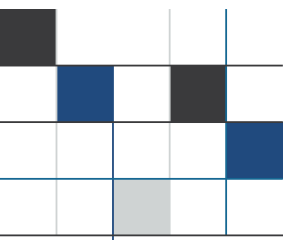


Policy

Water entitlement transactions for Western Australia

Formerly operational policy 5.13

October 2020



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For more information about this policy, contact: Principal Policy Officer, Water Policy branch.

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The Department of Water and Environmental Regulation (the department) has implemented a policy framework across all of its regulatory documents. The framework provides a clear and structured document hierarchy, which details how the department and its stakeholders should apply the different types of documents within the hierarchy.

As part of the implementation of this framework, this document has been updated with a new format to show how the document is classified within the framework.

The content of the document has not been changed and remains the department's position.

For more information on the policy framework refer to the department's website here: www.dwer.wa.gov.au.

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Summary

Trading of water entitlements is an effective means for optimising the benefits of using water, to individuals and the broader community. This policy provides a framework for water entitlements transactions in Western Australia (WA).

Water licences are granted by the Department of Water and Environmental Regulation (the department) under the *Rights in Water and Irrigation Act 1914* (RIWI Act). Licences are granted to the allocation limit of a particular resource.

Water transactions can occur at any time, subject to approval by the department. Transactions are most common when a resource becomes fully-allocated. Existing licence holders may transfer all or part of the water entitlements or may enter into agreements with third parties.

The aims include:

- water usage migrating to higher economic uses
- allowing new developments and industries to proceed in an otherwise fully-allocated resource
- appropriately valuing the water entitlements
- encouraging the efficient and effective use of water.

Issues detailed in this document include the laws governing transactions such as:

- eligibility
- how an application to transact a water entitlement can be made
- criteria for assessment and forms for processing transactions
- the role of water allocation plans
- how environmental issues are addressed
- security interests.



1. Policy

The department will support the voluntary redistribution of licensed water entitlements through opportunities to trade, transfer or through agreements allowing another person to take water, with the aim of:

- encouraging the efficient use of water resources (within allocation limits) by providing the opportunity to capitalise on water savings
- enabling the migration of water to uses of higher economic value
- appropriately valuing water resources
- enabling the re-allocation of water resources, including opportunities for new water users to access limited water resources.

When assessing applications to trade, transfer or through agreements allowing another person to take water, the Minister for Environment will ensure that these transactions will not compromise:

- sustainability for the needs of current and future users
- sustainability of the local environment and ecosystems of the water resources that are being managed
- the promotion of the orderly, equitable and efficient use of these water resources.



2. Background

2.1 Issue

To ensure our water resources are used sustainably, protecting existing water users and supporting future water dependant development opportunities, our water resources must be properly managed and accounted for. The main management tool is the granting of water licences under the RIWI Act. As our water resources are not limitless, licensed water entitlements are granted up to the allocation limit of a particular resource.

In many areas of the state, the volumes of water entitlements granted have reached the allocation limit of those resources. For existing businesses wishing to expand in those areas or for new ventures to commence operations, the supply of water can limit the potential for further development.

To provide future opportunity for development in areas where available water resources are limited, the RIWI Act has provisions for licensees to transfer water entitlements or reach an agreement for a limited time to allow another person to use (transact) part or all of their entitlements.

Water entitlement transactions are most common where allocation limits have been reached. However, in some circumstances, transactions may offer lower cost outcomes than obtaining a new water entitlement in areas where the allocation limit has not yet been reached. For example, an industry may wish to relocate to an area and instead of applying for a water entitlement in an area not yet fully-allocated, may purchase an existing entitlement together with the existing infrastructure of the licensee if that results in reducing the cost of setting up.

The value of a water entitlement is likely to vary depending on demand, the location and the conditions of the licence. The department does not set prices or participate in any market in water entitlements that has been created. It is expected that over time, water entitlements will tend to shift to more productive uses in terms of the value that water returns (that is, higher value return). As the value of water increases, so should the desire to be more water efficient.

2.2 Intent

The intent of this document is to provide the policy detail for the implementation of water entitlement transactions in WA. It has been prepared to account for many of the policy issues that may arise with implementation and explains how the department will address them.

This policy was originally published in 2001 as Statewide policy no. 6 Transferable (tradeable) water entitlements in WA. It was reviewed and renamed as Operational policy 5.13 Water entitlement transactions for Western Australia in April 2010. This document has been updated with current government directions.



2.3 Policy links

This policy has links to other strategic and operational policies of the department including:

- Statewide policy 9 Water licensing, staged developments, 2003
- Policy: Management of unused water entitlements, 2020
- Policy: Water conservation/efficiency plans, 2020
- Policy: Giving an undertaking to grant a licence or a permit, 2020
- Policy: Use of operating strategies in the water licensing process, 2020
- Policy: Timely submission for required further information, 2020
- Operational policy 5.12 Hydrogeological reporting associated with a groundwater well licence, 2009
- Policy: Managing unlicensed groundwater use, 2020
- Schedule G of the National Water Initiative, Principles for trading rules (2004).

2.4 Legislation

The RIWI Act establishes the legislative framework for managing and allocating water resources in WA. Under the RIWI Act, the right to the use, flow and control of the water in watercourses, wetlands and underground water sources is vested in the Crown, except as appropriate under a written law. The department assists the Minister for Environment with the water resource management powers and functions set out in the RIWI Act.

The RIWI Act requires all artesian bores to be licensed for their construction (under section 26D) and the taking of water (under section 5C). Non-artesian bores in proclaimed groundwater areas must also be licensed under sections 26D and 5C. Licences to take water usually specify the conditions, length of tenure, and the volume of water that may be taken. This volume is referred to as the 'water entitlement'.

Clause 29 of Schedule 1 to the RIWI Act allows water entitlements to be transferred to another person who is eligible to hold a water licence under section 5C.

Clause 30 allows for the temporary movement of water entitlements, by providing that a licensee may enter into an agreement allowing a third party to take water under the licence for a limited period of time. The policy is to allow temporary transfers for a defined period that must expire within the licence term.

In accordance with clauses 30 and 31, all water entitlement transactions must be assessed with regard to the relevant provisions of the RIWI Act, including Schedule 1 clause 7(2) and section 4.

Clause 32 of Schedule 1 provides that applications must be made on the required form and submitted with the prescribed fee. The applicant must provide any further information that is required.



The department may, under Clause 33 of Schedule 1 of the RIWI Act, direct the applicant to produce an assessment of the impacts of granting the application. It is preferable that this report, done at the expense of the applicant, be done by an expert appointed or approved by the department.



3. Transaction rules

3.1 Eligibility

Who is eligible to purchase a water entitlement?

Any person eligible to hold a licence under the RIWI Act is potentially able to purchase a water entitlement. That person must have legal access to the land the water is to be taken from.

Special provisions relate to people who are purchasing a property and want to make arrangements to also purchase an entitlement for that property. In this situation if the purchaser has met all the legal and the department's criteria for holding a licence, the department can undertake to approve the water transaction once the property is purchased (refer to Operational policy 5.05 Giving an undertaking to grant a licence or a permit under the RIWI Act).

A purchaser who does not already have a licence to take water must apply for a licence under the normal licence assessment process and receive a new licence as part of the transaction. Where the purchaser already has a licence, the assessment will be on the outcomes of the transaction, usually the impacts of increasing the existing water entitlement, and whether these impacts are acceptable.

Which water entitlements can be transacted?

Only water entitlements that are clearly defined in terms of a volume in a licence to take water or as a percentage of the allocation limit, under section 5C of the RIWI Act, may be transacted. If the licence in question does not have a volumetric entitlement, the department will determine the entitlement prior to the transaction.

All, or part, of a licensed entitlement (referring to the consumptive part of the entitlement) may be transacted.

A person purchasing the land that the water is taken from, as well as the water entitlement (that is, a transfer), will be issued a licence on the same terms as the vendor.

Agreements must not continue beyond the term of the water licence.

Rights that cannot be transferred

The RIWI Act has provisions for 'riparian right' use of water that is an incident of land ownership and no licence is required to use water under these provisions. In addition, the department-gazetted exemption orders that exempts the following non-artesian groundwater uses from having to apply for and be granted a licensed water entitlement under the RIWI Act:

- takes water for firefighting purposes
- watering cattle or other stock, other than those being raised under intensive conditions
- domestic garden and lawn irrigation (not exceeding 0.2 ha)



- short-term dewatering activities taking small volumes of groundwater from the water table aquifer.

Rights are not water entitlements that can be transferred where:

- they are not licensed
- they were conferred by a water licence that has expired
- there are any outstanding fees associated with the water licence
- surface water from one watercourse to another watercourse even if in the same Water Resource Management Unit (WRMU)
- some licences may be granted with conditions that restrict the licence from being transferred (for example licence for dewatering, MAR or geothermal activities).

Consistency with department positions

All transactions must be consistent with any department-approved plan for managing the water resources and environmental water provisions that apply to the water resource management unit (WRMU) in question. The willing seller and willing buyer determines where transactions will occur. Water entitlement transactions will generally be approved where allocation limits are established if the transferring licensee is not in breach of licence conditions.

Consideration of applications on a case by case basis in light of the objectives of the RIWI Act and in accordance with the assessment undertaken including Schedule 1 clause 7(2) may mean in some cases the transfer will be refused.

Any decision to refuse a trade, transfer, or an agreement is subject to the appeal provisions of the RIWI Act.

3.2 Water transfer limits

A water entitlement transaction must remain within a water resource management unit (WRMU) (that is, same surface water subarea or groundwater subarea and aquifer).

However, within surface water and groundwater systems, transactions within a WRMU may be constrained by geophysical limitations. In surface water systems, transactions cannot be made from one tributary to another. The local impacts and the capacity of the catchment area to deliver the requested volume as well as the cumulative impacts on the water availability in the WRMU are some factors to be assessed. In groundwater systems, physical limitations and groundwater-dependent ecosystems are some factors to be assessed.

For a specific year, a transaction can only be for the volume of water remaining after the volume already used for that year is subtracted from the total entitlement. The onus is on the vendor to determine and declare this to the department's satisfaction. For example, if a grower has an annual allocation of 10 ML and has already used 6 ML at the time of the transaction, then the amount available for use for the remainder of that water year is 4 ML. The water year may be stipulated in the licence.



If the licence does not stipulate a water year, then the date will be from the month the licence is issued. The full entitlement will be available in subsequent years.

If a new landowner fails to apply to transfer the water entitlement related to that land within 30 days of the land sale, the new owner will need to apply for a new water licence. A new licence might not be granted if the water allocation limit has been reached unless the applicant can demonstrate just cause for the delay.

3.3 Water transactions between different industry sectors

Water licence holders can transact their entitlements to eligible persons that may result in the water entitlement being used for another purpose. For example, a water entitlement holder that uses his entitlement to irrigate a crop can trade the entitlement to a mining company that will utilise it for mineral processing. These transactions will allow water entitlements to migrate to higher value uses.

Water service providers can transact their entitlements to eligible persons, when:

1. these entitlements are deemed to be no longer necessary as other sources of water have been established (for example entitlements of providers of drinking water supply) or
2. when they have satisfactorily demonstrated water savings from water use efficiency practices (for example irrigation co-operatives).

Water service providers can purchase water entitlements within the same WRMU from other licensees to augment their supplies.

3.4 Environmental and resource management

The trade and agreement is not to result in unacceptable impacts (ecological or social) either through direct impacts or through the concentration of water abstraction within a small area. The onus is on the proponent to establish this to the department's satisfaction.

A transfer of a water entitlement if considered a 'significant proposal' under the *Environmental Protection Act 1986* must be referred to Environmental Protection Authority for assessment under Part IV of that Act (refer s38).

Water transactions must be consistent with water allocation plans. If no water plan exists, transactions must be consistent with approved department policy or guidelines.

The department will encourage the use of water commensurate with its quality. This may include rejecting transactions that will result in high quality water being moved to a low-quality use where an alternative and practical low-quality option exists. This approach shall be applied consistently by the department across all localities.



3.5 Security issues

If a licensee wishes to use the water entitlement licence as security for a loan, the licensee must advise the department by completing the relevant form found on the department's website www.water.wa.gov.au.

The security interest will be recorded on the department's licensing database.

Any party who has a registered security interest in a licence will be notified by the department in writing of any application by the licensee to transact the licensed entitlement as well as any other event that may alter any of the terms or conditions or otherwise significantly affect the licensed entitlement and therefore its value.

The department will not approve a water transaction until the party who has the security interest provides written consent.

3.6 Administration

The department maintains a database of licences and entitlements which usually includes the water volume, tenure, delivery capacity or abstraction rates and conditions as appropriate.

An on-line water register will be available from mid-November 2010 enabling prospective applicants to search and obtain general information on licences and entitlements. The release of information will be in accordance with department's policies and legislative requirements. Licensing data is also subject to the requirements of the *Freedom of Information Act 1982*.

It is the responsibility of both the vendor and purchaser to ensure adequate contractual documentation is used as part of the water entitlement transaction. The department is not involved in contractual matters including any monetary exchange between parties.

The department would not require the applicant for a water entitlement transaction to advertise the potential transaction, as long as there are no environmental issues identified. However, where there is likely to be significant impact on the resource (for example the entitlement represents large percentage of available resource), the department may request applicants to advertise the transaction (under section 23 of Part 3 of the Rights in Water and Irrigation Regulations 2000). This can also be seen as an open and consultative process and engendering community cooperation.

Specific provisions in the RIWI Act apply where a property is sold. The vendor and the purchaser have 30 days after the sale of the land to apply to transfer the entitlement to the new owner. The department will generally approve the transfer if all the licence conditions have been complied with.

3.7 Other considerations

The water entitlement transaction may affect property values. It is the responsibility of the vendor and purchaser to consider these implications as part of a transaction. An 'agreement' cannot be transacted to a third party. A person who has an agreement to



operate under another person's licence cannot enter into an agreement for a third party to operate under the licence.

To achieve effective management of water resources, it may be necessary for the department, from time to time, to review and amend allocation limits, environmental water provisions, and WRMU boundaries.

In the event that new water becomes available and allocation limits are increased or previously reserved water becomes available resulting in 'new water' entering an operating market, the department will give consideration to other options, such as auctioning the newly available water.

The department will assess transaction applications in over-allocated areas. The department may approve the transaction if it is determined that the transaction will result in the same or reduced impacts, that is where there may be environmental benefits. For example, a 'trade' may be approved if this results in the water entitlement being taken from a location further away from an environmentally sensitive wetland.

Water allocation management plans may have specific rules regarding water entitlement transactions in over-allocated areas. For example, it might stipulate that a transaction may only be approved if a certain percentage of the water entitlement is surrendered to the department.

Speculation and market manipulation

Water entitlement transactions are a business tool providing flexibility to legitimate water users including allowing new businesses to establish in fully-allocated areas. The department will discourage the use of such transactions as speculative investment alone, as this may lead to water not being used productively.

The department will act to prevent market manipulation (for example water monopoly) that disrupts the use of water entitlement transactions as a business tool to provide increased flexibility to legitimate water users. We will scrutinise any transaction applications that will result in a single licensee gaining access to more than 50 per cent of the total water availability in a WRMU.

The redistribution of any 'saved' or recouped water will be at the discretion of the department consistent with approved policy.



4. Implementation

4.1 Application of this policy

This policy applies to terrestrial water resources (groundwater or surface water) of WA, licensed under the RIWI Act, unless otherwise specified by by-laws or conditions included in a licence to take water.

4.2 Submitting application to trade, transfer or to approve agreements

Applications for water entitlement transactions are to be submitted to the department (at a regional office) using the appropriate application form. All requested information must be recorded by the applicant on the form including the proposed price of the transaction. The appropriate form and details of the application fee are also found on the department's website www.water.wa.gov.au.

This, together with additional information requested by the department and the department's existing resource management data, will form the basis for assessing the acceptability of an application for the water entitlement transaction.

4.3 Additional information may be required

The preliminary review may conclude that the applicant should provide further information to complete the application (refer Appendix 1). Such further information may be required by the department under clause 4(2) or 32(2) of Schedule 1 to the RIWI Act. The information may be required to enable the department to complete its assessment or review its assessment. The precise nature of this further information is not prescribed by the RIWI Act because it may differ between applications.

The required further information must be submitted to the department in a timely manner (refer to *Policy: Timely submission for required further information*, the department, 2020).

4.4 Assessing applications

When assessing applications for water entitlement transactions, it is important that the department takes a holistic view of all the matters that may affect the assessment of an application. The assessment process fits within an overall policy framework that includes national, state and local policies, positions and strategies, such as the National Water Initiative.

Applications for water licences are assessed in accordance with the objectives of water management in section 4(1) of the RIWI Act and specific matters for consideration including those set out in clause 7(2) of Schedule 1 to the RIWI Act.

Upon receiving the application, the department will undertake a preliminary review to determine whether it has sufficient information to make a determination or if there are issues that need to be addressed in more detail by the applicant.



Generally, department licensing officers will liaise directly with the applicant regarding the provision of required further information and the timeframe for response. The department will aim to undertake its preliminary review of the application and notify the applicant of the further information requirements within 60 days for most applications. The process may take longer for complex or larger scale projects, in highly allocated or environmentally sensitive areas; or in areas where there is limited knowledge of the water resource.

The department will seek to address issues relating to applications for trades, transfers or agreements, according to matters given in Section 7(2) of the RIWI Act, including whether the proposed taking and use of water:

- is in the public interest
- is ecologically sustainable and environmentally acceptable
- may impact nearby water users
- is consistent with land use planning instruments
- is in keeping with relevant local by-law and/or local practice.

In undertaking the preliminary review of an application for a water entitlement transaction, the department will take into consideration issues including the:

- level of the department's knowledge of the local water resources
- degree of competition for accessing the water resources
- volume of water allocated compared with the water availability of that management area
- volume of water requested and timelines of the proposed development
- policies and practices of the department in that specific water management area
- operating strategy detailing how the applicant will manage the impacts of the proposed operations
- previous decisions made by the department on similar applications.

Applications for approval of transfers or agreements need to be valid (compliant with clause 32 of Schedule 1 to the RIWI Act) before an assessment is undertaken.

Where the transfer application is linked to a property sale, the vendor must inform the department immediately if the sale does not proceed.

4.5 Plans for managing the water resources

Water allocation plans are prepared with community input. Water allocation planning and policy issues within these plans need to be compatible with this water entitlement transaction policy or specifically deal with potential conflicts or limitations on the implementation of the plan. Some entitlements may not be transacted due to water resource management constraints identified in the plans.

Water allocation plans identify water resource values, including ecological and other environmental values and will establish how rights to water are to be allocated to



meet various needs including the quantity of water that can be diverted on an ecologically sustainable basis.

Plans determine the allocation limit of each water resource. Once the total water entitlements granted equal the allocation limit, the resource is deemed to be fully-allocated. Under these conditions, water transactions will allow new enterprises to move into the area.

Plans may specify the 'start up rules' for water entitlement transactions to occur within the relevant water management sub-area. There may be certain conditions that must be met before transactions can occur.



5. Review

The policy will be reviewed within a period not exceeding five years. Where the department believes it is necessary, earlier modifications will be made. Significant changes to the policy would require the department to consult with the community and stakeholders.



Appendices

Appendix A - Water entitlement transaction process

Refer to the department's website (www.water.wa.gov.au) for:

- water entitlement transaction forms for:
 1. a trade or transfer
 2. an agreement.
- access to an online water register (available since mid-November 2010) enabling applicants to search and obtain general information on licences and entitlements.

A fee is payable to the department with each transaction application. The purchase price of the entitlement must be stated on the application form or the application is considered as incomplete.

In circumstances where a licensee ceases to be an owner or occupier of the land, a 30-day period from the change of ownership or occupancy is allowed to enable the relevant application to be made to transfer the water licence.

Applications for water entitlement transactions are assessed by the department in accordance with the provisions of the RIWI Act.



Glossary

Term	Definition
agreement	a form of lease and occur via the temporary 'assignment' of a licensed entitlement, or part thereof, to another party. This second party is then able to operate under the licence for the period of the agreement. Usually under agreements the water is taken from a new location, requiring an assessment of the likely impacts. Also called a 'temporary transaction'.
allocation	the specific volume of water allocated to water access entitlements in a given year.
allocation limit	the volume of water that can be harvested each year from a water resource with acceptable impacts.
aquifer	a geological formation or group of formations capable of receiving, storing and transmitting significant quantities of water.
bore	a specific type of well accessing groundwater, generally a small diameter well.
department	the Department of Water and Environmental Regulation established under the <i>Water Resources Legislation Amendment Act 2007</i> .
domestic allocation	the volume of water required for household purposes and the irrigation of a small domestic garden.
ecological water requirements	the water regimes needed to maintain the water-dependent ecosystems at a low level of risk.
environment	livings things, their physical, biological and social surroundings and the interactions between all of these.
environmental value	a value or use of the environment or any element or segment of the environment which is conducive to public benefit, welfare, safety, health or aesthetic enjoyment and which requires protection from pollution sources (also known as beneficial uses).
environmental water provisions	the water volume that is provided to maintain the environment, including the social and cultural requirements, as a result of the water allocation decision-making process. Environmental water provisions take into account the ecological, social, cultural and economic impacts. They may meet in part or in full the ecological water requirements.



Term	Definition
groundwater	the water that occurs in pore spaces and fractures in rocks beneath the ground surface.
policy	a guideline that is not directly supported by any legislation but has been adopted by the Department of Water and Environmental Regulation as its guideline when assessing developments
purchaser	a person wishing to purchase an existing entitlement either through a trade, a transfer or by forming an agreement with an existing licensee.
right	the rights to take and use water conferred by the <i>Rights in Water and Irrigation Act 1914</i> , for example a riparian right or by licence under section 5C of the Act.
riparian right	rights of a landowner to water on or bordering his property, including the right to prevent diversion or misuse of upstream water
trade	where an entitlement is permanently traded to another person and the water will be taken from another location. An example is where a licensee sells their water entitlement to another person who will take the water from a different location and possibly use it for a different purpose.
transfer	where an entitlement is permanently transferred to another person but the water will be taken from the same location. An example of a transfer is when a licensee sells their property operation (for example a market garden) together with the water entitlement to another person who will continue with the operation.
vendor	a person wishing to either trade, transfer or through an agreement allow another person (purchaser) to take the water
water entitlement	in relation to a licence means the quantity of water that the licensee is entitled to take under the licence and includes part of a water entitlement.
water entitlement transaction	describes the ability of a licence holder to trade, transfer, or form an agreement (that is, transact) for all or part of the licensed entitlement, to be taken by another person. In most cases an exchange of a water entitlement transaction involves a monetary exchange although in some instances transfers may occur without recompense (for example a deceased estate).



Term

Definition

water resources management unit (WRMU)

a defined subarea within a groundwater area or surface water area and aquifer or stream from which water is abstracted. A defined subarea may have a number of WRMUs (for example, multiple aquifers). This is the base unit of allocation planning and will usually define the area within which a trade, a transfer, or an agreement may occur.



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Regional enquiries

Please direct any enquiries relating to the implementation of this policy or to management of water resources in the regions to the following regional offices:

Kimberley Region

27 Victoria Highway

Kununurra WA 6743

Telephone: (08) 9166 4100

Facsimile (08) 9168 3174

Swan Avon Region

7 Ellam Street

Victoria Park WA 6100

Telephone (08) 6250 8000

Facsimile (08) 6250 8050

South Coast Region

120 Albany Highway

Albany WA 6330

Telephone: (08) 9841 0100

Mandurah

107 Breakwater Parade

Mandurah Ocean Marine

Mandurah WA 6210

Telephone (08) 9550 4212

Facsimile (08) 9581 4560

South West Region

35–39 McCombe Road

Davenport WA 6230

Telephone: (08) 9726 4111

Facsimile (08) 9726 4100

Mid West Gascoyne Office

20 Gregory Street

Geraldton WA 6530

Telephone: (08) 9841 7400