss.10 and 12 of the Water Act.

7.4.4 Decision-makers fail to obtain relevant information

The general file review indicated that the department's investigating officers and decision-makers were not even making simple enquiries about the efficiency of the proposed water use. For example, applicants frequently did not put the proposed use on the application form and the application was 'investigated' and decided without requiring that information from the applicant. It appears to me that the approved application form requires this information in the interests of advancing sustainable management and efficient use of water. The legislative scheme requires a consideration of the s.210 criteria, and therefore the proposed water use is information that is essential before the application can be decided.

Case Study 5

An applicant applied to amend the purpose on the water licence from 'irrigation, stock and domestic purposes' to 'industrial, stock and domestic purposes'. There was no change proposed to the amount of the entitlement. No information was provided on the application form about the nature of the industrial use intended and no further information was requested by the department. The application was granted.

I considered that the decision did not advance the efficient use of water as it did not consider why the applicant needed the water applied for, let alone whether it was the correct amount required to efficiently carry out their activities.

As to the s.210(1) criteria, s.210(1)(a) requires the decision-maker to consider the application and additional information. The application did not provide the required information and the decision-maker did not request that information as additional information under s.207(1) of the Water Act. The remaining s.210(1) criteria were considered.

In addition, the general file review noted that site inspections were rarely conducted in investigating and deciding water licence applications. It appears to me that a site inspection would often be useful to verify the information on the application form and to gather information about the land use and method of irrigation, the types of crops being grown, and the prevailing hydrology and water use of surrounding licence holders. I suspect that many more applications could benefit from site inspections.

In the proposed report provided to the department for comment, I proposed to form an opinion about not requiring information from the applicant about the proposed water use in considering a s.206 water licence application.

Department's response – proposed opinion 7

The Director-General advised:

Not accepted. The Department does request additional information from the applicant as and when required. In this context, the Department does aim to minimise bureaucratic process by requesting information only when it is critical or relevant to the decision making process.

In this context, I would suggest that just because information was not apparent to the investigators from their review of the files, does not mean that the relevant decision maker did not have the necessary knowledge and information when they made their decision. For example, just because it was not apparent to the investigators that the animals involved in the feedlot application (case study 1) were beef cattle, does not mean that the decision maker did not know that (even if it wasn't documented in the file material). In case study 3, just because the investigators were unable to ascertain the area of land that was disposed of, doesn't mean the decision maker didn't have such knowledge. In case study 5, just because the investigators didn't know what industrial use the applicant had in mind, doesn't mean that the investigating officer didn't have an appreciation of what the applicant intended to use the water for.

From the information provided in your report, it is not apparent that your investigators interviewed the relevant decision makers to ascertain what additional knowledge and information they relied on in making their respective decisions. If no such interviews occurred, it is difficult to accept how such conclusions could reasonably be drawn in each of the documented case studies.

(See also comments below re Opinion 8.)

I agree that if the department is already aware of the applicant's proposed water use, it is unnecessary to request it from the applicant. The implication of the department's response is that the information gathered by the investigation suggests a failure by the department to record (rather than require) information about the proposed water use and not a failure to consider the information. The department did not provide any evidence from any decision-maker to support this assertion. I also reiterate that the department is required by law to document its decision-making considerations in s.211(3) information notices.

Opinion 7

The failure to require and/or record information from the applicant about the proposed water use in considering a s.206 water licence application is unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act. That information is essential for the proper consideration of the criteria in s.210(1) of the Water Act and consideration of whether the proposed decision advances the sustainable management and efficient use of water under ss.10 and 12 of the Water Act.

7.4.5 Inappropriate consideration of submissions

The general file review found that in four out of the 15 (26.7%) decisions that involved submissions, the department's investigating officer and decision-maker did not properly consider the submissions. In one of these decisions, nearby licence holders made submissions that the grant of the licence would adversely affect the amount of water they could obtain. The decision-maker proceeded to grant the licence purely on the basis of the 'entitlement' in the local sustainable water management strategy. (I address the issue of local sustainable water management strategies in Chapter 8.)

In two other decisions, submitters had raised the issue that the applicant did not need the water applied for to efficiently carry out their irrigation activities. The response of both decision-makers was that this was irrelevant. As mentioned, I consider these are relevant considerations in relation to the sustainable management and efficient use of water. In the fourth decision, the six submissions were listed but the contents of them were not discussed in the investigation report or the information notice.

Case Study 6

An original landowner disposed of three of their four lots. Upon sale, the water licence over the four lots was deemed to expire under the Water Act. The original landowner alleged their intention was to sell the three lots as 'dry lots', the implication being that they expected to retain their water licence for the same amount of water. However, the purchaser applied for the full amount of water on the expired licence, namely 120 ML.

The majority of the lengthy report was devoted to considering whether, in the sale of the lots, the original landowner did intend to sell the lots as 'dry lots' and whether the department's advice to the original landowner prior to the sale influenced him in any way.

The original landowner, a sugarcane grower, submitted that the purchaser did not intend to grow sugarcane. The investigation report considered that to be irrelevant. The report did not consider what crop the purchaser intended to grow or the area of the land the purchaser intended to irrigate. Both the original landowner and the purchaser held a tradeable water allocation. The report did not consider how much water, additional to those allocations, the original landowner and the purchaser required to conduct their activities.

After considering the intentions of the parties in the sale, the report considered that 'as neither applicant could prove an exclusive claim to the entitlement', the original 120 ML was simply split according to the percentage of land now owned by each party. The original landowner received 80 ML and the purchaser received 40 ML.

The expired entitlement of 120 ML was originally determined under the previous Water Resources Act, which did not include a requirement to make decisions in a way that advanced the efficient use of water. Neither the department's investigating officer nor the decision-maker appreciated that the 120 ML 'entitlement' had never received a de novo consideration of whether it advanced the efficient use of water under the Water Act.

I consider that the decision did not advance the efficient use of water as it did not consider whether each applicant actually needed the amount of water applied for to efficiently carry out the irrigation of their particular crop and the area of land it was to be carried out upon.

The decision also failed to properly consider the existing entitlements and authorities (s.210(1)(d) of the Water Act), to the extent that it did not consider how the tradeable water allocations owned by the original landowner (60 ML) and the purchaser (90 ML) affected the amount of water each party required to conduct their activities. The decision also failed to properly consider the effects on the natural ecosystem (s.210(1)(e) of the Water Act), the effects on the integrity of the water resource (s.210(1)(f) of the Water Act), the local sustainable water management strategies (ss.210(1)(g) and (h) of the Water Act) and the public interest (s.210(1)(i) of the Water Act), as the decision was made on the basis of an overriding consideration not required by the Water Act, namely the intention of the parties in the sale.

I note that the department's records confirm the department did erroneously advise the original landowner prior to the sale that any purchaser of the land would not be able to obtain a water licence due to the current moratorium. The relevant departmental officers and the original landowner have assumed that this would mean that the original landowner would therefore be 'entitled' to the full 120 ML, despite disposing of three of the original four lots. This is clearly incorrect. Proper administration of the Water Act allows the granting of only the amount each party required to efficiently conduct their activities.

The department has work practice guidance about dealing with submissions, which is under review.¹⁴¹ However, I consider the department should take further action to ensure it properly considers submissions.

¹⁴¹ WM-105 Dealing with submissions on applications for water licences and WM-106 Negotiating with submitters and applicants.

7.4.6 Absence of work practice guidance

The investigation did not identify any work practice available to guide the department's investigating officers and water licence decision-makers as to how to apply the mandatory considerations contained in s.210(1) of the Water Act, the purposes of Chapter 2 of the Water Act (particularly the requirement to advance the efficient use of water) and the provisions of WRPs in making a decision about s.206 water licence applications.¹⁴² Particularly, the department is currently developing a work practice called 'Investigating water licence applications'. However, the department has confirmed it has never been released to investigating officers and decision-makers.¹⁴³ Also, until 2010, the work practice that applied under the former Water Resources Act, called WA-6 Inquiry Process for Licence Applications, was still available to investigating officers and decision-makers (along with others) with the following caveat:

The following work practices were prepared in relation to the operation of the repealed *Water Resources Act 1989*. However their content holds generally for the *Water Act 2000* and they may be read with any changes that are necessary for applicability to the *Water Act 2000*.¹⁴⁴

The decision-making criteria in s.210 of the Water Act differ significantly from those in the former Water Resources Act. The enquiry required under the former Act was limited to determining whether the water was available and sufficient to supply certain parties, including other licensees, and the effect of the grant of the licence on certain parties, including other licensees.¹⁴⁵ The former Act did not have any express objects.¹⁴⁶ Therefore, the focus was not on decisions that should advance the sustainable management and efficient use of water.¹⁴⁷ It is difficult to imagine WA-6 Inquiry Process for Licence Applications being of any use to investigating officers and decision-makers requiring guidance on the decision-making criteria in s.210 of the Water Act. To the contrary, I can imagine that it may have served to confuse investigating officers and decision-makers and lead to water licence decision-making being completed in a way more in line with the former Act, for example, considering whether water was available and sufficient to fulfill the applicant's needs while not adversely affecting other licensees.¹⁴⁸

During the interview with the Executive Director on 17 October 2013, investigators showed him the WA-6 work practice and put it to him that the document was developed under the previous Water Resources Act, yet was available for use during the period under investigation. He stated '[i]t doesn't sound like it would be terribly relevant then ... That surprises me ... Well, that doesn't seem to make a lot of sense, does it?'¹⁴⁹ I agree.

In the proposed report provided to the department for comment, I proposed to form an opinion about the continuing use of WA-6.

142 WA-6 Inquiry Process for Licence Applications was developed to guide decision-making under the previous *Water Resources Act 1989* and Investigating Water Licence Applications is under development and has never been available to investigating officers and decision-makers.

143 'Attachment 1: Response to Ombudsman Request Dated 17 April 2013'; attached to email from department, 1 May 2013.

144 Email from the Executive Director, 18 October 2013.

145 Section 43, Water Resources Act.

146 Water Resources Act.

147 That focus did not begin to emerge until the COAG agreement of 1994.

148 Also, the department's 23 page unfinished initial Water Resource Allocation Planning Barron internal review report states at page 19 that 'The only other relevant comment made was that some of the decision makers for the earlier decisions were long-term departmental employees and did not adapt well to the changes brought about by the repeal of the Water Resources Act, the implementation of the Water Act, and the resulting additional burden of the assessment criteria stated in the water resource plan.'

149 Interview with the Executive Director on 17 October 2013, lines 1343-1350.

Department's response – proposed opinion 8

The Director-General advised:

It is accepted that it was imprudent of the former Department to continue to make this historical document available to decision makers – albeit with the caveats that were explained by my officers, viz:

The work practice (WA-6) was removed from the Department's Insite (internal website) in 2010. Prior to its removal, it and other out-dated work practices were listed on Insite with the following caveat: "The following work practices were prepared in relation to the operation of the repealed Water Resources Act 1989. However their content holds generally for the Water Act 2000 and they may be read with any changes that are necessary for applicability to the Water Act 2000."

However, I find it difficult to accept the proposed opinion given that nothing in the report would suggest that the availability of this historical document in itself led to unreasonable administrative action under section 49(2)(b) of the Ombudsman Act.

The department has confirmed that WA-6 (which related to significantly different criteria in the previous legislation) continued to be electronically available to decision-makers for approximately 10 years. Further, during this time there was an absence of any procedure about the s.210(1) criteria. This evidence alone is sufficient to form the opinion, which concerns the action of continuing to make WA-6 available until 2010.

Opinion 8

The department continuing to make available WA-6 *Inquiry Process for Licence Applications* to s.206 water licence application decision-makers and investigating officers between 2000 and 2010 was unreasonable administrative action under s.49(2)(b) of the Ombudsman Act. The criteria for consideration of s.206 water licence applications are significantly different from the criteria for consideration under the previous Water Resources Act.

A work practice is needed to provide guidance about how legislative provisions should be considered and applied to s.206 water licence applications, including:

- the s.210(1) criteria
- sections 10 and 12 of the Water Act (particularly the requirement to advance the sustainable management and efficient use of water)
- the provisions of WRPs.

As to the s.210(1)(i) 'public interest' criteria, the general file review decisions showed obvious lack of insight as to how to consider 'the public interest'. Forty-seven per cent of the general file review decisions did not properly consider the public interest. Of those, most investigation reports stated the public interest had been considered without stating how and others stated that the public interest had been served by the advertising of the water licence application.

To mitigate the impact of these issues, a work practice should be developed to provide guidance as to how to properly consider s.206 water licence applications, with the underlying perspective of advancing the efficiency of water use.

In the proposed report provided to the department for comment, I proposed to make a recommendation to improve the standard of the administration of s.206 water licence applications through a work practice.

Department's response – proposed recommendation 2

The Director-General advised:

Agree in principle.

The provisions of Part 6 of Chapter 2 of the Water Act, including section 206, are being revised as part of a strategic review of those parts of the Water Act that are administered by the Department of Natural Resources and Mines.

The review is focussing on regulatory simplification, while maintaining transparency and procedural fairness for water entitlement holders.

The future requirement for local sustainable water management strategies and the recommended work practice will be evaluated once the implications of the review for section 206 and related provisions is finalised.

In the meantime, advice has been provided to the Department's water licensing staff on the proper decision making process (refer to Attachment 2).

I understand that my recommendation relates to the provisions of the current Water Act, and that the regulatory framework is likely to change with the proposed new water legislation. Attachment 2 is a one and a half page document titled Water Management Update No. 1 2014. It appears to be an internal staff newsletter. It briefly outlines some anticipated changes in 2014, including:

- *new training programs relating to administrative decision-making*
- *a review of existing work practices*
- *moves towards central endorsement and approval of local water management strategies*
- *moves towards finalisation of long-standing water licence applications not linked to a current moratorium.*

I am pleased that the department has now taken steps towards the improvement of the administration of s.206 water licence applications. However, Attachment 2 does not provide educative information to decision-makers about the consideration of s.206 water licence applications. The material in Attachment 2 is far from sufficient to convince me that the making of proposed recommendation 2 is unnecessary.

Recommendation 2

The Director-General introduce a work practice in relation to s.206 water licence applications that provides direction about:

- (a) how to properly consider the s.210(1) criteria, including the provisions of Water Resource Plans
- (b) how to properly consider whether the decision advances the sustainable management and efficient use of water under ss.10 and 12 of the Water Act
- (c) how to properly consider submissions to s.206 water licence applications
- (d) what enquiries must be undertaken to properly decide a s.206 water licence application.

7.5 Significant failure to consider efficient use of water and s.210(1) considerations

Based on the findings in this chapter, particularly that 82% of the general file review decisions failed to consider the efficient use of water and also that 57.7% failed to consider at least eight of the mandatory s.210(1) criteria, I propose to form the opinion that there has been significant failure to consider s.210(1) criteria and to administer the efficient use of water.

Therefore, I consider the department's conversion of water licences to water allocations should be

accompanied with a de novo consideration of whether the allocation advances the sustainable management and efficient use of water.

In the proposed report provided to the department for comment, I proposed to form an opinion about the standard of water licence decision-making between 2005 and 2010.

Department's response – proposed opinion 9

The Director-General advised:

It is accepted that there are widespread issues with the extent to which administrative decision makers have documented their decision making processes. It is not accepted that it necessarily follows that there has been widespread instances of unlawful administrative action.

The fact that there have been widespread deficiencies in documentation associated with administrative decision [sic] is acknowledged. However, from an administrative decision making perspective, I suggest that this is, at worst, imprudent. However, it is apparent to me that in all of the decisions that you have critiqued in Chapter 7 of the report, the decision makers have endeavoured to accommodate what would appear reasonable requests by the respective applicants. I suggest that this has been done both pragmatically and consciously in considering the risks to the water resources in the catchment, in accordance with the objectives listed in section 10 of the Water Act and with a view to minimise unnecessary administrative burden on the applicant.

It is particularly worth noting that administrative decisions under the Water Act are subject to potential internal review, appeal to the Queensland Land Court or judicial review. Such rights of review and appeal extend to the applicant and aggrieved third parties. In all of the case studies detailed in Chapter 7 of the report, there were no such appeals or reviews lodged. It is therefore difficult to conclude that these decisions were inappropriate.

The need for the significant prescription associated with the current decision making processes will be assessed as part of the review of the *Water Act 2000*. I also recognise that, like the circumstances in the Barron, the questions of legal validity of historical decisions that have been identified in the report will need to be addressed as a matter of urgency in order to provide certainty for existing water entitlement holders.

The department contends that the evidence in this investigation merely shows a lack of documentation and this was at worst imprudent. The department has not provided any evidence to support this contention.

By contrast, this investigation has found that no work practice has ever existed to guide s.206 water licence application decision-making. To the contrary, a work practice relating to previous and significantly different legislation was available. Both the Gallo and Williams decision and this investigation have found that there are local sustainable water management strategies that provide simple formulas for allocation of water and effectively ignore the legislative framework for the consideration of s.206 water licence applications. Both the Gallo and Williams decision and this investigation have found that water has been allocated purely on the basis of these formulas. There has previously not been any quality assurance mechanism for local sustainable water management strategies. This investigation has found that initial water licence applications are treated differently from applications where a water licence has existed previously. This does not advance the efficient use of water. The department attempts to cast doubt on the basis for the opinion by stating that none of the case studies in Chapter 7 involved an internal review or appeal. This is incorrect. Case Study 3 was subject to an internal review. Case Study 6 was subject to an internal review and appeal. In any event, there are numerous personal reasons why people decide not to complain. The department's statement does not persuade me to change my view. The departmental documents clearly indicate the considerations that were taken into account. These overriding considerations were inappropriate, with the result that the decisions did not advance the sustainable management and efficient use of water.

Further, even the failure to properly document the basis of the decisions in the relevant case studies is of significant concern. I reiterate that the department is required by law to document its decision-making considerations in s.211(3) information notices.

Opinion 9

There has been significant failure in s.206 water licence decisions across Queensland between 2005 and 2010 to properly consider the criteria in s.210(1) of the Water Act and make decisions that advance the sustainable management and efficient use of water under ss.10 and 12 of the Water Act. This is administrative action that was contrary to law under s.49(2)(a) of the Ombudsman Act because the legislation required consideration and documentation of these matters.

As mentioned in Chapter 5, failure to properly consider and apply a provision of the Water Act does not automatically render a licence liable to be set aside. Therefore, it is arguable that this factor alone may not necessarily warrant the department reviewing all previous licences issued. However, as mentioned in Chapter 5, my particular concern in relation to this significant failure is the following two potential situations:

- if there has been an over-allocation of a water resource, thereby excluding potential prospective licence holders from obtaining a water licence
- the intention of the current government to convert water licences to water allocations as soon as possible.

In the proposed report provided to the department for comment, I proposed to make a recommendation about considering whether future allocations are likely to advance the efficient use of water.

Department's response – proposed recommendation 3

The Director-General advised:

Not accepted.

The process of converting existing water licences to water allocations occurs through the development and implementation of a Water Resource Plan under Chapter 2 of the Water Act. Equally, Water Resource Plans may be developed to deal with degradation that has occurred to natural ecosystems (for example from over allocation of water resources.)

Such plans, necessarily, will need to include strategies that ensure future water entitlements, be they converted from existing water licences or new entitlements, are consistent with the purpose of Chapter 2 of the Water Act.

As I stated in my comment about the department's response to recommendation 1, my recommendations do not interfere with the intention to convert water licences to water allocations to allow water trading. I note that the 'conversion' process could be done through Water Resource Plans.

However, this report has found that in the past, the allocation of s.206 water licences has not been done in a way that advances the efficient use of water. The department refers to water licences being 'converted' to tradeable water entitlements. This term appears to connote a formulaic change based on the water licence entitlement, rather than a de novo consideration about whether that entitlement will advance the efficient use of water. In the context of the report's findings, this is concerning. Any creation of a new water entitlement should be accompanied by a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water. This could be achieved on a whole-of-catchment basis.

Recommendation 3

In relation to water licences issued in an area of Queensland:

- (a) any conversion to a new water entitlement or
- (b) any consideration of water licence applications in circumstances where the water resource is over-allocated

should be accompanied by a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water.

7.6 Summary

This chapter has described what would constitute a proper consideration of the efficient use of water and s.210(1) criteria. It demonstrated there has been significant failure to consider s.210(1) criteria and to administer the efficient use of water. It has provided specific examples of the failure to consider these matters. It noted an absence of work practice guidance about how to decide a s.206 application in a way that considers the s.210(1) criteria and advances the sustainable management and efficient use of water.

Chapter 8: Development and central approval of local sustainable water management strategies

8.1 Introduction

The strategies and policies referred to in ss.210(1)(g) and 210(1)(h) of the Water Act (in this report called 'local sustainable water management strategies') also guide water licence decision-making. Investigators found a wide variance in the quality and availability of local sustainable water management strategies.

This chapter considers local sustainable water management strategies and particularly the extent to which they are effectively developed and approved across Queensland.

As has been stated above, ss.210(1)(g) and 210(1)(h) of the Water Act provide:

(1) In deciding whether to grant or refuse the application or the conditions for the water licence, the chief executive must consider the following—

- (g) **strategies and policies** for the sustainable management of water in the area to which the application relates;
- (h) the sustainable resource management **strategies and policies** for the catchment, including any relevant coastal zone and regional aquifer systems ... [emphasis added]

Local sustainable water management strategies are administrative policies. Where they exist, the terms of s.210(1)(g) and s.210(1)(h) indicate they must be taken into account in deciding a s.206 water licence application.

8.2 Local sustainable water management strategies in response to questionnaire

The investigation identified that each local area may have a number of unique local sustainable water management strategies and local scientific findings that underpin their water licence decision-making. To obtain information about local practices, investigators issued a questionnaire to every local licence decision-making office across Queensland.

On 1 May 2013, following consultation with the department to target the appropriate officers, investigators emailed the questionnaire to 20 local officers, namely:

- Ayr – two officers
- Bundaberg – one officer
- Emerald – one officer
- Gatton – one officer
- Goondiwindi – one officer
- Gympie – one officer
- Mackay – two officers
- Mareeba – two officers
- Rockhampton – two officers
- South Johnstone – one officer
- St George – one officer
- Toowoomba – one officer
- Warwick – two officers
- Wolloongabba – two officers.

In addition to the questionnaire responses, the recipients provided copies of documents locally in use, including local sustainable water management strategies.

8.2.1 Reasonableness of local sustainable water management strategies

The investigation considered that nine of the 'local sustainable water management strategies' were not strategies at all. Instead, the investigation considered that they simply declared the 'entitlement' for particular areas on a megalitres per hectare basis. Namely:

- a one page typed document titled Allocation Guidelines (for Atherton, Barron Delta, Mulgrave River, Russell River, Mossman and Daintree Rivers and Mareeba Shire) and the three page word processed document titled Allocation Guidelines (for Atherton, Barron, Mulgrave River, Russell River, Mossman and Daintree Rivers, Mareeba Shire, Cook Shire)
- Draft Option Paper: Setting up the allocation policy for Cappella Basalt as an exception of the regional aquifer interim management policy which was made in December 2003
- Isaac Connors Groundwater System Interim Management Arrangements, 7 August 2003
- Fractured Rock Aquifer Interim Allocation Policy, 11 July 2008
- Fitzroy Basin Alluvial Groundwater Aquifers, Water Entitlements - Interim management policy, 15 October 2007
- Central Highlands Basalt Aquifers, Water Entitlements - Interim management policy, 29 February 2008
- Central Highlands Tertiary Unconsolidated Aquifer, Water Entitlements - Interim management policy
- Draft Option Paper: Review of the allocation policy for Springsure Basalt as an exception of the regional aquifer interim management policy.

In my view, documents that amount to a declaration of entitlement do not constitute a local sustainable water management strategy. I consider local sustainable water management strategies should reasonably consider particular information about efficient use of water and sustainable management in the local area and also particular local information relevant to the mandatory s.210 considerations.

Documents that merely designate an 'entitlement' without discussing local information relating to efficiency of use and the s.210 considerations may lead to decision-making that grants water licences without proper consideration of the necessary criteria. The decisions examined in *Gallo and Williams* suffered from this failing, as did the decisions discussed in the case studies in section 7.4.1 of this report.

In the proposed report provided to the department for comment, I proposed to form an opinion about local sustainable water management strategies that designated an 'entitlement' for an area.

Department's response – proposed opinion 10

The Director-General advised:

Noted - see comments below relating to Recommendation 4 (rec 4 accepted in principle).

As I have stated in connection with the department's response to recommendation 2, I understand that my recommendation relates to the provisions of the current Water Act, and that the regulatory framework is likely to change with the proposed new water legislation. I note that the department has now taken a step to draw attention to the issue of a work practice, but the material in Attachment 2 is insufficient to improve the standard of water licence application decision-making. I also consider Attachment 2 does not provide educative information to decision-makers about the consideration of local sustainable water management strategies in s.206 water licence applications.

Opinion 10

A number of local sustainable water management strategies improperly designated an 'entitlement' for the local area. The reliance on such documents is unreasonable administrative action under s.49(2)(b) of the Ombudsman Act because they do not properly consider the criteria in s.210(1) of the Water Act and whether the proposed decision advances the sustainable management and efficient use of water under ss.10 and 12 of the Water Act.

8.2.2 Lawfulness of some local sustainable water management strategies

Some local sustainable water management strategies go further than providing direction for water licence decision-making and purport to administratively prohibit all grants of water licences in a particular area in circumstances where there is no statutory basis for the prohibition in either the Water Act or a WRP.

An important principle of law is that administrative bodies may not act in a way that prevents them from carrying out a duty, or from freely exercising a discretion. The principle is succinctly expressed as follows:

It (is) perfectly clear ... that an administrative body, including a licensing body, which may have to consider numerous applications of a similar kind, is entitled to lay down a general policy which it proposes to follow in coming to its individual decisions, provided always that it is a reasonable policy which it is fair and just to apply.

Once laid down, the administrative body is entitled to apply the policy in the individual cases which come before it. The only qualification is that the administrative body must not apply the policy so rigidly as to reject an applicant without hearing what he has to say. It must not 'shut its ears to an application'.¹⁵⁰

Brennan J (as he then was) sitting as President of the Administrative Appeals Tribunal in *Drake (No. 2)* approved the above-stated principle in the following clear terms:

There is a distinction between an unlawful policy which creates a fetter purporting to limit the range of discretion conferred by a statute, and a lawful policy which leaves the range of discretion intact while guiding the exercise of the power.¹⁵¹

In other words, a local sustainable water management strategy cannot create a fetter (or limit) on the water licence decision-making discretion. Decisions that apply a local sustainable water management strategy to the exclusion of the relevant considerations in the Water Act demonstrate poor administrative practice and raise questions concerning the potential validity of these decisions if challenged.

Investigators put an example of this alleged fettering of discretion in the Bowen Water Management Policy 2007 (Version 1)¹⁵² to the Executive Director for his comment. Unusually, the department's policy section had also been involved in the drafting of the Bowen Water Management Policy, due to community pressure to more closely manage the Bowen groundwater resource (which was not regulated by the local WRP).¹⁵³ The Bowen Water Management Policy places prohibitions on the granting of certain water licences. For example:

As zones 1 to 13 as a whole are over allocated, all applications for new or increased subartesian entitlements in management zones 1 to 13 should be refused (unless they meet the requirements under section 2.1.5 below).¹⁵⁴

Section 2.1.5 goes on to state that an application for a water licence might be granted if the person once had a licence, but has failed to renew, reinstate or replace it in certain circumstances.¹⁵⁵

The Executive Director conceded the Bowen Water Management Policy may create a fetter upon the water licence decision-making discretion.¹⁵⁶ He advised that the department was taking steps to remove that potential fetter.¹⁵⁷

As mentioned, this investigation only received a sample of local sustainable water management strategies. The

¹⁵⁰ *Sagnata Investments Ltd v Norwich Corporation* (1971) 2 QB 614, 626 (Denning LJ).

¹⁵¹ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* 2 ALD 634, 641; see also *Perder Investments Pty Ltd v Elmer* 23 ALD 545. See also *Perder Investments v Lightowler* (1990) 101 ALR 151 where in considering an application similar in substance to that considered in *Perder v Elmer* Spender J, applying *Drake (No. 2)*, held '(i) The Authority could not abrogate a statutory discretion by the application of a universal policy with no consideration of the merits of the matter. (ii) As the Authority could not lawfully refuse to exercise its statutory discretion, to consider the transfer of the licence, it equally could not give a direction to a delegate to refuse the exercise of that discretion. (iii) The direction to the delegate had the effect of preventing the exercise of a discretionary power. The direction was therefore unlawful.'

¹⁵² Bowen Water Management Policy 2007, WAM/2007/3184 – Version 1.

¹⁵³ Interview with the Executive Director on 17 October 2013, lines 1252-1257 and 1297-1304; Meeting including the Executive Director, 10 September 2013.

¹⁵⁴ Bowen Water Management Policy 2007, WAM/2007/3184 – Version 1, para 2.1.1.

¹⁵⁵ Bowen Water Management Policy 2007, WAM/2007/3184 – Version 1, para 2.1.5.

¹⁵⁶ Email from the Executive Director, 18 October 2013.

¹⁵⁷ Email from the Executive Director, 18 October 2013.

department does not centrally monitor local sustainable water management strategies. However, based on the sample, I am concerned that a proportion of the department's other local sustainable water management strategies may also purport to fetter (or limit) the water licence decision-making discretion.

In the proposed report provided to the department for comment, I proposed to form an opinion about the Bowen Water Management Policy 2007.

Department's response – proposed opinion 11

The Director-General advised:

Accepted.

The investigators were advised on 18 October 2013 by the Department's Executive Director, Water Policy, that the 2007 policy has been rescinded and that any replacement document, if required, will be reworded to reflect the appropriate manner in which such documents may be considered.

While it is accepted that the 2007 document may be misleading when read in isolation, the report fails to acknowledge advice and information provided by Departmental staff in relation to the fact that DNRM officers undergo training in administrative decision making principles to ensure that officers understand that policies and procedures are guidelines, not law.

In particular, training programs delivered to departmental staff include the following statements:

- Don't rigidly apply policy and procedure regardless of the circumstances: Policy and procedures are guidelines, not law, unless clearly stated as such by legislation (e.g. statutory codes under IPA).
- Don't confuse Law and Policy: Law is the paramount formal expression of government public policy. Law takes precedence over the department's policies/guidelines.

Information on these training programs have been provided to your investigators during the course of the investigation.

The Department has reviewed files associated with groundwater licensing in the Bowen groundwater management area and has not identified any instance where the 2007 policy has been applied inappropriately.

I acknowledge that some departmental officers have undergone training in administrative decision-making principles. However, that does not alter the fact that the terms of the Bowen Water Management Policy 2007 created a fetter on statutory water licence decision-making. I note that it has been rescinded.

Opinion 11

The approval, and use of, the Bowen Water Management Policy 2007 was administrative action that was contrary to law for the purposes of s.49(2)(a) of the Ombudsman Act because its terms created a fetter on the statutory water licence decision-making discretion.

8.2.3 Transparency of local sustainable water management strategies

In a number of general file review decisions, the decision-maker referred to local strategies generally, in a way that created ambiguity as to whether the strategy was contained in a written document. Investigation reports made statements to the effect that a licence decision was in accordance with 'management strategies'.¹⁵⁸ For example, decisions stated that the:

- decision was 'consistent with the Mareeba Stream Management Unit's water allocation strategy for the watercourses comprising the Johnstone River Catchment'

¹⁵⁸ For example, see the bulleted list in section 8.2.1 of this report.

- management strategy for Victory Creek and Johnstone River Catchment had been considered
- management strategy for the Denizen Creek, Mena Creek and Johnstone River Catchment had been considered
- 'current management strategy for aquifers within the Main Range Volcanics Formation is to allocate groundwater at a maximum rate of the 0.8 ML/ha if property overlying the aquifer system, or based on 2000 hours pumping at the pump rate of the bore, whichever is lesser'.

Further, the three page Allocation Guidelines for Atherton, Barron, Mulgrave River, Russell River, Mossman and Daintree Rivers, Mareeba Shire and Cook Shire include a note that they were 'not to be referred to as policy'.

Non-statutory documents that provide guidance about sustainable management of water and sustainable water resource management strategies (whether called 'management strategies', 'allocations guidelines' or another title) are administrative policies. Section 20 of the *Right to Information Act 2009* (and previously, s.19 of the *Freedom of Information Act 1994*) require them to be available (at least for inspection and purchase) to the public, as they are documents 'containing a statement of the way, or intended way, of administration of an enactment ... that is used by the agency in connection with the performance of such of its functions as affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the community are or may become entitled, eligible, liable or subject.'¹⁵⁹

Also, s.27B of the *Acts Interpretation Act 1954* requires information notices to 'refer to the evidence or other material on which those findings were based'. Therefore, in my view, information notices issued under s.211(3) of the Water Act ought to clearly and accurately identify the local sustainable water management strategies (and relevant parts of those documents) considered in deciding the water licence application.

In summary, local sustainable water management strategies must be labelled and described transparently in the information notice, to ensure the public may scrutinise the terms and application of those documents, making the process more transparent.

In the proposed report provided to the department for comment, I proposed to form an opinion about the identification of local sustainable water management strategies in s.211(3) information notices.

Department's response – proposed opinion 12

The Director-General advised:

Noted – see comments below relating to Recommendation 4.

As I have stated in connection with the department's response to proposed recommendation 2, I understand that my recommendation relates to the provisions of the current Water Act, and that the regulatory framework is likely to change with the proposed new water legislation. I note that the department has now taken a step to draw attention to the issue of a work practice, but the material in Attachment 2 is insufficient to improve the standard of water licence application decision-making. I also consider Attachment 2 does not provide educative information to decision-makers about the consideration of s.206 water licence applications.

Opinion 12

The failure to properly identify local sustainable water management strategies in information notices required by s.211(3) of the Water Act is unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act because they fail to properly inform applicants of the basis for the decision.

¹⁵⁹ *Right to Information Act 2009*, schedule 6 dictionary and *Freedom of Information Act 1994* (repealed), s.7 definitions.

8.2.4 Absence of local sustainable water management strategies despite local issues

In some of the general file review cases, the decisions reviewed indicated the department was aware that the water resource yield was declining; however, decisions identified no local sustainable water management strategies to guide water licence decision-making. For example, in the case of the Toowoomba area, investigation reports stated there was 'no known information about the effects of taking, or interfering with, water on natural ecosystems' but also noted that the aquifer was declining.

I am conscious that in the absence of the development of timely local sustainable water management strategies, the water resource yield in a particular area may decline to a level that could be considered over-allocated.

At interview on 17 October 2013, the Executive Director thought there may be merit in the department having a work practice to guide the coordination of the drafting and review of local sustainable water management strategies.¹⁶⁰ I agree.

For these reasons, I consider there is merit in the Director-General developing a work practice that provides guidance as to when a new or amended local sustainable water management strategy is required and the proper way to develop a new or amended local sustainable water management strategy.

8.2.5 Lack of central approval and monitoring

Local sustainable water management strategies are ordinarily developed in the local area and are ordinarily not seen by the department's central office, either during development or for review.¹⁶¹ The department has no central inventory or oversight of local sustainable water management strategies.¹⁶² Information gathered during the investigation indicates that local sustainable water management strategies are a large class of documents that direct s.206 water licence application decision-making. Local sustainable water management strategies are administrative policies which guide and provide direction as to how ss.210(1)(g) and 210(1)(h) of the Water Act apply in the context of a local area. These strategies cannot be inconsistent with a legislative provision. Because of this, and due to the deficiencies this investigation found in the sample strategies, I consider it is reasonable that the department should centrally oversee the local sustainable water management strategies to ensure they:

- do not simply designate 'entitlements'
- provide local information to inform the consideration of the efficiency of water use and the mandatory s.210 criteria
- do not override the provisions of the Water Act.

In the proposed report provided to the department for comment, I proposed to form an opinion and make a recommendation about the development, approval and monitoring of local sustainable water management strategies.

Department's response – proposed recommendation 4 and proposed recommendation 5

The Director-General advised:

Accepted in principle.

The provisions of Part 6 of Chapter 2 of the Water Act, including section 206, will be revised as part of a strategic review of those parts of the Water Act that are administered by the Department of Natural Resources and Mines.

The review is focussing on regulatory simplification, while maintaining transparency and procedural fairness for water entitlement holders.

¹⁶⁰ Interview with the Executive Director on 17 October 2013, line 994.

¹⁶¹ Meeting including the Executive Director on 10 September 2013; interview with the Executive Director on 17 October 2013, lines 1252-1257.

¹⁶² Meeting including the Executive Director on 10 September 2013; interview with the Executive Director on 17 October 2013, lines 1252-1257.

The future requirement for local sustainable water management strategies and the recommended work practice will be evaluated once the implications of the review for section 206 and related provisions is finalised.

In the meantime, advice has been provided to the Department's water licensing staff on the proper consideration of local sustainable water management strategies as part of the decision making process (refer to attachment 2).

As I have stated in connection with the department's response to proposed recommendation 2, I understand that my recommendation relates to the provisions of the current Water Act, and that the regulatory framework is likely to change with the proposed new water legislation. I note that the department has now taken a step to draw attention to the issue of a work practice, but the material in Attachment 2 is insufficient to improve the standard of water licence application decision-making. I also consider Attachment 2 does not provide educative information to decision-makers about the consideration of s.206 water licence applications.

Recommendation 4

The Director-General introduce a work practice to guide the development of local sustainable water management strategies, in relation to s.206 water licence decisions, including direction about how those documents should:

- (a) set out local information that informs the consideration of the mandatory s.210(1) criteria and that advances the sustainable management and efficient use of water
- (b) prescribe the process necessary to properly consider all relevant provisions as part of water licence decisions.

Recommendation 5

The Director-General centrally approve and monitor local sustainable water management strategies.

8.3 Summary

This chapter considered that there were significant deficiencies in local sustainable water management strategies, stemming primarily from the absence of any central approval and monitoring mechanism and an absence of work practice guidance about the development and amendment of those policies. I have formed opinions and made recommendations to address these issues.

Chapter 9: Other failures in the decision-making process

9.1 Introduction

As part of the general file review, in addition to identifying a significant number of cases that failed to properly consider the efficient use of water and all s.210 criteria, the investigation also identified cases of poor administrative practice. Three areas of concern were identified, namely:

- decision-making delays
- lack of contemporaneous public notice of applications
- lack of work practice guidance about the use of the amendment 'safeguard' in s.218 of the Water Act.

This chapter addresses each of these concerns in detail and forms opinions and makes recommendations to improve these aspects of the water licence application decision-making process.

9.2 Decision-making delay

The general file review indicated a pattern of delay in deciding water licence applications. Of the general file review sample, 23 applications took one to two years to finalise, nine applications took two to three years, 10 applications took three to four years, four applications took four to five years, 14 applications took more than five years and the longest period an application took to finalise was 13.8 years.

The Water Act provides a power to impose a statutory moratorium on the consideration of water licence applications.¹⁶³ I understand the essential purpose of a statutory moratorium is to allow the department time to gather updated hydrological information for the preparation of a new or amended WRP and to guard against a rush of applications during the period of preparation of a new or amended WRP. Of the general file review sample, only three applications were wholly affected by a statutory moratorium. The delays in those applications were 1.3 years, 2.9 years and 4.5 years.

In addition, however, the department often also imposes administrative moratoriums (otherwise known as 'general holds') on the consideration of water licence applications.¹⁶⁴ These administrative moratoriums or general holds have no statutory basis. Administrative moratoriums/general holds have previously been centrally sanctioned by the department because, until 2010, the department made available to its investigating officers and decision-makers a work practice called WA-44 Applying a 'General hold' on licensing.¹⁶⁵

Section 211 of the Water Act provides:

- (1) If the chief executive is satisfied the application should be granted, or granted in part, the chief executive must grant all or part of the application for a stated period, with or without conditions.
- (2) If the chief executive is not satisfied the application should be granted, the chief executive must refuse the application.

As has been identified above, an important principle of law is that administrative bodies may not act in a way that prevents them from carrying out a duty, or from freely exercising a discretion.¹⁶⁶ This principle was relevantly applied in the decision of Pincus J in *Perder Investments Pty Ltd v Elmer*.¹⁶⁷ In relation to an application for review of the Torres Strait Protected Zone Joint Authority's refusal to consider an application for a transfer of a fishing licence by reference to an administrative 'freeze' or moratorium unsupported by legislation, Pincus J stated:

¹⁶³ Section 26, Water Act.

¹⁶⁴ For example, *Gallo and Williams*, para [12], p.10.

¹⁶⁵ Developed in connection with the previous Water Resources Act.

¹⁶⁶ *Sagnata Investments Ltd v Norwich Corporation* (1971) 2 QB 614, 626 (Denning LJ). *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* 2 ALD 634, 641; see also *Perder Investments Pty Ltd v Elmer* 23 ALD 545. See also *Perder Investments v Lightowler* (1990) 101 ALR 151 where in considering an application similar in substance to that considered in *Perder v Elmer* Spender J, applying *Drake* (No. 2), held:

(i) The Authority could not abrogate a statutory discretion by the application of a universal policy with no consideration of the merits of the matter.
 ii) As the Authority could not lawfully refuse to exercise its statutory discretion, to consider the transfer of the licence, it equally could not give a direction to a delegate to refuse the exercise of that discretion.

(iii) The direction to the delegate had the effect of preventing the exercise of a discretionary power. The direction was therefore unlawful.

¹⁶⁷ *ibid*.

When parliament says that in certain circumstances there is a discretion to grant permission, then no official may replace that law by one to opposite effect – for example, by a law requiring that in no circumstances shall permission be granted.¹⁶⁸

Having regard to s.211 of the Water Act and *Perder Investments Pty Ltd v Elmer*, I consider that the blanket holding of all applications for licences to take water from a particular water resource in the absence of a statutory moratorium is contrary to law.

At interview on 17 October 2013, investigators put to the Executive Director the suggestion that in the general file review, the majority of decisions that took over one year to make may have been subject to an administrative moratorium/general hold. In response, the Executive Director suggested that some of those delays may have not been due to an administrative moratorium/general hold but instead due to the normal progression of the application. The Executive Director pointed out that there is a difference between holding a particular application while the investigation of that application is being completed, and an administrative hold of particular applications while further information about the prevailing hydrology is gathered.¹⁶⁹ He considered in some applications, it may take years to gather the required information.¹⁷⁰

One departmental document indicates that ideally, water licence applications should be decided within 60 days.¹⁷¹

Whatever the cause of the delay, it appears there is scope to improve the timeliness of s.206 water licence application decision-making. I can understand, however, that there may be the occasional complex water licence application that may genuinely take longer to decide.

In the proposed report provided to the department, I proposed to form opinions and recommendations about s.206 water licence applications held under general holds or administrative moratoriums.

Department's response – proposed opinions 13 and 14 and proposed recommendations 6 and 7

The Director-General advised:

Accepted.

Opinion 13

The practice of placing a general hold or administrative moratorium on the consideration of all applications for licences to take water from a particular water resource is administrative action that is contrary to law under s.49(2)(a) of the Ombudsman Act.

Recommendation 6

The Director-General ensure that the practice of imposing a general hold or administrative moratorium on water licence applications ceases.

Opinion 14

Significant delay in finalising s.206 water licence applications (except those stopped by a statutory moratorium) is unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

168 *ibid.*

169 Interview with the Executive Director on 17 October 2013, lines 1814-1819.

170 *ibid.*

171 Water Management and Use, North Region - Office Handbook.

Recommendation 7

Except for those applications held under a statutory moratorium, the Director-General take steps to identify and decide s.206 water licence applications that are being held and not considered and ensure the timely progression of water licence decisions.

9.3 Lack of contemporaneous public notice of applications

Section 208 of the Water Act provides that for more consumptive water uses (particularly irrigation) notice of the particular details of a water licence application must be published in the local newspaper.¹⁷² The general file review found that in four of the 156 applications that required publication of decisions, water licence applications proceeded to be considered and decided even though the statutorily required public advertisement of the application occurred years earlier.

Case Study 7

A previous licence expired in 1995 and the new application was received in 1996 asking for another entitlement as the applicant planned to plant exotic fruit trees, timber trees and local natives over a similar sized area. The application was advertised in 1997. The application was granted in 2009, 12 years after it was advertised.

The deciding of the application such a long time after it was advertised defeated the purpose of public notification of the application because the public lost the opportunity to consider and respond to the application in the context of current conditions in the area (for example, current entitlements, the current effects on the natural ecosystem and integrity of the water resource, and the current public interest).

In my view, the purpose of the statutory requirement to advertise the application is to alert the public, including surrounding licence holders, to the existence of the application so that they may make a submission about it. Deciding an application years after the application was advertised defeats the purpose of the advertising, as many factors, such as the prevailing hydrology, the yield of the water resource and the number and volume of surrounding licences and other entitlements may have changed in the interim. For these reasons, I consider it is reasonable that the s.206 water licence application should be decided within a reasonably contemporaneous period of the public notification.

In the proposed report provided to the department for comment, I proposed to form an opinion and make a recommendation about the practice of considering and deciding a s.206 water licence application that was not publicly advertised within a reasonably contemporaneous period.

¹⁷² Section 208, Water Act.

Department's response – proposed opinion 15 and proposed recommendation 8

The Director-General advised:

Accepted in principle.

The provisions of Part 6 of Chapter 2 of the Water Act, including section 206, will be revised as part of a strategic review of those parts of the Water Act that are administered by the Department of Natural Resources and Mines.

The review of these provisions will include notification requirements - noting that the historical practice of advertising in a stated newspaper does not make use of contemporary information sources such as the Department's webpages and other more accessible communications media.

My recommendation relates to the provisions of the current Water Act, and I understand that the regulatory framework is likely to change with the proposed new water legislation. I consider that the department should continue to administer any new water legislation in keeping with the spirit of opinion 15 and recommendation 8 in this report.

Opinion 15

The practice of considering and deciding a s.206 water licence application that was not publicly advertised within a reasonably contemporaneous period is unreasonable administrative action under s.49(2)(b) of the Ombudsman Act because the public are not appropriately alerted to an impending water licence application decision and are deprived of the opportunity to make a submission.

Recommendation 8

The Director-General ensure a s.206 water licence application is ordinarily publicly advertised within a reasonably contemporaneous period of the consideration of the application and decision.

9.4 Lack of work practice guidance about s.218 amendment safeguard

Section 218 of the Water Act provides for the departmental amendment of a water licence. It provides that 'the chief executive may amend a water licence if the chief executive is satisfied the licence should be amended'.¹⁷³ However, the amendment must not increase licence terms, including the volume of, rate of or times when water may be taken under the licence and the area of land that may be irrigated.¹⁷⁴ The chief executive must give the licensee a show cause notice about the proposed amendment.¹⁷⁵

In relation to a recent legislative amendment which had the effect of removing the requirement to renew a water licence,¹⁷⁶ the Minister stated:

Additionally, the extension of the term of a water licence does not change the chief executive's ability to amend or cancel water licences where appropriate, including in areas where water resource plans and resource operations plans do not apply.¹⁷⁷

The general file review did not identify the existence of any department initiated amendments under s.218 of the Water Act (only applicant requested amendments). The Executive Director confirmed that the department rarely uses that provision and it is merely there as a safeguard.¹⁷⁸ The Executive Director confirmed that the

¹⁷³ Section 218(1), Water Act.

¹⁷⁴ Section 218(2), Water Act.

¹⁷⁵ Section 218(3), Water Act.

¹⁷⁶ Section 213A, Water Act.

¹⁷⁷ Minister for Natural Resources and Mines, The Honourable Andrew Cripps MP, Media release: Extension of licence terms to support water users, 4 July 2013.

¹⁷⁸ Interview with the Executive Director on 17 October 2013, lines 1702 to 1719.

department instead negotiates any necessary amendments to entitlements ahead of conversion to tradeable water allocations.¹⁷⁹

I note that no detailed work practice guidance exists about when the s.218 'safeguard' should be applied.¹⁸⁰ A lack of any clear guidance to decision-makers in relation to how and when to apply s.218 may be a significant contributing factor to the lack of use of the section. In other words, if a work practice does not explain the use of s.218, departmental officers are much less likely to use it.

In the proposed report provided to the department for comment, I proposed to form an opinion and make a recommendation about work practice guidance relating to s.218 of the Water Act.

Department's response – proposed opinion 16 and proposed recommendation 9

The Director-General advised:

Noted – see comments below relating to Recommendation 9 (Accepted in principle).

My recommendation relates to the provisions of the current Water Act, and I understand that the regulatory framework is likely to change with the proposed new water legislation. I consider that the department should continue to administer any new water legislation in keeping with the spirit of opinion 16 and recommendation 9 in this report.

Opinion 16

The absence of detailed work practice guidance about when and how s.218 of the Water Act should be applied hinders the use of s.218 as a meaningful safeguard.

Recommendation 9

The Director-General introduce a work practice about when and how the departmental water licence amendment 'safeguard' provision in s.218 of the Water Act should be applied.

9.5 Summary

This investigation identified delays in s.206 water licence decision-making due to general holds. I have formed opinions and made recommendations with the aim of eliminating those delays. I have also formed an opinion and made a recommendation with the aim of ensuring that when possible, a s.206 water licence application is publicly notified at the time the application is considered and decided. This investigation also identified a lack of work practice guidance about the use of the amendment 'safeguard' in s.218 of the Water Act. I have recommended that one be developed.

¹⁷⁹ Interview with the Executive Director on 17 October 2013, lines 1597 to 1602.

¹⁸⁰ Although I note one is 'under development' and has never been released to investigating officers and decision-makers.

Chapter 10: Conclusion and Water Act review

10.1 Introduction

The department has advised that the government is considering replacing the current Water Act with new legislation to regulate water use. This investigation found a significant lack of focus on advancing the efficient use of water (ss.10 and 12 of the Water Act) and the mandatory criteria in s.210 of the Water Act relating to water licence decision-making. This lack of focus was contributed to by the lack of work practices to provide direction about water licence decision-making and the lack of coordination and oversight of local sustainable water management strategies. Any new legislation may benefit from a redrafting of the provisions about how water licence applications are considered. As soon as possible after its enactment, the new legislation must be supported with work practices about water licence decision-making and properly coordinated local sustainable water management strategies.

10.2 Previous lack of focus on considerations in Water Act

This investigation found that the administration of s.206 water licence applications exhibited a significant lack of focus on the advancement of the sustainable management and efficient use of water and the mandatory s.210 criteria. Often, s.206 water licence decisions failed to consider these matters properly or at all.

The current Water Act contains nine mandatory criteria to consider when deciding a s.206 water licence application. Some of the criteria require consideration of a broad and uncertain range of information. For example, decision-makers are required to consider 'any information' about the effects upon natural ecosystems and the integrity of the water resource and also 'strategies and policies' about 'sustainable management' and 'sustainable resource management'.¹⁸¹ One mandatory criterion simply requires consideration of the 'public interest'.¹⁸² WRPs may also add other mandatory considerations. Finally, there is no provision in s.210 stating that a water licence application decision should advance the sustainable management and efficient use of water.

Although the Water Act has been in operation for about 13 years, to my knowledge the department has never put in place a work practice to facilitate proper investigation and decision-making regarding water licence applications under the Water Act. In light of the broad nature of s.210(1) considerations and apparent confusion as to how the purposes of Chapter 2 of the Water Act affect water licence decision-makers, a work practice to provide direction about water licence decision-making is necessary.

Local sustainable water management strategies are used to guide water licence decision-making in local areas. This investigation identified that local sustainable water management strategies are developed in local areas without any central coordination or oversight by the department. This investigation found that many local sustainable water management strategies reviewed failed to provide proper guidance as to sustainable management and at times sought to fetter the decision-making discretion. All strategies and policies used in connection with the new legislation should be coordinated and overseen centrally by the department. Importantly, they should be amended to align with the terms of the new legislation as soon as possible following its enactment.

In the proposed report provided to the department for comment, I proposed to form an opinion about whether the granting of water licences has advanced the efficient use of water.

¹⁸¹ Sections 210(1)(g) and 210(1)(h), Water Act.

¹⁸² Section 210(1)(i), Water Act.

Department's response – proposed opinion 17

The Director-General advised:

Not accepted.

The investigation has only looked at the decision making processes around water licence applications. It has not included any analysis of the extent or effectiveness of the Water Planning framework and the associated water markets in promoting sustainable management and use of water allocations. The department contends that to make this conclusion, a much broader policy and program review than that undertaken within the scope of this investigation would be required.

Since the introduction of the Water Act, some 14 years ago, the State has invested considerable effort in developing and implementing water resource plans, which now cover over 90 per cent of Queensland in 23 individual water resource plan areas. Already, around 75% of the total allocated volume of water in Queensland is covered by the approximately 13,600 tradeable water allocations with a total volume of 4,270,885 ML and an estimated market value over \$2 billion.

Under existing water resource plans, there has also been 1,500,000 ML unallocated water set aside for development opportunities and future growth. Equally, the assessment has not considered the effectiveness of unallocated water release processes that have involved open and competitive tenders to allocate available water resources.

The failings that have been identified in the Ombudsman's report relate only to water licences and, even then, primarily involve the reinstatement, subdivision or minor amendment of pre-existing entitlements. The results of the assessment therefore need to be put into the broader context of the application of the whole of Chapter 2 of the Water Act before any objective judgement can be made as to the whether the Department has achieved the objectives of the Chapter.

It is correct that the investigation only reviewed the decision-making processes around water licences. The legislation requires all s.206 water licence applications to be decided in the same way. As outlined in this report, it is largely irrelevant whether they are initial applications, applications where a licence has existed previously, applications for licence amendments, subdivisions, amalgamations or (at the time) following disposal of land. Further, no applications for reinstatement were considered in the investigation. In any event, initial water licence applications comprised a substantial portion of the files sampled in the investigation (34.9%).

Opinion 17

Due to the significant failures in water licence decision-making revealed in this investigation, the purpose of Chapter 2 of the Water Act to 'advance sustainable management and efficient use of water' through the allocation of water licences has not yet been achieved.

10.3 Future sustainable management of water

In 1994, the Council of Australian Governments (COAG) signed the Water Resource Policy Agreement. In 2004, COAG then signed the National Water Initiative. Although conversion to a water trading scheme (that is, water allocations) is the primary aim of both of these documents, a desire for efficient use and sustainable management of water underpins this goal.¹⁸³

The current Water Act is influenced by these Australia-wide water reform initiatives as the purpose of Chapter 2 of the Water Act is 'to **advance sustainable management** and **efficient use of water** and other resources

¹⁸³ Australian Government, National Water Commission website, Canberra, undated, 'NWI objectives', accessed at <http://www.nwc.gov.au/nwi/objectives> on 31 October 2013.

by establishing a system for the planning, allocation and use of water' [emphasis added].¹⁸⁴ Further, s.12 of the Water Act requires that water licence decision-makers make water licence decisions in a way that advances the purposes of Chapter 2 of the Water Act.¹⁸⁵

The Executive Director stated that the purposes of the water licensing chapter are being scrutinised in the current Water Act review.¹⁸⁶

The National Water Initiative anticipates that ultimately efficient use of water will be achieved by water trading and competitive market forces, rather than by government administration. However, around 60% of water entitlements in Queensland are still non-tradeable water licences.¹⁸⁷ The Queensland Government's intention is to eventually convert all water licences into tradeable water allocations.¹⁸⁸ Until that conversion, it is therefore important that the government continues to administer water licences in a way that advances the sustainable management and efficient use of water. In this way, water licence holders can be encouraged to develop efficient water use practices in readiness for competition in the water allocation market.

Because of the failures identified in this report about the achievement of efficient use of water through licensing of water users, I am concerned that any future process to 'convert' existing licences to water allocations may be a formulaic change based on the water licence entitlement amount, rather than a de novo consideration about whether that entitlement will advance the efficient use of water. In my view, to minimise the impact of past poor decision-making, any creation of a new water entitlement should be accompanied by a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water. This could be achieved on a whole-of-catchment basis upon the commencement of the new water legislation.

In the proposed report provided to the department for comment, I proposed to form an opinion about how the department should move forward with water licences.

¹⁸⁴ Section 10(1), Water Act. *Gallo and Williams* at [8].

¹⁸⁵ Section 12, Water Act requires that where 'a function or power is conferred on an entity, the entity must perform the function or exercise the power in a way that advances this chapter's purpose'.

¹⁸⁶ Interview with the Executive Director on 17 October 2013, line 123.

¹⁸⁷ The Executive Director said 40% were tradeable entitlements in meeting on 10 September 2013.

¹⁸⁸ Interview with the Executive Director on 17 October 2013, line 1104.

Department's response – proposed opinion 18

The Director-General advised:

Not accepted.

It is a matter for Executive Government to decide matters of legislative policy.

While efficiency of water use is a relevant consideration, efficient use of water is not the Government's sole objective in allocating and managing access to water. Furthermore, it is unrealistic to expect that efficient water use could be effectively achieved through administrative decisions in relation to the grant, amendment or conditioning of water licences. There is ample evidence that placing a value on any commodity or resource (e.g. through establishing a market) is the most effective way to change practices and facilitate more productive and efficient use of that commodity or resource.

Processes of allocating and managing water need to include consideration of long-term and short-term economic, environmental, social and equitable considerations. In this context, providing security, certainty and opportunity to existing and future water users is a vital element in the Government's plans to grow a strong four-pillar economy.

For these reasons, the Government has asked this Department to accelerate the conversion of existing water licences to tradeable water allocations and, in doing so, expand existing water markets to cover more of the State's water resources.

I agree it is a matter for the government to decide matters of legislative policy. Particularly, it is a matter for the government to decide the matters that will be required to be considered under any new legislation under which existing water licences will be converted to new tradeable water entitlements.

However, I was requested by the department to conduct the investigation. In that context, I consider it is appropriate to express an opinion which the government may consider.

This report has found that, in the past, the allocation of s.206 water licences has not been done in a way that advances the efficient use of water. If the government wishes the efficient use of water to be considered in 'the conversion of existing water licences to tradeable water allocations' under the new water legislation, I am concerned that this may be a formulaic change based on the water licence entitlement amount, rather than a de novo consideration about whether that entitlement will advance the efficient use of water. In the context of the report's findings, this is concerning. Any creation of a new water entitlement should be accompanied by a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water. This could be achieved on a whole-of-catchment basis upon the commencement of the new water legislation.

Opinion 18

If the Government proposes to promote the efficient use of water through 'the conversion of existing water licences to tradeable water allocations', any creation of a new water entitlement should include a de novo consideration of whether the proposed entitlement can be expected to advance the efficient use of water.



QUEENSLAND
ombudsman