



Issues Paper No. 03 of 2013

A Review of the Water Resources Management Act 9 of 2002

*You are invited to make a submission or comment on this
Issues Paper.*

Submissions close on 26 August 2013, 4:30pm.

About the Vanuatu Law Commission

The Vanuatu Law Commission was established on 30 July 1980 by the *Law Commission Act* [CAP115] and was finally constituted in 2009.

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Making Submissions

Any public contribution to an inquiry is called a submission. The Vanuatu Law Commission seeks submissions from a broad cross-section of the community as well as those with a special interest in a particular inquiry. Comments and submissions from the public are welcome.

The closing date for submissions is **26 August 2013**. There are a range of ways that a submission can be made and you can respond to as many or as few questions and proposals as you wish. You can write a submission, send an email or fax, or ring the Commission and speak to one of our staff.

You must indicate in your submission whether you wish your submission to be confidential as in the absence of such an indication your submission will be treated as non-confidential.



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Introduction and Background

The issue of water supply, especially with regard to good and clean water being available to the people, is not a new issue in the Pacific even though the majority of the Pacific islands are not lacking in water resources. With lack of resources, both financial and otherwise, and also lack of coordination between the numerous departments that have the responsibility of looking after the water supply, the quality of the water supply in most of the Pacific island countries is not as high. This is further complicated by the lack of detailed legislative provisions to help monitor, regulate and manage water resources. Most of the Pacific Island Countries, if not all, do not have a comprehensive or detailed legislation dealing with water resource management.

Vanuatu comprises of over eighty islands, with sixty five of these islands inhabited. The total population of the country in the last census was approximately 234,000. The majority (75%) of the people live in rural areas and the main urban centers are Port Vila and Luganville on Santo Island.

With regard to the water resources and supply, both ground and surface water resources are utilized for domestic purposes. In urban areas the main water resource is groundwater whereas in rural areas, various sources such as wells, springs, rivers and rainwater are used. However, at most places other than the main urban settlements, water supply systems are either quite poor, or do not exist. The quantity of water is inadequate in many cases, and water sources are subject to contamination. In the hot and dry season in particular it is common to have insufficient amounts of safe drinking water in the rural areas.¹

One of the Millennium Development Goals that Vanuatu has set out to achieve is to halve the proportion of people without sustainable access to safe drinking water and basic sanitation, by 2015. While it has been reported that Vanuatu is on track to achieve this MDG target, there hasn't been a recent significant improvement in access to improved drinking water in household and rural areas.²

In 2012, the Director of the Department of Geology, Mines and Waters Resources (DGMWR) requested the Vanuatu Law Commission to review the laws regarding water rights (taking into consideration United Nations declarations on water rights), the identifying of river buffer zones, the expansion of the National Water Advisory Committee (NWRAC) along with the establishment of Provincial Water Advisory Committee and a provision for the enforcement of Declared Water Protection zones and its surveillance. The Director referred to the Water Resources Management Act 9 of 2002 and the Water Supply Act of 1985 along with some other relevant laws namely; Land Lease Act, Environmental Protection and Conservation Act, Physical Planning Act and the Utilities Regulatory Authority Act.

This issues paper follows a request made by the Department of Geology & Mines to identify the best ways to improve the current legislations.

¹ P.A. Kingston 'Surveillance of Drinking Water Quality in the Pacific Islands: Situation Analysis and Needs Assessment Country Reports' (2004) www.vanuatu.usp.ac.fj (Accessed 11/02/2013)

² Prime Minister's Office 'Millenium Development Goals 2010 Report for Vanuatu' (September 2010) [://www.undp.org.fj/pdf/MDG%20 http Report/Vanuatu_MDG.pdf](http://www.undp.org.fj/pdf/MDG%20http%20Report/Vanuatu_MDG.pdf) (Accessed 7/03/2013)

ISSUE ONE

Ownership of water- Water Rights

While Vanuatu is not a member party to the Convention on Economic, Social and Cultural Rights (ICESCR), it is a member of the General Assembly and on 28 July 2010, the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights. The Resolution calls upon States and international organizations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all. In addition, Vanuatu is also a party to some UN Conventions that recognize the right to water, namely CEDAW³ and CRC⁴.

Furthermore, Vanuatu is a member of the Pacific Integrated Water Resource Management program which aims to implement applicable and effective Integrated Water Resource Management and Water Use Efficiency plans based on best practices and demonstrations. The Integrated Water Resource Management has been highlighted as part of the Millennium Development Goals and the Pacific Regional Action Plan on Sustainable Water Management, and has been put forward by the Pacific Island Government as the roadmap for securing water for sustainable development.

The Constitution states that Ni-Vanuatu indigenous custom owners collectively own all land in the country in perpetuity. The Water Resources Management Act allows for custom owners to continue using the water situated on their land if no other custom users or lawful users of the same water resources are adversely affected by that use and the use of that water is for a customary use. This, in an indirect way, can be taken as a general definition of water rights in Vanuatu legislation. However, it does not state or set out just exactly what these rights entail, for example, what activities are permitted or not permitted with this right. The *Mines and Minerals Act 1986* provides the Minister with the power to make regulations with respect to water rights and the use of water.⁵ However, these provisions have yet to be utilized. In addition, if any lease made under the Land Leases Act grants the right to use any water, the lessee is entitled to use any water on, adjacent to or under that land and must apply to the Director for the right to use water for any other purpose. Furthermore, there is no proper definition of the term water right, what this right entails and the limits associated with these rights.

In PNG sections of the *Environment Act*, as highlighted by the *Ramu Nico* case, gives effect to the principle of precaution and preventative action, which provides that an environmental permit confers on the holder the right to carry out the activities specified in the permit in accordance with the conditions imposed under the permit. The permit in other words enables and creates an opportunity for *preventative* measures or precautionary conditions to be included in the permits when issued so that holder of such permits will not only carry on their activities but also have due regard of the conditions set out under the permit either precautionary, preventative or both.

³ Art.14(2) (h): “to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication”

⁴ Art.24(2) (c): “to combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risk of environmental pollution”.

⁵ *Mines and Minerals Act 1986* [Vanuatu], section 88(2)(w)

Should the law be amended to provide a more specific definition for water right which brings together the reference elsewhere in the Act to occupiers and customary rights and water use? Should this definition also provide for the limits that a landowner has with regards to water, such as with what has been done in Australia, by listing out the different rights that a custom owner of land occupier has and the types of activities that are permitted and restricted?

Should environmental permits given to holders provide also for the principle of precaution and preventative action, as in Papua New Guinea? If so, should the laws be amended to provide for this or should this be left to the relevant department's discretion?

Is there a need for the law to state that where water rights are illegally breached or limited, the customary owners or occupiers may seek compensation? Should the laws be amended to include a provision that deals with compensation? If so, what should be provided for under this provision? Should it follow a similar approach as the Western Australian approach where there should be no compensation subject to the limitations identified above? Or should any illegal interference with water rights be compensated on application to the Supreme Court?

However, there is no underlying policy or legislation that supports this and it is left to the Department of Environment and Conservation's discretion to consider environmental law principles in assessing environment impact statements and issuing permits.

In Australia, access to and use of water is governed by statutory rights administered by state and territory governments. There are different types of water rights and their properties, including tradeable water rights or water products. Water access entitlement or water right is defined under the Australian National Water Initiative as a perpetual or ongoing entitlement to exclusive access to a share of water from specified consumptive pool as defined in the relevant water plan. The different water rights included river right, stock and domestic right, water delivery right, irrigation right and native title right. While the other rights are tradeable, the native title right is not tradeable.

The legal position in Western Australia in relation to compensation is provided for under its Town Planning and Development Act 1928. This provides that claims for compensation can arise only where a property is injuriously affected by the making of a town planning scheme. It further provides that land is not deemed to be injuriously effected unless the town planning scheme permits development on that land for no purpose other than a public purpose or prohibits wholly or partially any use at all of that land.⁶ This includes land that is declared as a Water Protection Zone. Two methods of compensation have been identified and these are direct payments to landowners and indirect payments to landowners.⁷

Another issue is compensation. This issue arises mainly from the limitations that are imposed on the use and development of the land.

⁶ Western Australian Planning Commission 'Statement of Planning Policy No. 4.1- State Industrial Buffer Policy' http://www.planning.wa.gov.au/dop_pub_pdf/spp4_1.pdf (Accessed 22/02/2013)

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ISSUE TWO

Definitions of River Buffer Zones

River areas are places where land, water, vegetation and animals interact. The current laws which provide for water protection zones do not provide a definition of river buffer zones and how these zones operate. There is also a failure to specify what activities are permitted and what is not permitted. For example, prior to the Tagabe river being declared as a Water Protection Zone, communities would make use of the river frequently for domestic purposes, such as bathing or washing. People and animals had easy access to the river.

Rivers and creeks are quite common in Vanuatu, especially on the larger islands. The flow is seasonal, and often villages are situated close to them. These sources carry water from inland spring sources to coastal area and often the quality of surface water is contaminated from upstream. This may be from humans or animals using the creeks or its vicinity for drinking or defecation⁸.

Under the Environmental Management and Conservation Act, the construction of any single family residential building in an approved residential area must be at least 30 metres from any river. While this is legally provided for, in practice, it is not strictly followed or enforced by enforcement officers, chiefs and community leaders. This leads to contamination of river water sources. The lack of any detailed legislative provisions for river buffer zones makes it difficult to monitor and ensure good water safety and quality in both rural and urban areas.

In Australia, the principal legislation for the protection of the rivers, springs and their riparian environments is the Water Act 2000. This Act applies to all lands (Crown and private) defined as being within the high banks or a stream or lake, as well as imposing limited controls on the land outside these features. The Act also grants the owner or occupier of lands adjoining a non-tidal boundary watercourse or lake, certain rights over the lands within the watercourse or lake to the water's edge. Specifically, this Act provides for the protection against disturbances that may adversely affect the stability of bed and banks of streams and lakes, for example, the clearing of native vegetation, excavation and placement of fill⁹.

Should Vanuatu's laws be amended to provide for definitions of river buffer zones for both rural and urban settings to provide better protection over Vanuatu's water zones or river environment? Should these amended laws also include the type of activities are permitted or not permitted as in Australia also?

⁸ SOPAC 'Water Safety Plan- Water Supply Description Assessment: Vanuatu' (2006)

<http://www.pacificwater.org/userfiles/file/Vanuatu%20-Water%20Supply%20System%20Assessment-new.pdf>
(Accessed 13/02/2013)

⁹ Queensland Riparian Legislation Info 'Appendix A- Legislation related to Management of Riparian Lands'
<http://www.malenyvoice.com/obiobi/resources/Old-Riparian-Legislation-Info.pdf> (Accessed 20/2/2013)

ISSUE THREE

Expansion of National Water Advisory Committee (NWRAC) and Establishment of Provincial Water Advisory Committee

Under the *Water Resources Management Act*, the Minister has the responsibility to appoint members of a National Water Resources Advisory Committee. The Director of the Department of Geology and Mines is the chairperson of this Committee and the Minister may appoint up to 5 additional members on the recommendation of the Director. Currently, the committee's membership is only 5 members.

The Committee's task includes providing advice to the Director on matters relevant to the protection, management and use of water, overseeing the proper planning and development of urban and rural water supplies. It must operate in such a way as to ensure co-ordination of water resource management activities and do such other tasks as are agreed with the Director. The Committee is the nation's peak water body and the main mechanism for cross-sectoral coordination of the sector towards the Integrated Water Resource Management. The Committee has a low profile and meets infrequently.

Considering the large task that this body has with regards to how the water resources in Vanuatu are to be managed, should the laws be amended to provide for the appointment of more qualified and environmentally trained persons to help in carrying out the Committee's tasks?

Vanuatu does not have any legal established bodies or committees to overlook the water resources management in the rural areas. The installation of rural water supply systems is normally financed by bilateral donors through the Government Investment Program. Projects are designed by the Rural Water Supply Section in the Department of Geology, Mines and Water Resources but a recent review reports that this section has a full time staff of only nine persons- with six based in the provinces and only three in the Head Office.¹⁰

The Department's capacity is limited to providing for six projects per year. This means that donor agencies and non-government organizations fill the gap by providing rural water infrastructure through individual schemes outside these government arrangements. The ongoing maintenance and operation of rural water supply systems is undertaken by communities and, in theory, is financed by user fees collected by the village water committees, although the success of this arrangement varies from village to village.¹¹

¹⁰ ISF-UTS (2011) *Vanuatu Water, Sanitation and Hygiene Sector Brief*, prepared for AusAID by the Institute for Sustainable Futures, University of Technology Sydney, October 2011.

¹¹ Above n8

Vanuatu's National Water Strategy has a water advisory committee from each province represented on the NWRAC. SANMA is the only province that has a committee similar to that of a Provincial Water Resource Advisory Committee. SHEFA has a committee that restricts itself to groundwater and surface water management, specifically that of Tagabe River. These provincial committees do not yet have legal recognition under the Act, unlike the village water committees which are recognized.¹²

The Vanuatu Law Commission has recently recommended that health committees and hospital councils be officially recognized in health laws to ensure that local health issues are properly dealt with at provincial and village level.

Should the laws be amended to provide for the legal establishment and recognition of provincial WRAC, with its TOR? This would be a similar body as that of the NWRAC but this would be at the provincial level.

Should provincial WRAC be required to include provincial health representatives and representatives of chiefs, women and medically trained professionals?

Or should the WRAC be required to meet regularly with health committees in their provinces to ensure that a consistent and effective water resources policy is followed in each province?

¹² Above n8

ISSUE FOUR

Water Protection Zones

Should the laws be amended to provide for the enforcement and surveillance of Water Protection Zones through Department officers, authorized offices and Provincial Water Resource Advisory Committees, as South Australia has done?

Should the amended laws also provide for penalties to deal with any offences committed under this section, so as to help with the enforcement of these laws?

The Water Resources Management Act provides that a Water Protection Zone may be declared. This is done by the Director for any of the purposes as provided for by the Act. This type of zone can be urban or rural. To date, there is only one area in Vanuatu that has been declared as a Water Protection Zone and this is the Matnakara Water Protection Zone, and it protects the quality and quantity of the Tagabe River which is the only current water zone for Port Vila and nearby settlements.¹³

A Water Protection Zone is also being established for Luganville although this is not yet gazetted. The main water intake is being relocated and the protection zone will then be redefined and gazetted. Compensation has already been given to landowners who have been relocated from within the protection zone. Water Protection Zones have not yet been started in Malekula or Tanna but it is known that farmers are already living within the water catchment. Protection Zones for all water supplies need to be

defined and gazetted quickly to prevent further settlement and farming within these catchments.¹⁴

While the Act provides for the declaration of a Water Protection Zone, it does not deal with enforcement and surveillance. While a Water Protection Zone may be declared, it does not have much effect if it is not being constantly monitored and surveyed by Department officers and Provincial Water Resource Advisory Committees to ensure good and clean water quality. A provision for enforcement may be just the push that is needed to ensure that a Water Protection Zone is declared to protect the water catchments that provide water to the different rural and urban centres.

In South Australia, the Environment Protection Act 1993 and the Environment Protection (Water Quality) Policy refer to and set up the Water Protection Areas, which are defined for the purpose of providing special environmental protection. Prior to the authorization of the policy, there was no State legislation that enabled water bodies to be protected on the basis of their environmental value. This policy goes beyond the general environment duty by setting down specified obligations for listed industries. It also imposes obligations on the community and seeks to manage and control diffuse sources of pollution. The lack of a consistent State-wide approach to the management of water quality posed the risk, that over time, the quality of South Australian water would be degraded leading to economic, social (including public health) and environmental impacts¹⁵.

¹³ Declaration of Matnakara Water Protection Zone (Tagabe River) (Cap 281) Vanuatu

¹⁴ SOPAC 'Sustainable Integrated Water Resources and Wastewater Management in Pacific Island Countries-National Integrated Water Resource Management Diagnostic Report Vanuatu' (2007) <http://www.sprep.org/att/IRC/eCOPIES/Countries/Vanuatu/29a.pdf> (Accessed 4/03/2013)

¹⁵ Australia Environment Protection Authority 'Environment Protection (Water Quality) Policy and Explanatory Report 2003' http://www.epa.sa.gov.au/xstd_files/Water/Report/epwq_report.pdf (Accessed 7/03/2013)

Opinions and Submissions

Any opinions expressed in this Paper do not represent the policy position of the Government of Vanuatu, the Department of Geology, Mines and Water Resources or the Vanuatu Law Commission.

You are invited to make a submission on any matter raised in the Paper or anything you think is relevant to the statistics and census laws in Vanuatu. Information on where and how to make submissions is found on page 2 of this Paper.