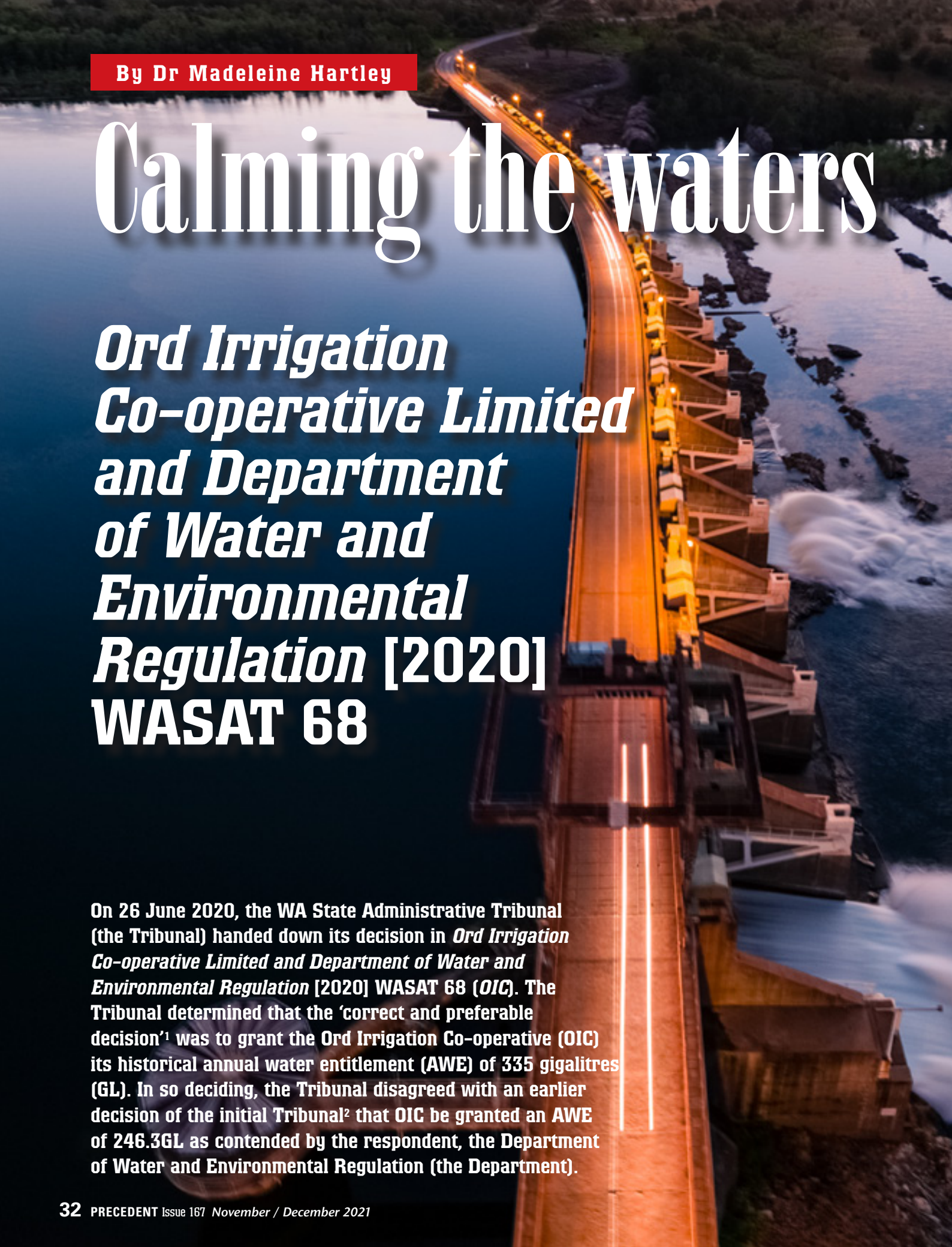
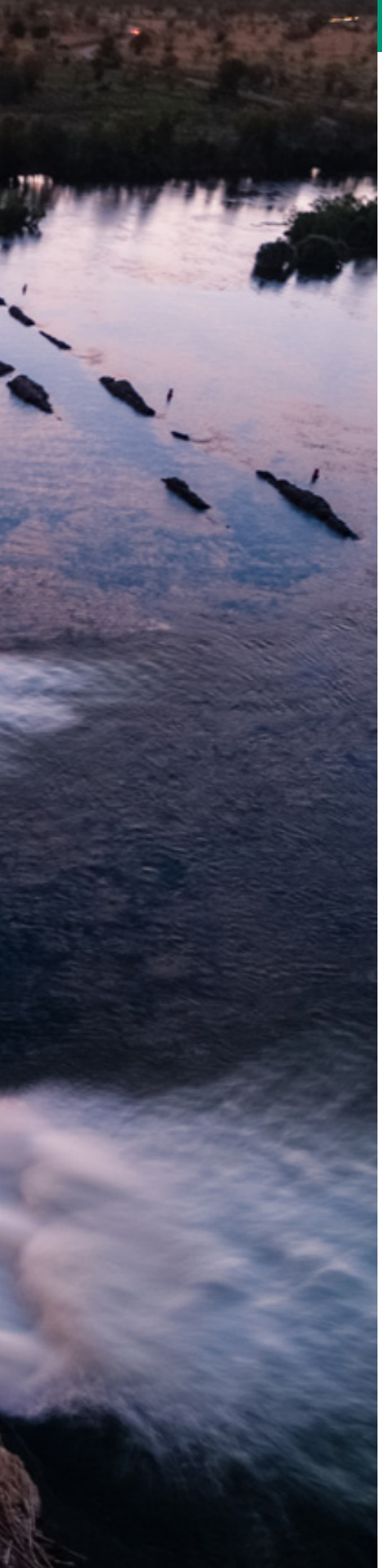
By Dr Madeleine Hartley

Calming the waters

Ord Irrigation Co-operative Limited and Department of Water and Environmental Regulation [2020] WASAT 68



On 26 June 2020, the WA State Administrative Tribunal (the Tribunal) handed down its decision in *Ord Irrigation Co-operative Limited and Department of Water and Environmental Regulation* [2020] WASAT 68 (*OIC*). The Tribunal determined that the 'correct and preferable decision'[1] was to grant the Ord Irrigation Co-operative (OIC) its historical annual water entitlement (AWE) of 335 gigalitres (GL). In so deciding, the Tribunal disagreed with an earlier decision of the initial Tribunal[2] that OIC be granted an AWE of 246.3GL as contended by the respondent, the Department of Water and Environmental Regulation (the Department).



This article outlines the factual background of *OIC* and highlights the importance, in the ultimate judgment, of the on-ground expertise of OIC irrigators and the unique water context of the Ord River Irrigation Area (ORIA). *OIC* demonstrates the challenges of irrigation and agribusiness in remote north-eastern Australia and this article examines the implications for government policy and water licensing decisions in this context.

BACKGROUND

OIC is an irrigation co-operative of over 100 members. It supplies water to approximately 15,031 hectares (ha) of agricultural land in an area of the ORIA known as Ord Stage 1. In 2004, OIC was granted a surface water licence under the *Rights in Water and Irrigation Act 1914* (WA)[3] (*RiWI Act*) to a maximum AWE of 335GL from the Ord River and Ord River Basin at Lake Kununurra.

OIC's licence was renewed for 4 years at the same volume in 2010. In 2014, OIC applied to the Minister for Water for a further renewal of its licence to an AWE of 335GL. The Minister's delegate at the Department renewed OIC's licence for a period of 10 years but with a reduced AWE of 225GL.

In September 2015, OIC sought a review of the Minister's decision under s26GG(1)(c) of the *RiWI Act* and in December 2015 the Tribunal granted an interim injunction with the effect that the AWE remained at 335GL until further order.[4] OIC's application to review the Minister's decision was for both the reduced AWE of 225GL and the 'Annexure to Licence to Take Water', but this case note focuses only on the first, substantive, matter relating to the licence volume.[5]

PROCEDURAL HISTORY

The initial Tribunal heard the matter in November 2017, dismissing the application for review and fixing the AWE for the relevant licence at 246.3GL as contended by the Department.[6] OIC sought leave to appeal to the Court of Appeal of WA,[7] which was granted, and the matter was heard in March 2018.

The Court of Appeal held that the initial Tribunal had erred in law in its decision by incorrectly proceeding on the basis that the onus was on OIC, as applicant, to prove its case on the balance of probabilities.[8] Instead, the appropriate standard for the Tribunal was the 'correct and preferable decision' in accordance with the *State Administrative Tribunal Act 2004* (WA) (*SAT Act*).[9] The appeal was allowed, the initial Tribunal's decision was set aside, and the matter was sent back to a differently constituted Tribunal for reconsideration.

DETERMINATION OF THE APPROPRIATE ANNUAL WATER ENTITLEMENT

OIC involved a heavy factual matrix in which the Tribunal was asked to consider (*inter alia*):

- the challenges associated with farming in such an isolated region;[10]
- current and likely future crop water requirements;
- the appropriate level of distribution efficiency;
- whether there were cogent reasons to depart from a Departmental policy permitting recoupment of unused water entitlements; and
- the public interest in granting OIC an AWE of 335GL.[11]

The historical development of the ORIA was an important starting point for the Tribunal in determining the likely future water requirements of OIC and its appropriate AWE. Unlike other Australian irrigation districts, and despite over 60 years of operation, the ORIA and its associated Scheme is considered an under-developed district.[12]

The Tribunal accepted the evidence of several OIC witnesses that it is, in fact, more appropriate to characterise the ORIA as 'a pioneering region … [which] needs the room to move, adjust and react'.[13] The Tribunal found that the ORIA 'remains in a state of transition'.[14] The implications of this finding, expressed throughout the judgment and reflected in the Tribunal's ultimate decision, are that OIC's future development and successful operations rely on an AWE that permits this flexibility despite historical under-utilisation.

CROP WATER REQUIREMENTS

The Tribunal's decision to grant an AWE of 335GL relied heavily on the consideration of crop water requirements and, in particular, of three 'principal issues'. The first principal issue concerned the crop types and areas of utilisation and, in particular, whether it was more appropriate to use the respondent's point-in-time data from 2018 or the applicant's forecast of crops and areas likely to be planted in 2029. This went to the second principal issue of which crop irrigation water requirements to utilise in order to determine justified individual crop needs. The third principal issue was determining the appropriate measurement of distribution efficiency relevant to the *RiWI Act* and related policies.

As to the first issue, the Tribunal drew from the Ord's history of substantial crop rotation and found it more appropriate to rely on the applicant's 'reasonable forecast' of potential crop types and areas than the respondent's approach based on past experience.[15] Importantly, the Tribunal did not 'require certainty' in its consideration of future crop forecasts although it relied heavily on ten assumptions provided in evidence by the OIC General Manager.[16] These assumptions gave reasoned insight into the crops (and approximate hectares of growth) likely to be produced over the forecast period.[17]

The respondent contested five of the ten assumptions, including as its reasoning that some assumptions were 'highly speculative at present' and 'unsubstantiated'.[18] However, the Tribunal found that the five contested assumptions were equally 'sound and reasonable'.[19] In preferencing this evidence, and given that the respondent had contested that some of the applicant's forecasts were not based on direct evidence from owners or lessees of the relevant land, the Tribunal noted it was not bound by the usual rules of evidence.[20]

The Tribunal preferred the applicant's evidence due to the witness's then current on-ground knowledge, experience in and of the area, and reasoning underlying each assumption, including other evidence (also accepted by the Tribunal) which supported these assumptions.[21] The Tribunal's reliance on the applicant's evidence demonstrates the acceptance of the fact that OIC's successful operations in the ORIA are based largely on pivoting with domestic and international commodity markets.

In relation to the second issue of determining crop irrigation water requirements, the Tribunal again preferred the evidence of the applicant's witnesses who, unlike the respondent's witnesses, had 'knowledge and experience of the amount of water required to grow this crop in the ORIA'.[22] As a result, this provided OIC with favourable crop water requirements for crops that included cotton, maize, sorghum hay and sandalwood.

DISTRIBUTION EFFICIENCY

The third principal issue related to OIC's distribution efficiency, or 'how much of the water that is diverted from Lake Kununurra is delivered to farms'.[23] Distribution efficiency was specifically relevant to the ORIA's guiding policy, the 'Ord surface water allocation plan' (OSWAP),[24] which gave OIC an 80 per cent distribution efficiency target that would increase to 90 per cent upon the completion of further civil works.[25]

There must be 'cogent reasons' in order for the Tribunal to depart from the OSWAP and other relevant policies.[26] The Tribunal accepted the applicant's submission that the actual distribution efficiency over the last 11 years (not the OSWAP target) was the appropriate basis for determining distribution efficiency.[27] Separate to the discretion afforded to the decision-maker under the *RiWI Act*,[28] the cogent reason for departure from the OSWAP was based on the effective and 'significant financial investment of $4.05 million'[29] that the applicant had made in improving the distribution efficiency for a supply channel owned by the state.

This investment improved distribution efficiency from 56 per cent in 2007 to an average of between 76 and 78 per cent over 10 years, from 2009 to 2018. Further significant investment would be required to improve distribution efficiency to 80 per cent due to 'legacy' infrastructure consisting of open channels and a poor irrigation system, but the state had proven reluctant to make the required investment in its own infrastructure. The applicant's expert witness also provided uncontested evidence that he was not aware of any similar open channel irrigation scheme that had achieved 80 per cent distribution efficiency. Ultimately, the Tribunal accepted that distribution efficiency of 76 per cent was appropriate, being the average distribution efficiency achieved by OIC in the 10 years between 2009 and 2018.[30]

THE OSWAP AND RECOUPMENT POLICIES

After finding that the correct and preferable decision was to set the AWE at 335GL,[31] the Tribunal next considered the application of the Department's recoupment policies. The respondent argued that a total of 76.3GL of unused water from OIC's licence should be recouped.

The OSWAP contains a recoupment policy (the Department also has a separate Recoupment Policy[32]) allowing the Department to recoup unused water entitlements that either have never been used, or have not been used for more than two consecutive years.[33] The basis for the policy is to avoid unnecessary restrictions on electricity generation triggered by higher allocations (but not use)[34] and to protect the water needs of future ventures in the Ord Stages 2 and 3.[35]

The Tribunal found three cogent reasons to depart from the application of the recoupment policies. Firstly, the Tribunal had accepted the evidence that OIC required an AWE of 335GL to match justified crop needs and efficient use of water. It would be counter to the OSWAP to recoup water in these circumstances where the policy itself provides this as a methodology for granting licences.[36]

Second, the Tribunal reflected on the 'state of transition' that the ORIA has experienced (and continues to experience), most significantly between 2008 and 2019, the period upon which the respondent focused in its justification for recouping water from OIC. It was accepted, upon the applicant's evidence, that 'historical water use over the last 10 years is an *extremely* poor measure of future water needs'.[37]

The third cogent reason was based on the significant investment and efficiency savings OIC had made between 2005 and 2011, when the state's Recoupment Policy, not the OSWAP, was the relevant policy. The Recoupment Policy stated (and continues to state) that unused water entitlements resulting from investment in water use efficiency would not be recouped.[38] The Tribunal accepted that 2008 was the point in time when the relevant savings were made, which was before the operation of the OSWAP. Further, upon the first licence renewal in 2009, the Department did not seek to recoup any water from OIC despite a decrease in its entitlement utilisation between 2007 and 2009. Consequently, it was held that OIC had made savings through improved efficiency and its resulting volume of water could not be subject to recoupment powers.[39]

PUBLIC INTEREST

Finally, the Tribunal considered mandatory relevant considerations under the *RiWI Act*, in particular the relevance of whether it was in the public interest to grant the licence. Public interest considers matters including whether the licence will be used (and used efficiently) and whether its granting might prejudice other current and future water needs.[40] These considerations are within the broader context of the economic and sustainable use and development of water resources, pursuant to the *RiWI Act's* objectives.[41]

The granting of an AWE of 335GL was indeed found to be in the public interest. There were both social and economic benefits of issuing a licence to the applicant in circumstances where the water would be used (and used efficiently), including the economic benefit to the region of growing crops.[42] Further, any future development in the Ord would be able to rely on the volume of water remaining in the allocation limit for the Main Ord sub-area, and, importantly, not prejudicing future needs.[43] There was also nothing to suggest that the licence volume was not ecologically sustainable and environmentally acceptable, and as such the relevant objects of the *RiWI Act* would not be breached.[44]

IMPLICATIONS

The decision of *OIC* emphasises the challenges of irrigation and agribusiness in remote north-eastern Australia, where, contrary to the situation in most Australian farming contexts, those challenges do not extend to access to abundant water resources.

The Tribunal benefited from a view of the Ord Scheme and relied heavily on the applicant's witnesses, recognising that their on-ground experience and local farming knowledge provided them with insights unmatched by desktop or theoretical reviews.

In short, *OIC* highlights that water resources across Australia are not uniform, and neither should their associated licensing decisions be. These licensing decisions must take into account all of the relevant circumstances and give weight to the on-ground expertise of farmers and irrigators, all of which may result in cogent reasons to depart from otherwise well-established government policies. ■

Notes: **1** Pursuant to the *SAT Act*, s27(2), the purpose of the review (which is a hearing de novo) is to 'produce the correct and preferable decision at the time of the decision upon review'. **2** *Ord Irrigation Co-operative Limited and Department of Water* [2017] WASAT 85 (*OIC No. 1*). **3** *RiWI Act*, s5C. **4** *SAT Act*, s90(1). **5** The parties resolved the disputed matters in the Annexure during the proceedings. **6** *OIC No. 1*, [209], [234] and [346]–[347]. **7** *SAT Act*, s105. **8** *Ord Irrigation Cooperative Ltd v Department of Water* [2018] WASCA 83 *(OIC CoA)*, [6(2)]. See also [125]–[128] and [136]–[137]. **9** *SAT Act*, s27(2). **10** Kununurra, at the heart of the Ord River Irrigation Scheme, is over 3,000km to Perth and over 800km to Darwin. **11** The Tribunal also considered other matters of smaller volumetric relevance to the OIC licence in determining the appropriate AWE, which are not explored in this article. See for example *OIC*, [134] and [259]–[261]. **12** For a particularly scathing analysis of the Ord River Irrigation Scheme, see M Grudnoff and R Campbell, *Dam the Expense: The Ord River Irrigation Scheme and the Development of Northern Australia* (Discussion paper, May 2017) <https://australiainstitute.org.au/wp-content/uploads/2020/12/P309-Dam-the-expense-Ord-River-report-FINAL.3_0.pdf>. **13** *OIC*, [55]. **14** Ibid, [63]. **15** Ibid, [142]. **16** Ibid, [150]. **17** Ibid, [151]. **18** Ibid, [155], referring specifically to predictions by the OIC General Manager that 3,000ha of cotton would be grown in the ORIA by 2029. **19** Ibid, [153]. **20** *SAT Act*, s32(2)(a); *OIC*, [191]. **21** *OIC*, [153]. **22** Ibid, [228]. **23** Ibid, [235]. **24** Government of WA, Department of Water, *Ord Surface Water Allocation Plan* (Report no. 48, September 2013) (OSWAP) <https://www.water.wa.gov.au/__data/assets/pdf_file/0015/1662/105880.pdf>. **25** Ibid, 48. **26** *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634, 644–5. In relation to WA water law specifically, this principle was also observed and held in *More and Water and Rivers Commission* [2006] WASAT 112, [33]–[36]. **27** *OIC*, [241]. **28** *RiWI Act*, sch 1, cl 15(2); *OIC*, [242]. **29** *OIC*, [244]. **30** Ibid, [258]. **31** Ibid, [263]–[273]. **32** Government of WA, Department of Water, *Management Of Unused Licensed Water Entitlements* (Statewide Policy No. 11, 2019) (Recoupment Policy) <https://dwer.wa.gov.au/sites/default/files/Policy_Management_unused_licensed_water.pdf>. **33** See OSWAP, above note 24, 51. **34** Ibid, 35. **35** *OIC*, [276]. **36** See OSWAP, above note 24, 34; *OIC*, [278]. **37** *OIC*, [280]. **38** See Recoupment Policy, above note 32, 13; *OIC*, [287]. **39** *OIC*, [288]. **40** *RiWI Act*, sch 1, cl 7(2)(d). **41** *RiWI Act*, s4. **42** *OIC*, [296]. **43** Ibid. **44** Ibid, [297].

Dr Madeleine Hartley was instructing solicitor in the initial case in 2017 before moving to Corporate Counsel (Water Law) at WaterNSW, where she now heads Government Relations. Any views expressed or errors are those of the author.
EMAIL madeleine.hartley@waternsw.com.au.