

July 2019



1. Introduction

The Western Australian Local Government Association (WALGA) is the united voice of Local Government in Western Australia. The Association is an independent, membership-based group representing and supporting the work and interests of 138 Local Governments in Western Australia. The Association provides an essential voice for 1,222 elected members and approximately 15,000 Local Government employees as well as over 2 million constituents of Local Governments in Western Australia. The Association also provides professional advice and offers services that provide financial benefits to the Local Governments and the communities they serve.

WALGA appreciates the opportunity to comment on the DWER draft Compliance and Enforcement Policy (the Policy). The draft Policy draws upon the former DER Enforcement and Prosecution Policy (July 2013), and the DWER Regulatory Best Practice Principles (September 2018).

This Submission provides general comments on the draft Policy and the Department's prior approach to compliance and enforcement. The Submission also comments on the factors that WALGA considers need to be addressed to effectively implement the draft Policy.

2. General Comments

WALGA notes that other than the removal of guidance regarding prosecutions, the proposed policy differs only minimally from the existing DER Enforcement and Prosecution Policy (July 2013). WALGA considers that any revised compliance and enforcement policy should be informed by a thorough review of the effectiveness of the Department's existing approach to compliance and enforcement.

With regard to prosecutions, it is not clear from the information provided in the draft Policy why this needs to be included in a separate Guideline, particularly given the relatively small number of prosecutions that have historically occurred *Environmental Protection Act 1986* (refer to Figure 1).

In previous Submissions, WALGA has commented on the need to further examine the adequacy of the *Environmental Protection Act 1986*, along with the resources allocated to deliver the Department's regulatory functions, including compliance and enforcement. These factors have the potential to undermine the regulatory efforts of the Department, and compromise the implementation of the Policy. Further commentary on this is provided in Section 4 of this Submission.

The draft Policy reaffirms the Department's commitment to a risk based approach in the delivery of its compliance and enforcement functions. The draft Policy covers a number of the Department's operational areas, including; native vegetation, contaminated sites, licencing of prescribed premises, waste discharges and emissions, WARR Levy Compliance and water licencing (refer to Section 3 of the draft Policy). Clarity is required on how a risk based approach will be applied to the different areas that are being regulated. WALGA considers that specific guidance for a range of licenced premises is required, so that a risk based approach can be used to determine the level of risk to public health, the environment and water resources. This guidance would need to include considerations relating to siting of facilities (using a risk based approach) and operational guidance. It is also essential that there is alignment between the licencing and compliance and enforcement regimes. The licencing process, and conditions attached, should be clear and provide the compliance and enforcement teams with the relevant information to determine what compliance and enforcement actions are required. Conversely, the compliance and enforcement teams should be providing feedback to those

undertaking licencing to ensure that any problems with compliance and enforcement of licences is addressed in a timely manner.

3. Existing Approach to Compliance and Enforcement

The effectiveness of the Department's approach can be determined by assessing the performance of the sectors it regulates and the consequent number, type and success of enforcement actions undertaken.

3.1 Performance of Regulated Sectors

Regulation of the WARR Levy

WALGA has previously commented on the issues associated with the regulation of the WARR Levy¹. There appears to be significant underreporting of C&I and C&D waste through the WARR Levy reporting regime and the Recycling Activity Report as a result of the WARR Levy increase in the 2015/16 Financial Year. The diversion of leviabale material away from landfill has had a direct financial and environmental impact, with an increase in the amount of material that is illegally dumped, illegally stored or illegally landfilled. Some Local Governments on the fringes of the Perth metropolitan area have reported spending in excess of \$1 million annually to collect and dispose of illegally dumped material. Due to deficiencies with existing data capture systems, the full impact of the diversion of leviabale material away from landfill is not clear.

Compliance with offset conditions

WALGA has been concerned to learn through the offset review process conducted by DWER that there was insufficient information to determine the status of a significant number of offsets conditioned for approved projects, and that there was insufficient reporting to determine if the intended environmental benefits of on-ground management offsets have been achieved. WALGA notes that this is a longstanding issue, having been identified by the WA Auditor General in 2011 and the DER in 2014. WALGA therefore supports the recommendations that strengthen the regulatory capacity to ensure that offsets are being delivered as intended and are realising their intended benefits.

3.2 Number, Type and Success of Enforcement Actions

In considering Section 6.2 of the draft Policy, WALGA has reviewed publicly available information on the number and type of enforcement actions undertaken by the Department. Information was not available on the effectiveness of these enforcement actions – in relation to whether the environmental harm was eliminated/reduced. Where possible, WALGA has sought to differentiate enforcement action that occurred under different Departmental structures.

¹ WALGA (May 2019). Submission on the DWER Approved Methods for Mandatory Reporting under the WARR Regulations 2008. Available online <https://www.wastenet.net.au/documents/360/walga-submission-on-the-dwer-data-methodologies-may-2019>.

Enforcement Actions - Environment

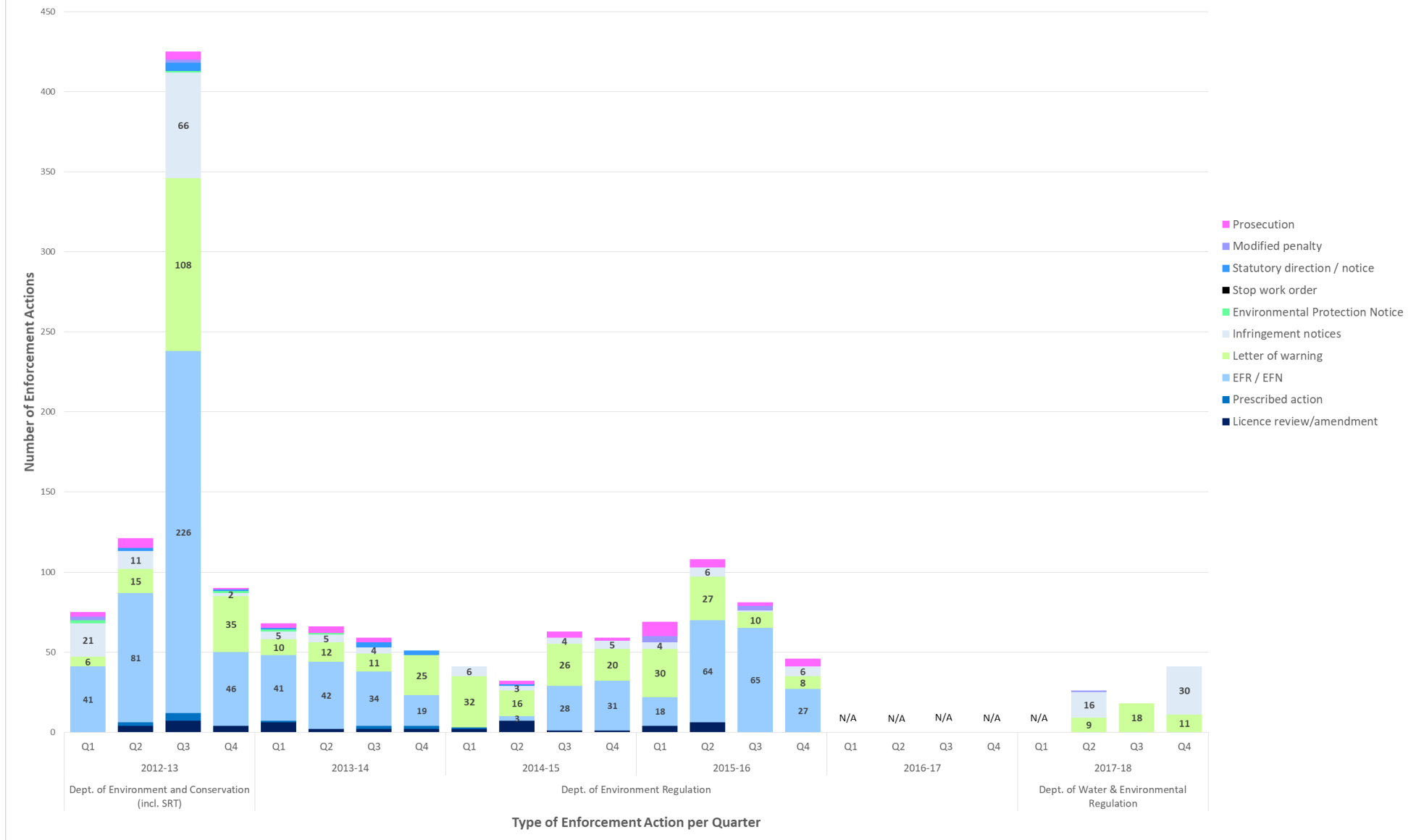


Figure 1: Enforcement Actions - Environment (DER Environmental Enforcement Quarterly Reporting Data Summary 2015-16, DWER Regulatory Performance Report – Q4 2017-18).

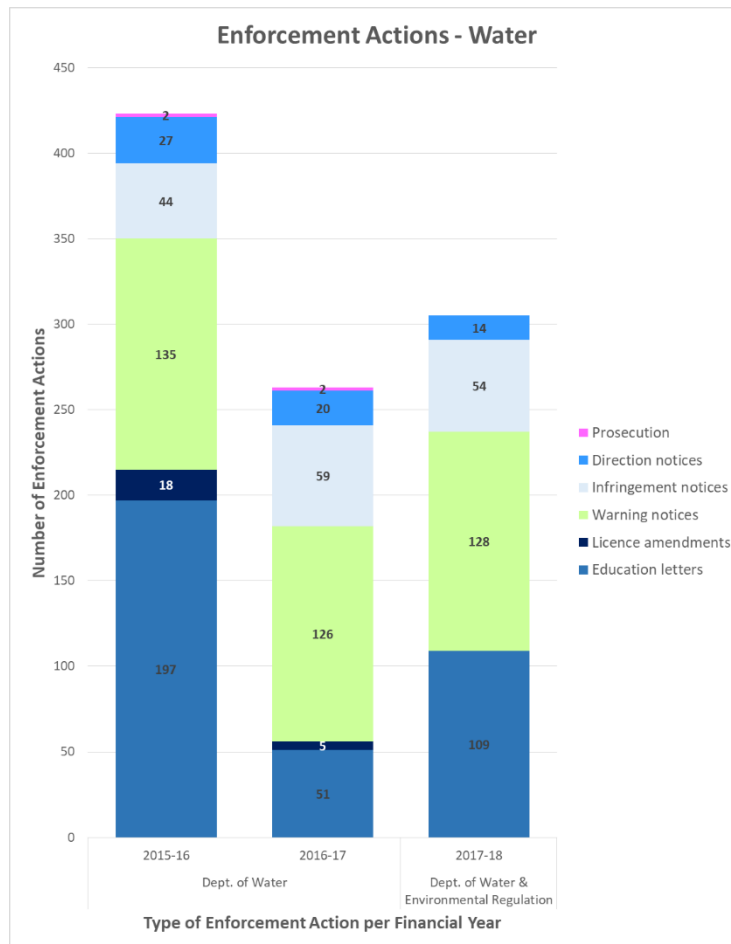


Figure 2: Enforcement Actions – Water (DWER Annual Report 2017-18).

4. Effective Implementation of the Policy

From the information provided in Figures 1 and 2, it is evident that some of the enforcement actions listed in Section 6.2 of the draft Policy are rarely used. It is not clear if this is due to one or more of the following factors:

1. Level of investment in both compliance and enforcement resourcing
2. Strategic direction provided by senior DWER management and the Government
3. Limitations with the legislative framework, and court processes.

Level of Investment

WALGA understands that the Government allocated \$19.4 million in the 2018-19 State Budget to the Department (over 4 years) to employ additional staff in environmental regulation and compliance². However, it is not clear if these funds have translated into additional resources for compliance and enforcement, resources for environmental approvals or on ground outcomes. Inadequate compliance and enforcement activity by the Department places an additional burden on Local Government. For example, responding to an increase in occurrences of illegal dumping.

Recommendation: The Department adequately resources the delivery of its compliance and enforcement functions.

² Government of Western Australia (10 May 2018). Improved cost recovery model to help speed up environmental approvals and support economic growth. Available online. <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/05/Improved-cost-recovery-model-to-help-speed-up-environmental-approvals-and-support-economic-growth.aspx>.

Strategic Direction

WALGA recognises that there is often a degree of discretion and judgement exercised on the need, and type of activity required to deliver the Department's compliance and enforcement functions. However, the extent of and type of compliance and enforcement action undertaken by the Department appears to be unduly influenced by the strategic direction provided by the approach of senior management and the Government of the day. Publicly reported information on the number of infringements issued by the former Department of Environment Regulation indicates that a total of 49 infringement notices were issued in the period 2013 to 2017. While the Machinery of Government changes have had an impact on the structure and legislative responsibilities of the Department, 46 infringement notices were issued in the Environment portfolio for the Q2, Q3 and Q4 periods of the 2017-18 Financial Year.

Recommendation: That compliance and enforcement functions and actions are prioritised as an essential component of the Departments function.

Recommendation: That compliance and enforcement functions and actions are applied across the state, ensuring that rural and remote communities are equally serviced by DWER in this regard.

Recommendation: That where there is an absence of suitably qualified DWER staff in rural and remote communities, State Government staff from other departments are authorised under the *Environmental Protection Act (1986)* to undertake the necessary regulatory and compliance functions of the DWER.

Legislative Framework and Court Processes

In WALGA's view, the adequacy of the legislative framework that underpins the compliance and enforcement activities of the Department should be reviewed, to ensure it aligns with community expectations and can be used to address risks to public health, the environment and water resources.

For example, the legislative framework provided by the *Environmental Protection Act (1986)* cannot require an operator to obtain a licence, and officers can only encourage the operator to obtain a licence and inform them of the penalties if they are found to have polluted the environment. The limited number of successful prosecutions indicates that the compliance pathway established by the Act is not straightforward to use and as shown in Figure 3, the time period for prosecutions which do occur is lengthy. WALGA would therefore support amendments to the Act that require a licence to undertake Schedule 1 activities. This would facilitate other enforcement options and ensure a more rapid pathway for the resolution of any issues.

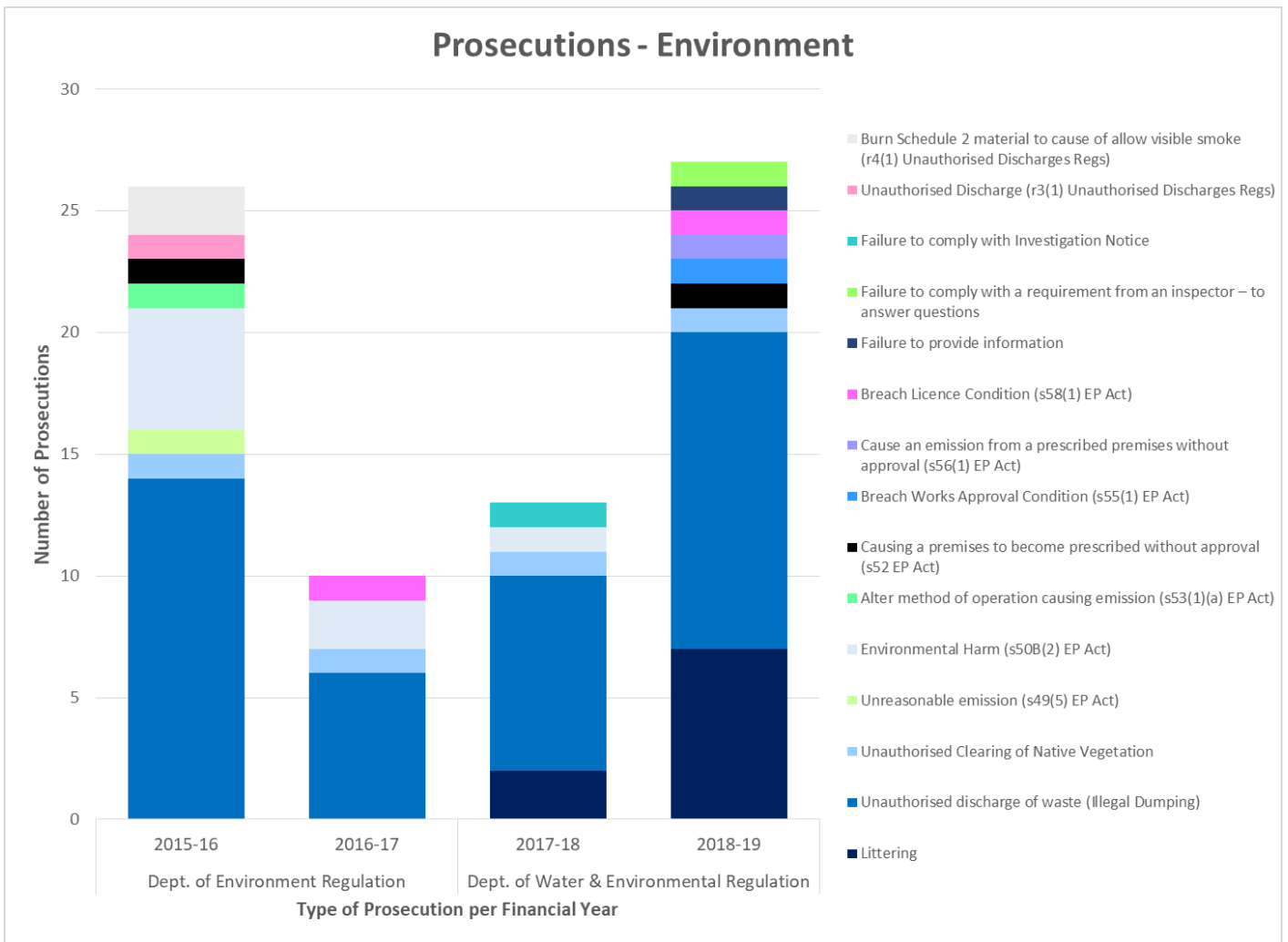


Figure 3: Summary of Prosecutions – includes spent convictions (DER/DWER 2015-16 to 2018-19 Financial Years³).

Furthermore, the current structure of the legislative framework may have contributed to the limited number of successful prosecutions for unlawful activity (Figure 4). Section 49A of the *Environmental Protection Act (1986)* establishes an offence for the unauthorised discharging or abandonment of waste. This carries a maximum penalty of \$62,500 for individuals, and \$125,000 for corporations. The information provided in Table 1 on unauthorised discharge of waste (Illegal Dumping), demonstrates that magistrates have different views as to the seriousness of unlawful activity such as illegal dumping under environmental law.

It is also important for effective regulation that the Law is not only enforced, but seen to be enforced. Hence the importance of clearly communicating the outcomes of prosecutions.

The Association commends recent media releases by the Minister for the Environment which highlighted successful prosecutions for illegal dumping.

Table 1: Successful prosecutions for unauthorised discharge of waste (Illegal Dumping) 2018-19.

³ Department of Water and Environmental Regulation (accessed June 2019). Summary of Prosecutions. Available online. <https://www.der.wa.gov.au/our-work/enforcement/summary-of-prosecutions>.

Offender	Date of Offence	Address	Charges	Summary	Date of Conviction	Penalty	Legal Costs*	Other Costs*
Adam Graham Vardy	15/10/2018	Warbrook Road Jandabup	Unauthorised discharge of waste (Illegal Dumping)	Dumped trailer load of green waste in State Forest	07/06/2019	\$1000	\$328.70	
Jai Coughlan	12/01/2018 and 14/01/2018	Warbrook Road Jandabup	4 x Unauthorised discharge of waste (Illegal Dumping)	Discarded four loads of waste in State Forest over two days without authority	07/06/2019	\$8000	\$787.67	
Aaron Lewis Jones	10/01/2018 and 12/01/2018	Warbrook Road Jandabup	4 x Unauthorised discharge of waste (Illegal Dumping)	Discarded four loads of waste in State Forest over two days without authority	07/06/2019	\$6000	\$753.30	
Luke James Rodwell and Tom Songsak Cox	Between 18/01/2018 and 10/02/2018	State Forest 22 Ashendon	Unauthorised discharge of waste (Illegal Dumping)	Discarded truck load of shop fittings and furniture from closed restaurant in Priority 1 drinking water source area	04/06/2019	\$9000 each	\$376.65 each	
Rodney Beattie	2/09/2017	Mingenew	Unauthorised discharge of waste (Illegal Dumping)	Discarded demolition waste on road reserve	11/10/2018	\$4,000 (suspended)	\$578.70	
Liam Ronald Downes	20/10/2017	Warbrook Road Jandabup	Unauthorised discharge of waste (Illegal Dumping)	Discarded motor vehicle parts in State forest	11/10/2018	\$500	\$328.70	
Hyuksu (Jamie) Lee	Between 31/01/2018 and 01/02/2018	Kingia Place, Goldsbrough Entrance and Darwinia Crescent, Helena Valley	Unauthorised discharge of waste (Illegal Dumping)	Discarded three truck-loads of building waste	29/10/2018	\$3,500	\$328	\$4,500
Brandon Abson	2/08/2018	Canning Mills Road	Unauthorised discharge of waste (Illegal Dumping)		9/10/2018	\$5,000		
Colin Jason Butera	5/06/2017	Warbrook Road, Jandabup	Unauthorised discharge of waste (Illegal Dumping) x 2	On two separate occasions, the offender drove tip truck into State Forest and discharged waste, including vehicle parts and glass.	7/09/2018	\$5,000 (\$2,500 per offence)	\$433.67	
DOWNER EDI	7/10/2016	Urch Road, Roleystone	Unauthorised discharge of	Discharged liquid waste, being water,	3/08/2018	\$12,500	N/A	N/A

			waste (Illegal Dumping)	soil and vegetation onto the ground within a reserve under the control and management of the City of Armadale.		(Modified Penalty Notice)		
Aaron Bradley Solomon	8/04/2017	Brookton Hwy Leslie. State Forest 22	Unauthorised discharge of waste (Illegal Dumping)	Offloaded waste, including an air conditioning unit, from the tray of his utility into State Forest.	27/07/2018	\$1,500	\$696.85	
Shayne Ronald Northey	Around 5/07/2017 and 8/07/2017	Goomalling Road, Northam	Unauthorised discharge of waste (Illegal Dumping) x 5	Discharged septage waste into Water Corporation drainage system	9/07/2018	\$7500 fine	\$328.70	\$957.98
Mirmehdi Mokhtari	prior to 23/09/2017, and 06/09/2017, 04/10/2017	Warbrook Road, Jandabup	Unauthorised discharge of waste (Illegal Dumping) x 3	On three separate occasions, the offender drove his vehicle with a trailer attached into State Forest and discharged waste, being fibro-cement, plastic tubing and bricks.	6/07/2018	\$4,000	\$328.70	

* Costs incurred by offender

Recommendation: The adequacy of the legislative framework for compliance and enforcement is reviewed, including:

1. Requirement of a licence to undertake Schedule 1 activities
2. Introduction of a minimum penalty for certain offences.

5. Conclusion

WALGA appreciates the opportunity to provide feedback on the draft DWER Compliance and Enforcement Policy. It is concerning that the effective implementation of the Policy could be limited by a number of factors outside the control of individual staff. These factors include the level of investment in resources allocated to deliver these functions, the strategic direction provided by senior management and the Government, and the adequacy of the framework established by the *Environmental Protection Act 1986*.

WALGA extends its support for the timely resolution of these matters, to ensure that the Department can address risks to public health, the environment and water resources in manner that aligns with community expectations.