



REPORT OF THE
STANDING COMMITTEE ON
LEGISLATION
IN RELATION TO THE
Rights in Water and Irrigation
Amendment Bill 1999

Presented by the Hon Bruce Donaldson MLC

Report 51

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

December 21 1989

Terms of Reference:

- 1 There is hereby appointed a standing committee to be known as the *Legislation Committee*.
- 2 The Committee consists of 5 members.
- 3 A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice.
- 4 A referral under clause 3 includes a recommittal.
- 5 The functions of the Committee are to consider and report on
 - (a) Bills referred under this order;
 - (b) what written laws of the State and spent or obsolete Acts of Parliament might be repealed from time to time;
 - (c) what amendments of a technical or drafting nature might be made to the statute book;
 - (d) the form and availability of written laws and their publication.

Members as at the time of this inquiry:

Hon Bruce Donaldson MLC (Chairman)
Hon Bill Stretch MLC (Deputy Chairman)
Hon John Cowdell MLC
Hon Derrick Tomlinson MLC
Hon Giz Watson MLC
Hon Norm Kelly MLC (Participating Member)
Hon Ken Travers MLC (Participating Member)

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Note

The Fifty First Report of the Standing Committee on Legislation consists of a Report, and a Minority Report of the Hon Giz Watson MLC. The Report reflects the unanimous position of the Committee save and except in relation to Recommendation 4. The Minority Report reflects the position of the Hon Giz Watson MLC in relation to that recommendation.



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CONTENTS

CHAPTER 1 EXECUTIVE SUMMARY	1
CHAPTER 2 RECOMMENDATIONS	3
CHAPTER 3 REFERENCE AND PROCEDURE	5
REFERRAL OF THE BILL TO THE COMMITTEE	5
PROCEDURE OF THE COMMITTEE	5
Role of the Committee	5
Consultation Process	6
Reporting Considerations	6
Briefings from the Water and Rivers Commission	7
Written Submissions	7
Hearings	7
Consultant Advisory Officer	7
CHAPTER 4 OVERVIEW OF THE BILL	9
INTRODUCTION	9
SUMMARY	9
Objectives	9
Community Partnership	9
Rights to Water	10
Allocation Planning	11
Licences	11
Trading	11
Compensation	11
Penalties	12
CHAPTER 5 PRIVATE WATER RIGHTS	13
INTRODUCTION	13
CROWN VESTING	14
Current Act	14
Changes Proposed by the Bill	14
CONTROLLED WATER BODIES	15
Current Act	15
Changes Proposed by the Bill	15
BASIS OF LICENSING	16
Current Act	16
Surface Water	16
Groundwater	17
Changes Proposed by the Bill	18
WATER LICENCES	19
Current Act	19
Grant of a Licence	19
Amendment and Cancellation	19
Renewal	20
Changes Proposed by the Bill	20
Grant of a Licence	20
Amendment and Cancellation	21
Renewal	21
Civil Remedy and Limits on Rights	21

RIPARIAN RIGHTS AND RIGHTS TO ‘PUBLIC’ WATER	21
Riparian Rights	21
Rights to Public Water	22
Changes Proposed by the Bill	22
Changes to the Wording of the Provisions	23
Augmented Water Flow	23
Rights in Unlicensed Areas	23
An Additional Right	23
Construction of Works	23
LIMITS ON RIGHTS	24
ADDITION OF A CIVIL ACTION	24
SPRINGS AND WETLANDS	25
Current Act.....	25
Changes Proposed by the Bill	26
ON-FARM STORAGE OF WATER.....	27
Current Act.....	27
Definition of ‘dam’	27
Licensed Areas	27
Unlicensed Areas.....	28
Riparian Dams.....	28
Changes Proposed by the Bill	28
CONCERNS RAISED BY WITNESSES	30
Crown Vesting	30
Definition of ‘watercourse’	30
Pre-existing Use of Water	31
Increased Powers to Remove Rights to Property in Water	32
Riparian Rights	32
Licensing of Existing On-Stream Dams	33
CONCLUSION.....	34
CHAPTER 6 COMPENSATION	35
INTRODUCTION	35
CURRENT ACT.....	35
CHANGES PROPOSED BY THE BILL	35
Licence Conditions	36
Trading by the Commission.....	36
Through Specific Compensation Provisions.....	36
Through Local By-laws	38
Compensation Principles	38
CONCERNS RAISED BY WITNESSES	39
Compensation for the Amendment of a Licence Reducing Water Rights	39
Compensation in Relation to Licensing of Existing Use	40
Compensation for Reduction in Current Water Rights	40
Removal/Reduction of Water Rights	41
Concerns with clause 17	41
Appeals	42
Removal of Compensation Through Local By-laws.....	42
CONCLUSION.....	42
CHAPTER 7 CAPITAL GAINS TAX	45
INTRODUCTION	45
THE LEGISLATIVE FRAMEWORK.....	45

SPECIFIC CONCERNS	45
The Introduction of a New Tax Liability	46
Licensing of Pre-existing of Water.....	46
Renewal or Variation of a Licence.....	47
Transfer of a Pre-1985 Licence	47
CONCLUSION.....	47
CHAPTER 8 SPECULATION.....	49
INTRODUCTION.....	49
LEGISLATIVE AND POLICY CONTROLS ON SPECULATION.....	49
Current Act.....	49
Changes Proposed by the Bill	50
SPECIFIC ISSUES	50
Accumulation of Licences and Removal of Water that is not Needed.....	50
Varying Reasons for Non-use of Water Allocations	51
CONCLUSION	51
CHAPTER 9 WATER RESOURCE MANAGEMENT COMMITTEES	53
INTRODUCTION.....	53
CONCERNS RAISED BY WITNESSES	53
CONCLUSION	54
CHAPTER 10 APPEAL PROCESSES	55
INTRODUCTION.....	55
CURRENT ACT	55
PROPOSED CHANGES UNDER THE BILL.....	56
Decisions which can be Appealed.....	56
Appeal Processes	57
SPECIFIC ISSUES	58
Independence of the Appeal Process	58
Inclusion of a Broader Range of Matters to be Appealed	58
Proposed Amendments to the Appeal Process	59
Cost and Complexity	59
CONCLUSION	59
CHAPTER 11 NATIVE TITLE.....	61
INTRODUCTION.....	61
LEGISLATIVE FRAMEWORK.....	61
CONCLUSION	62
CHAPTER 12 OTHER ISSUES.....	63
INTRODUCTION.....	63
ISSUES SPECIFIC TO AN AREA OF THE BILL.....	64
Charges for Water Collected on Private Property	64
Water for the Environment.....	65
The Need to Set Aside Water for Certain Purposes	65
Recognition of Public Water Supply	66
Trading by the Water and Rivers Commission	66
Security Interests	67
Leasing of Water Licences	68
Reliance on Other Legislation	68
Objects.....	68

State Agreement Acts	69
Effect of Trading on the Environment	69
Monitoring of Bores.....	69
Public Review of Water Resource Management Plans.....	70
Local By-laws	70
Licence Conditions Relating to the Environment	71
Licence Objections and Access Licences	71
Water Allocation Issues	71
Concerns Relating to section 12 of the RIWI Act.....	72
BROADER ISSUES	72
Ecologically Sustainable Development Framework.....	73
Duty of Care.....	73
Third Party Civil Proceedings.....	73
Regulations	73
Protection of Environment Dependent on Water	73
CONCLUSION.....	74
 APPENDIX 1	 75
APPENDIX 2	81

CHAPTER 1

EXECUTIVE SUMMARY

- 1.1 The *Rights in Water and Irrigation Amendment Bill 1999* (“Bill”) introduces a number of amendments to the *Rights in Water and Irrigation Act 1914*.
- 1.2 The Bill was commended as a modernisation of Western Australia's water resource management laws. It sets out the scope of water resource management, the types of resource use that should be fostered and an obligation for the Water and Rivers Commission to work with the community. The objectives of the Bill are to manage water resources sustainably; protect environmental values; encourage the efficient use of water; and actively engage local communities in management.
- 1.3 The Bill was introduced into the Legislative Council on Thursday, 25 November 1999, whereupon it was read a first time and the second reading was commenced. On March 29 2000 the Legislative Council resolved:

“That the Order of the Day for the second reading of the Rights in Water and Irrigation Amendment Bill 1999 be discharged and the Bill be referred to the Legislation Committee, and that the Committee report to the House by 4 May 2000.”
- 1.4 Pursuant to the Committee’s request the Legislative Council granted an extension of time within which to report until June 1 2000. On May 30 2000 the Legislative Council granted the Committee a further extension of time to report until June 20 2000.
- 1.5 Time constraints imposed by the Legislative Council prevented the consideration of the entire Bill in detail. The Committee, guided by the second reading speech in the Legislative Council and debate on the motion to refer the Bill to the Committee, therefore restricted its examination to a number of issues of concern. The Committee considered the following issues:
 - 1.5.1 private water rights
 - 1.5.2 compensation
 - 1.5.3 capital gains tax implications
 - 1.5.4 water banking
 - 1.5.5 the powers and composition of local management committees
 - 1.5.6 appeal processes

1.5.7 native title implications

- 1.6 This Report addresses the principal issues raised by the Bill. As stated above, time constraints prevented the Committee from pursuing in detail all of the issues raised by witnesses. The Report aims to assist the Legislative Council with informed debate on the Bill.

CHAPTER 2

RECOMMENDATIONS

Recommendations are grouped as they appear in the text at the page number indicated.

Page 34:

Recommendation 1:

The Committee recommends that the *Rights in Water and Irrigation Amendment Bill 1999* be amended to ensure landholders with a spring or wetland on their property are eligible to apply for a special licence, if that spring or wetland is brought within the control of the *Rights in Water and Irrigation Act 1914*.

Recommendation 2:

The Committee recommends that the *Rights in Water and Irrigation Amendment Bill 1999* clarify the extent to which riparian rights authorise the building of a dam to collect water for riparian uses in unlicensed areas and areas which are not prescribed.

Page 42:

Recommendation 3:

The Committee recommends that the term ‘public interest’ should be defined as including but not limited to ‘social, planning and recreational purposes’.

Recommendation 4:

The majority of the Committee recommends that the payment of compensation be mandatory wherever a legitimate existing use, whether licensed or unlicensed, is reduced or removed, the scope of exemptions from such compensation to be decided by Parliament.

Recommendation 5:

The Committee recommends that compensation should take the form of any land or water exchanges, of financial recompense or any other mutually agreed form. Where agreement on compensation cannot be reached, the compensation claim shall be referred to arbitration under the *Commercial Arbitration Act 1985*.

Recommendation 6:

The Committee recommends that, in unlicensed areas, compensation should be considered only where the existing usage was in place on the date of the First Reading of the *Rights in Water and Irrigation Amendment Bill 1999* in the Legislative Assembly (June 30 1999).

Page 59:

Recommendation 7:

The Committee recommends that consideration should be given to an independent appeals mechanism.

Recommendation 8:

The Committee recommends that the adapted appeal system proposed by the Bill, if adopted, should be reviewed if problems with fairness become apparent.

Page 74:

Recommendation 9:

The Committee recommends that consideration be given to a periodic review of regional water resource management plans.

CHAPTER 3

REFERENCE AND PROCEDURE

REFERRAL OF THE BILL TO THE COMMITTEE

3.1 The Bill's long title is:

“AN Act to amend the *Rights in Water and Irrigation Act 1914* and to make consequential amendments to the -

- *Country Areas Water Supply Act 1947*;
- *Environment Protection Act 1986*;
- *Metropolitan Water Supply, Sewerage, and Drainage Act 1909*; and
- *Mining Act 1978*. ”

3.2 The Bill was introduced and read a first time in the Legislative Council on motion by the Hon Peter Foss on Thursday, November 25 1999. The Bill's second reading commenced on November 25 1999.

3.3 The Bill was referred to the Committee on March 29 2000 on motion by the Hon Ken Travers prior to the second reading being agreed. A reporting date of May 4 2000 was fixed. The Committee commenced consideration of the Bill on April 5 2000.

3.4 Pursuant to the Committee's request the Legislative Council granted an extension of time within which to report until June 1 2000. On May 30 2000 the Legislative Council granted the Committee a further extension of time to report until June 20 2000.

PROCEDURE OF THE COMMITTEE

Role of the Committee

3.5 The role adopted by the Committee was two-fold:

- to comment on whether the Rights in Water and Irrigation Amendment Bill 1999 is consistent with claims made concerning it in the second reading debate, particularly by the Minister promoting the Bill; and
- to consider matters of detail such as the feasibility or clarity of particular clauses.

- 3.6 The Committee also considered amendments proposed by the Hon Murray Criddle MLC, Minister for Transport, in the Supplementary Notice Paper No 28-2.¹

Consultation Process

Reporting Considerations

- 3.7 The Committee's approach to consultation was limited by time constraints.
- 3.8 At the time of the Bill's referral to the Committee, the Council of Australian Governments ("COAG") agreement imposed a deadline of June 30 2000 for the State to have *passed legislation* in order to receive certain payments from the Commonwealth. Just prior to finalisation of this Report, this deadline was extended to require legislation to be passed and operational by January 1 2001.
- 3.9 The COAG requirements affected the extent of the Committee's consideration of the Bill. It was not possible for the Committee to seek substantive extensions of time to report as this would have reduced the amount of time for Parliament to consider any necessary amendments and to pass the legislation. This meant that it was not possible for the Committee to conduct a detailed analysis on the clauses of the Bill. The Committee resolved to concentrate on specific areas of interest raised in the second reading speech in the Legislative Council,² the debate on the motion to refer the Bill to the Committee,³ and as raised by witnesses to the Committee. These were:
- 3.9.1 private water rights
 - 3.9.2 compensation
 - 3.9.3 capital gains tax implications
 - 3.9.4 water banking
 - 3.9.5 the powers and composition of local management committees
 - 3.9.6 appeal processes
 - 3.9.7 native title implications
- 3.10 The Committee also considered amendments which related to the above areas which were raised in the Supplementary Notice Paper.

¹ Legislative Council of Western Australia, *Supplementary Notice Paper No. 28-2*, Tuesday, March 28 2000.

² *Parliamentary Debates (WA) (Hansard)*, Thirty Fifth Parliament Third Session 1999, November 25 1999, p. 3818.

³ *Parliamentary Debates (WA) (Hansard)*, Thirty Fifth Parliament Third Session 2000, March 29 2000, pp. 5647 – 5650.

Briefings from the Water and Rivers Commission

- 3.11 The Water and Rivers Commission (“Commission”) was invited to brief the Committee on the Bill. The following Commission officers attended the Committee meetings of April 10 2000 and May 22 2000:
- Tim McAuliffe, Director, Policy and Planning Division
 - Rod Banyard, Manager, Strategic Projects Branch
 - Cheryl Leyland, Policy Officer
- 3.12 These officers gave briefings on all of the areas of specific interest to the Committee and explained the general framework of the reforms contained in the Bill.
- 3.13 The Committee expresses its appreciation to the Commission for its prompt assistance throughout the inquiry.

Written Submissions

- 3.14 In view of the issues raised by the debate in the Legislative Council on the motion to refer the Bill to the Committee and the time constraints for reporting to the Legislative Council, the Committee considered that it would be of limited assistance to invite submissions on the Bill from the general public.
- 3.15 The Committee invited submissions from persons well placed to give the Bill consideration. A list of persons invited to make submissions is set out in Part 1 at Appendix 1. A list of submissions received by the Committee is set out in Part 2 at Appendix 1. The Committee thanks all who provided submissions.

Hearings

- 3.16 Witnesses also were invited to appear before the Committee. A list of witnesses who appeared before the Committee is set out at Part 3 of Appendix 1. The Committee thanks the witnesses for giving their time.

Consultant Advisory Officer

- 3.17 The Committee was fortunate to secure the services of Ms Ambelin Kwaymullina as Consultant Advisory Officer to the Committee for the purposes of this inquiry. The Committee expresses its appreciation to Ms Kwaymullina for her assistance in the conduct of this inquiry and preparation of this report. She was ably assisted by the Committee Clerk, Ms Kate Fitzgerald, and the Principal Advisory Officer, Ms Mia Betjeman.

CHAPTER 4

OVERVIEW OF THE BILL

INTRODUCTION

4.1 The Bill is intended to “modernise [Western Australia’s] *water resource management laws*”¹ and implement obligations under the Council of Australian Governments Water Reform Framework Agreement. The major reforms introduced by the Bill, as highlighted during the Second Reading Speech,² relate to:

- objectives
- community partnership
- rights to water
- allocation planning
- licences
- trading
- compensation
- penalties

SUMMARY

Objectives

4.2 The current *Rights in Water and Irrigation Act 1914* (“RIWI Act”) does not contain objectives. The Bill introduces a set of objectives which apply to Part III of the Act. These objectives include providing for sustainable use and development of water resources and promoting orderly, equitable and efficient use of water resources.³ The Commission, and any other person performing a function under Part III of the RIWI Act, must seek to ensure that these objectives are achieved.

Community Partnership

4.3 Among the objectives introduced into the RIWI Act by the Bill is an objective to foster consultation with local communities and enable communities to participate in the local administration of Part III of the RIWI Act.

¹ sup. ch.3, fn 2, p. 3818.

² ibid. pp. 3818 - 3820.

³ Bill, clause 7 (proposed s. 4(1) and (2)).

- 4.4 The Bill introduces water resource management committees,⁴ which are intended to “*take an active role in developing local policy and rules and arbitrating over disputes.*”⁵ Duties of committees include ensuring that the Commission has access to community views and assisting the Commission in dispute resolution. Water resource management committees also have a role in commenting on draft water resource management plans and local by-laws.
- 4.5 Water resource management plans are prepared by the Commission, on a regional, sub-regional or local basis, to guide the management of the water resources of an area.⁶ Local by-laws can be made for specific areas for a number of purposes including to regulate the construction of works relating to water resources and the manner in which water can be taken.⁷ Local by-laws are intended to “*regulate and manage water flexibly so that what needs to be controlled is controlled and other matters are left to landowners or occupiers.*”⁸
- 4.6 Water resource management plans and local by-laws are subject to comment by the public.⁹

Rights to Water

- 4.7 The Bill “*consolidates and clarifies the rights to control and use water.*”¹⁰
- 4.8 The Bill allows the sharing of water that can be taken under riparian rights and the imposition of controls on springs and wetlands on private land “*when the water resources committee, the Commission and the Minister all agree that [controls] are needed.*”¹¹
- 4.9 In addition, the Bill provides that dams on watercourses be managed “*without unnecessary red tape through a set of local by-laws or licences.*”¹² The Bill “*amends the Act so that it cannot interfere with a farmer’s right to harvest reasonable quantities of water from his land for stock purposes.*”¹³

⁴ Bill, clause 44 (proposed Division 3C).

⁵ sup. ch.3, fn 2, p. 3819.

⁶ Bill, clause 44 (proposed ss. 26GW, 26GX and 26GY).

⁷ Bill, clause 45 (proposed s. 26L).

⁸ Bill *Clause Notes*, p. 63.

⁹ Bill, clause 44 (proposed s. 26GZB) and clause 45 (proposed s. 26N).

¹⁰ sup. ch.3, fn 2, p. 3819.

¹¹ *ibid.* p. 3819.

¹² *ibid.*

¹³ *ibid.*

Allocation Planning

- 4.10 The Bill is intended to meet environmental water needs “*through a system of allocation planning at the regional, sub-regional and local levels.*”¹⁴ The Bill seeks to achieve this through water resource management plans, which can specify environmental requirements.¹⁵

Licences

- 4.11 The Bill is intended to “*increase the scope and flexibility of licensing and ensure that licensing is introduced only where needed.*”¹⁶ It “*allows local by-laws to be used as an alternative to licensing.*”¹⁷
- 4.12 The Bill also specifies relevant considerations to guide the Commission in deciding whether to grant a licence to take water and sets out powers and processes relating to licences to take water in a Schedule.¹⁸

Trading

- 4.13 The Bill allows people who hold a water licence to transfer either the licence itself, or the water entitlement held under the licence.¹⁹ A water entitlement is all or part of the water that a licensee is entitled to take under the licence.²⁰ Water licences can be transferred permanently or temporarily. An amendment has been tabled which would replace the ability to temporarily transfer licences with an ability to make an agreement to allow another person to take water under the licence for a limited time.²¹

Compensation

- 4.14 The Bill “*increases the provisions for compensation for water users, where appropriate.*”²² The Bill requires licence holders to be compensated wherever their licensed entitlement to take water is reduced or removed in the ‘public interest’.²³ Otherwise the Bill allows compensation to be provided through licence conditions or local by-laws.

¹⁴ *ibid.* p. 3820.

¹⁵ Bill, clause 44 (proposed ss. 26GW, 26GX and 26GY).

¹⁶ *sup.* ch.3, fn 2, p. 3820.

¹⁷ *ibid.* p. 3820.

¹⁸ Bill, clause 51 (proposed clause 7).

¹⁹ Bill, clause 51 (proposed Schedule 1, Division 7).

²⁰ Bill, clause 51 (proposed Schedule 1, clause 28).

²¹ *sup.* ch.3, fn 1.

²² *sup.* ch.3, fn 2, p. 3820.

²³ Bill, clause 51 (proposed Schedule 1, Division 9).

Penalties

- 4.15 The Bill increases the penalties under the Act “*to maintain their value as a deterrent to individuals and to corporations.*”²⁴

²⁴ sup. ch.3, fn 2, p. 3820.

CHAPTER 5

PRIVATE WATER RIGHTS

INTRODUCTION

5.1 During the Second Reading Speech, the Hon Max Evans stated:

“The Bill consolidates and clarifies the rights to control and use water. The current balance of crown and private rights is maintained.”¹

5.2 The possible impact of the Bill on private water rights has caused disquiet among landowners. Concerns raised with the Committee were that the Bill will reduce private water rights, and that compensation will not be paid for these reductions.

5.3 The debate in the Legislative Council on the motion of referral of the Bill to the Committee² identified the following specific areas of interest which involve consideration of private water rights:

- the effect of the Bill on springs and wetlands on private land; and
- the effect of the Bill on on-farm storage of water.³

5.4 Further areas of interest contained in the submissions received by the Committee were:

- the recognition of, and/or controls on, pre-existing use of water;⁴
- increased powers to remove or reduce rights to property in water;⁵
- increased controls through the definition of ‘watercourse’;⁶ and
- concerns relating to the removal of, and trading of, riparian rights.⁷

5.5 A broader concern is presented in the submissions related to the removal or reduction of any entitlement to take water, for instance for environmental purposes, without compensation. This issue more properly relates to compensation rather than private water rights and will be dealt with in Chapter 6. This Chapter will examine existing

¹ sup. ch.3, fn 2, p. 3818.

² sup. ch.3, fn 3, pp. 5647 – 5650.

³ Submissions 1, 4 and 7 also raise this concern. Full details of the submissions are set out in Appendix 1.

⁴ Submissions 1, 3 and 4.

⁵ Submission 2.

⁶ Submissions 1 and 8.

⁷ Submission 9.

rights to water contained in the RIWI Act and changes proposed by the Bill. The following Chapter will address the issue of compensation generally and will include a consideration of whether compensation should be paid for any possible impacts on private water rights.

- 5.6 The distinction between ‘water rights’ and ‘water licences’, as they are dealt with in the existing RIWI Act and in the Bill, should be noted. A water licence is commonly regarded as a ‘right’ to take water. However, ‘water rights’ under the RIWI Act are a set of specified rights – such as riparian rights⁸ – that apply to landowners simply by the operation of the RIWI Act. In contrast, ‘water licences’ do not automatically attach to landowners. They must be applied for to the Commission and are granted at the discretion of the Commission.⁹

CROWN VESTING

Current Act

- 5.7 Rights to the use, flow and control of all groundwater, and of surface water in areas subject to licensing, vest in the Crown.¹⁰ See paragraphs 5.19 to 5.39 for a discussion of the introduction of licensing.
- 5.8 In surface water areas subject to licensing, the RIWI Act states that the vesting does not prevent landholders from making a dam or tank on their land, or draining their land, provided the flow of water in a watercourse or the amount of water in a lake, lagoon, swamp or marsh is not ‘sensibly diminished’.¹¹ See paragraphs 5.88 to 5.103 for a discussion of dams.

Changes Proposed by the Bill

- 5.9 The Bill vests rights to use, flow and control of *all water* in the Crown.¹² The impact of this change is that surface water in areas that are not subject to licensing becomes vested in the Crown. See paragraphs 5.19 to 5.39 for a discussion of the introduction of licensing.
- 5.10 The statement in the RIWI Act that the vesting does not prevent the building of a dam on private land is retained and extended to all water. See paragraphs 5.98 and 5.99 for a discussion of this provision as it relates to dams.

⁸ Riparian rights are the rights of landholders whose land has contact with a watercourse or lake, lagoon, swamp or marsh to take water for domestic, ordinary and stock use and in some cases for irrigation of a garden. See ss. 9 and 20 of the RIWI Act.

⁹ RIWI Act, ss. 11, 12, 13, 26A, 26B, 26D.

¹⁰ RIWI Act, ss. 8 and 26.

¹¹ RIWI Act, s. 8.

¹² Bill, clause 18 (proposed s. 5A).

CONTROLLED WATER BODIES

Current Act

- 5.11 The RIWI Act applies to ‘watercourses’, ‘lakes, lagoons, swamps and marshes’,¹³ and ‘underground sources of water supply’.¹⁴
- 5.12 A ‘lake, lagoon, swamp or marsh’ is defined as a natural collection of water, whether permanent or temporary, that is not part of a watercourse.¹⁵
- 5.13 The definition of ‘watercourse’ includes:¹⁶
- rivers, creeks, streams and brooks;
 - conduits which (wholly or partially) divert a river, creek, stream or brook and form part of the river, creek, stream or brook; and
 - a natural collection of water into which either of the above flow.
- 5.14 The definition also includes the bed and banks of any of the above. Water flow can be permanent, intermittent or occasional.
- 5.15 The term ‘underground sources of water supply’ is not defined.

Changes Proposed by the Bill

- 5.16 The term ‘lake, lagoon, swamp or marsh’ is replaced with the word ‘wetland’. A wetland is defined as “*a natural collection of water, whether permanent or temporary, on the surface of any land*” and includes:¹⁷
- any lake, lagoon, swamp or marsh; and
 - a natural collection of water that has been artificially altered.
- 5.17 The definition of watercourse is altered to specify that a ‘collection of water’ includes a reservoir, and to allow local by-laws to prescribe a place where water flows as a watercourse.¹⁸

¹³ RIWI Act, Divisions 1 and 2 of Part III.

¹⁴ RIWI Act, Division 3 of Part III.

¹⁵ RIWI Act, s. 2(1).

¹⁶ RIWI Act, s. 2(1).

¹⁷ Bill, clause 5.

¹⁸ Bill, clause 6.

- 5.18 The Bill changes ‘underground sources of water supply’ to ‘underground water’ or ‘underground water source’, and defines these terms as including water that percolates from the ground into a well or other works.¹⁹

BASIS OF LICENSING

Current Act

Surface Water

- 5.19 Licensing provisions apply to irrigation districts, and to areas or specific water bodies (watercourses or lakes, lagoons, swamps or marshes) which are proclaimed to be subject to Division 1 of the RIWI Act.²⁰ (Hereafter referred to as “licensed areas” - note that under the Bill ‘licensed areas’ will include areas prescribed by regulations.)
- 5.20 Irrigation Districts are constituted by the Governor on the recommendation of the responsible Minister (the Minister for Water Resources – hereafter “the Minister”).²¹ Proclamations also are made by the Governor on the recommendation of the Minister.²²
- 5.21 Once licensing is introduced, any diversion or taking of water not authorised by riparian rights or rights to water accessible by a public road or reserve (“public water”) must be subject to a licence.²³ See paragraphs 5.53 to 5.64 for a discussion of riparian rights and rights to public water.
- 5.22 In licensed surface water areas the RIWI Act recognises special licences and other (“ordinary”) licences.
- 5.23 Special licences can be granted where:²⁴
- an area or water body is proclaimed; and
 - prior to the proclamation, a riparian user had been taking water for uses outside those permitted by riparian rights in licensed areas.
- 5.24 Special licences, which are granted for ten year periods, allow riparian users to continue their current uses of water. Special licences are not available within Irrigation Districts.
- 5.25 Ordinary licences are granted to authorise all other takings or diversions of water.

¹⁹ Bill, clauses 5, 18 (proposed s. 5A) and 33.

²⁰ RIWI Act, s. 6.

²¹ RIWI Act, s. 28.

²² RIWI Act, s. 6.

²³ RIWI Act, s. 11.

²⁴ RIWI Act, s. 12.

5.26 In unlicensed surface water areas:

- The RIWI Act recognises riparian rights and rights to public water (see paragraphs 5.53 to 5.64 for a discussion of riparian rights and rights to public water).²⁵
- The taking of water outside of, or in excess of, these rights is *not prohibited*.

5.27 The Commission can issue a direction defining a person's ability to take water where.²⁶

- a person is taking water outside of, or in excess of, a right to do so; and
- that taking of water has interfered with another person's rights, has damaged another person's land, or should not, in the public interest, be permitted to continue.

5.28 A direction can *prevent* or *allow* the taking of water. The Commission can issue a direction allowing the taking of water outside of riparian rights or rights to public water only if it is satisfied that the taking will not cause damage to riparian rights or rights to public water or to another persons land.²⁷

5.29 In unlicensed surface water areas, therefore, the use of water outside a recognised right to do so is neither authorised nor prohibited by the RIWI Act, and the Commission can issue directions either preventing or allowing that use.

5.30 In licensed and unlicensed areas, there are prohibitions on obstructing or interfering with watercourses and lakes, lagoons, swamps or marshes without authorisation – see paragraphs 5.88 to 5.103.

*Groundwater*5.31 A person must have a licence to commence, construct, enlarge, deepen, alter or draw water from (hereafter “construct, alter, or draw water from”) *any artesian well*.²⁸ A *non artesian well* must also be licensed when it is located in an area that has been proclaimed to be subject to the relevant section of the RIWI Act.²⁹

²⁵ RIWI Act, ss. 20 and 21.

²⁶ RIWI Act, s. 22.

²⁷ RIWI Act, s. 22.

²⁸ RIWI Act, s. 26A.

²⁹ RIWI Act, s. 26B. Note that this is different to the proclamation of a surface water area, which takes place under section 6.

- 5.32 An order can be made exempting from licensing requirements non artesian wells used for domestic, ordinary or stock purposes.³⁰
- 5.33 In unproclaimed groundwater areas, there is no prohibition on constructing, altering or taking water from non artesian wells. Information supplied by the Commission indicates that the majority of groundwater areas are proclaimed.³¹
- 5.34 Where water is being used improperly, is being wasted, is having a harmful effect, or is not being used to best advantage, the Commission can direct:³²
- the closing or partial closing of the well; or
 - other steps to be taken as it thinks necessary.
- 5.35 The Commission also can give directions as to the amount of water that can be drawn and the rate of draw.

Changes Proposed by the Bill

- 5.36 Surface water provisions relating to the introduction of licensing are retained, except that:
- the Commission will be required to give notice to any relevant water resources management committee and to call for public comment prior to proclaiming an area;³³ and
 - watercourses or wetlands in unlicensed areas can be prescribed by regulations to be subject to licensing.³⁴
- 5.37 Groundwater provisions are retained with the following changes:
- Non artesian wells can be prescribed by regulations (as well as proclaimed) to be subject to licensing.³⁵
 - A new section is included giving people rights – subject to local by-laws - to take water without a licence from non artesian wells in areas prescribed by regulations for:³⁶
 - domestic and ordinary use;

³⁰ RIWI Act, s. 26C.

³¹ Water and Rivers Commission, *Issues Sheets: Rights to Water*, April 2000.

³² RIWI Act, s. 26G.

³³ Bill, clause 20.

³⁴ Bill, clause 18 (proposed s. 5C).

³⁵ Bill, clause 18 (proposed s. 5C)

³⁶ Bill, clause 33 (proposed s. 25A).

- firefighting;
 - watering cattle or stock other than those being raised under intensive conditions; and
 - for other purposes as prescribed in local by-laws.
- The provision exempting non-artesian wells from licensing is to be widened to allow wells used for any purposes to be exempted, and to allow local by-laws to exempt non artesian wells from licensing.³⁷

5.38 The Bill separates a licence to take water from a licence to construct or alter a well. All licences to take water, including licences to take groundwater, will be granted under a single provision and subject to a single set of processes.³⁸ The current provisions are retained regarding licences to construct or alter wells.

5.39 The Bill also introduces local by-laws and plans for the management of water resources. (See paragraphs 4.4 to 4.6 for a discussion of plans and local by-laws.) Material supplied to the Committee by the Commission indicates that plans and local by-laws will eventually replace the proclamation of areas as the mechanism for introducing licensing requirements.³⁹

WATER LICENCES

Current Act

Grant of a Licence

5.40 The Commission has a discretion as to whether to grant a licence or impose conditions on a licence.⁴⁰

Amendment and Cancellation

5.41 In relation to surface water, the Commission can vary the term of an ordinary licence, or change the conditions, at any time.⁴¹

5.42 A special licence (see discussion at paragraphs 5.22 to 5.24) can be amended or cancelled if a licensee has not complied with a condition of the licence or if it is in the public interest to do so.⁴² Discretionary compensation is available for a public interest

³⁷ Bill, clause 36.

³⁸ Bill, clauses 18 (proposed s. 5C) and 51.

³⁹ Water and Rivers Commission, *Water Law Reform: Guide to Legislative Change*, Water Reform Series Report No WR9, August 1998.

⁴⁰ RIWI Act, ss. 12, 13 and 26D.

⁴¹ RIWI Act, s. 13.

⁴² RIWI Act, s. 12.

cancellation or amendment. (See paragraphs 6.2 and 6.3 for a discussion of compensation in these circumstances).

- 5.43 In relation to groundwater, a holder of a licence to construct, alter or draw water from a well can apply to the Commission for an amended licence allowing alterations to the well.⁴³ In addition, where a direction is given to a licence holder and the licence holder is convicted of failing to comply with it, the licence can be cancelled. (See paragraphs 5.34 to 5.35 for directions.)

Renewal

- 5.44 There are no specific provisions relating to renewal of licences in the current RIWI Act.

Changes Proposed by the Bill

Grant of a Licence

- 5.45 The current provisions are retained in relation to licences to construct or alter wells.
- 5.46 The decision to grant a licence to take water, or impose conditions on a licence, remains at the discretion of the Commission. However, the Bill lists matters that the Commission can have regard to in making that decision.⁴⁴ These matters include a consideration of whether the proposed taking and use of water:
- is in the public interest;
 - is ecologically sustainable;
 - may prejudice other current and future needs for water; and/or
 - could be provided for by another source.
- 5.47 The Bill includes a list of matters that licence conditions can relate to, including monitoring, the construction or maintenance of works, and the use, management and protection of the water resource.⁴⁵
- 5.48 The Bill states that the Commission must refuse to grant a licence where it considers that a person would not be willing or able to comply with the terms of a licence.⁴⁶

⁴³ RIWI Act, s. 26F.

⁴⁴ Bill, clause 51 (proposed Schedule 1, clause 7).

⁴⁵ Bill, clause 51 (proposed Appendix 1 to Schedule 1).

⁴⁶ Bill, clause 51 (proposed Schedule 1, clause 8).

Amendment and Cancellation

- 5.49 The Bill retains the current provisions relating to licences to construct or alter wells.
- 5.50 The Bill provides that a licence to take water can be amended or cancelled in a range of circumstances. These are discussed at paragraphs 6.12 and 6.13.

Renewal

- 5.51 The Bill provides that a licence is to be renewed unless specified circumstances apply.⁴⁷ These circumstances include:
- where the renewal would be inconsistent with a local by-law or plan;
 - where a term of the licence has not been complied with; or
 - where it is a term of the licence that it is not renewable.

Civil Remedy and Limits on Rights

- 5.52 The Bill provides for a civil remedy allowing users to protect their rights. It also allows directions to be given to users where there is a water shortage or in other circumstances. See paragraphs 5.65 to 5.71.

RIPARIAN RIGHTS AND RIGHTS TO ‘PUBLIC’ WATER**Riparian Rights**

- 5.53 In licensed areas, riparian rights are the rights of owners or occupiers of land that has contact with a watercourse or lake, lagoon, swamp or marsh to take water for domestic and ordinary use, for watering cattle and other stock and, in some circumstances, to irrigate a garden of less than two hectares.⁴⁸ A limit is specified on the amount of water that can be taken under riparian rights where the volume of water in a watercourse or lake, lagoon, swamp or marsh has been increased by public works.⁴⁹
- 5.54 In unlicensed areas, riparian rights include the above rights as well as an additional right to take water ‘for any other purpose’ provided the flow of water in a watercourse or amount of water in a lake, lagoon, swamp or marsh is not sensibly diminished.⁵⁰ No limit is expressed with respect to water bodies augmented by public works.
- 5.55 In licensed areas, surface water is vested in the Crown and there is currently an unresolved legal debate as to whether this vesting has the effect of extinguishing

⁴⁷ Bill, clause 51 (proposed Schedule 1, clause 21).

⁴⁸ RIWI Act, s. 9.

⁴⁹ RIWI Act, s. 9.

⁵⁰ RIWI Act, s. 20.

common law rights, including riparian rights, or whether common law rights continue to operate.⁵¹

- 5.56 If common law rights are extinguished, riparian users may not be able to take civil action to protect their rights.⁵² This is partially addressed in the Bill by the provision of a civil remedy – see paragraphs 5.70 and 5.71.

Rights to Public Water

- 5.57 In licensed areas, water can be taken from any watercourse or lake, lagoon, swamp or marsh to which there is access by a public road or reserve for domestic and ordinary use, and for watering cattle and other stock.⁵³ In unlicensed areas there is an additional right to take water for ‘any other purpose’ provided the flow of water in a watercourse or amount of water in any lake, lagoon, swamp or wetland is not sensibly diminished.⁵⁴

Changes Proposed by the Bill

- 5.58 The Bill affects riparian rights and rights to public water through:
- changes to the wording of the provisions;
 - changes to the limit regarding augmented water flow;
 - allowing local by-laws to affect rights in unproclaimed areas; and
 - in the case of rights to public water, the inclusion of a new right in unlicensed areas and the inclusion of a prohibition on interference with water bodies, or public roads or reserves.
- 5.59 Riparian rights and rights to public water are further affected by the introduction of a civil remedy and limits on rights where there is a water shortage and in other circumstances. (See paragraphs 5.65 to 5.71 for a discussion of these provisions.)

⁵¹ Bartlett, Richard, “A Comparative Examination of Crown Rights and Private Rights to Water in WA”, in *Water Law in WA: Comparative Studies and Options for Reform*, Centre for Commercial and Resources Law, University of Western Australia and the Water and Rivers Commission, Perth WA 1997; Gardner, Alex, *Water Resources Law Reform*, National Environmental Law Association (WA Division) 1998 State Conference.

⁵² See Gardner, sup.

⁵³ RIWI Act, s. 10.

⁵⁴ RIWI Act, s. 21.

Changes to the Wording of the Provisions

5.60 The Bill changes the wording of the provisions so that:⁵⁵

- Rights do not extend to watering cattle or stock being raised under intensive conditions. ‘Intensive conditions’ are defined as conditions in which the cattle or stock are confined to an area smaller than that required for grazing under normal conditions and are usually fed by hand or mechanical means.
- In the case of rights to public water, there must be access to the water by a public road or reserve ‘at the point at which the water is taken’.
- In the case of riparian rights, rights do not extend to irrigation of a commercial crop.

Augmented Water Flow

5.61 As discussed above at paragraph 5.53, the RIWI Act limits the amount of water that can be taken under riparian rights in licensed surface water areas where water flow is increased by public works. The Bill extends this limit so that it applies to both licensed and unlicensed areas, and to both riparian rights and rights to public water. The Bill also allows the limit to be prescribed by local by-laws.⁵⁶

Rights in Unlicensed Areas

5.62 Currently under riparian rights and rights to public water in unlicensed surface water areas, a user can take water for ‘any other purpose’ provided the water flow in a watercourse or amount of water in a lake, lagoon, swamp or marsh is not sensibly diminished. The Bill allows this right to be controlled through local by-laws.⁵⁷

An Additional Right

5.63 The Bill includes an additional right to take water for firefighting under rights to public water in unlicensed areas.⁵⁸

Construction of Works

5.64 The Bill provides that public rights do not authorise the obstruction or interference with a watercourse or wetland or a public road or reserve, without authorisation.⁵⁹ The Commission can issue a permit authorising interference with a watercourse or

⁵⁵ Bill, clauses 8, 10, 24, 28 and 30.

⁵⁶ Bill, clause 40 (proposed s. 26GA).

⁵⁷ Bill, clauses 28 and 29.

⁵⁸ Bill, clause 11.

⁵⁹ Bill, clauses 24 and 30.

wetland. Authorisation to interfere with a road or reserve must be obtained from the body in which the control and management of the road or reserve is vested.⁶⁰

LIMITS ON RIGHTS

5.65 The Bill allows the taking of water to be restricted or prohibited where there is a water shortage and in other circumstances.⁶¹

5.66 Where the Commission determines there is insufficient water to meet the needs of all users (a water shortage), including the environment, the Commission can publish an order that a shortage exists.⁶² An order must be revoked as soon as the water shortage is over.⁶³

5.67 The Bill also allows the Commission to restrain the use of water where water is being improperly used, is being wasted, is having a harmful effect, or is not being used to best advantage.⁶⁴ The Commission has advised the Committee that:⁶⁵

- the application of the provision would be determined on a case by case basis; and
- situations where the provision might be applied include where water use was malicious - for instance a diversion of water to deny its use to a downstream landowner - or where irrigation is causing salinisation, or waterlogging or drainage problems for neighbours.

5.68 Where there is a water shortage or the other listed circumstances apply, the Commission can issue directions to users prohibiting or restricting the taking of water. Where a direction is issued, it overrides riparian rights, rights to public water, water licences, and rights to take water specified in regulations or local by-laws.

5.69 Any directions given in a situation of water shortage or other circumstances can be appealed.⁶⁶

ADDITION OF A CIVIL ACTION

5.70 The Bill includes a new provision that allows people to take civil action to protect their rights where:

- a person takes water contrary to the RIWI Act; and

⁶⁰ Bill, clauses 24 and 30.

⁶¹ Bill, clause 40, (proposed division 3A).

⁶² Bill, clause 40, (proposed s. 26GD).

⁶³ Bill, clause 40, (proposed s. 26GE).

⁶⁴ Bill, clause 40, (proposed s. 26GD(2)).

⁶⁵ Letter from the Waters and Rivers Commission to the Committee dated May 16 2000.

⁶⁶ Bill, clause 64, (proposed s. 26GH).

- that taking affects riparian rights, rights to public water, rights to groundwater, rights under local by-laws or the taking of water under a licence.⁶⁷

5.71 For this provision to operate, a person must have taken water in contravention of a specific statutory prohibition. As there is no prohibition on taking water in unlicensed areas, users could not make use of this provision to protect their rights from people taking water without a right to do so. The Commission could, however, issue a direction to a person taking water outside of, or in excess of, a right to do so. (See paragraphs 5.27 to 5.29 for directions.)

SPRINGS AND WETLANDS

Current Act

5.72 The RIWI Act does not apply to:

- the water flowing from a spring which rises on private land until the water passes beyond the boundaries of the land; or
- the water in a lake, lagoon, swamp, or marsh where the bed is wholly on private land.⁶⁸

5.73 The effect of these provisions is that springs and lakes, lagoons, swamps, and marshes on private property are not regulated by the RIWI Act, although other statutes, such as the *Environmental Protection Act 1986*, may apply.

5.74 The current definition of a spring is “a spring of water naturally rising to and flowing over the surface of land.”⁶⁹

5.75 In the absence of statutory regulation, common law riparian rights will apply.⁷⁰ At common law, riparian rights are the rights of landholders whose land has contact with a water body to take water for ordinary use, for example domestic and stock use and for extraordinary uses provided the flow of water is not sensibly diminished.⁷¹

5.76 Once the water flowing from the spring passes the boundary of private land – if it forms a watercourse - the RIWI Act applies. Landholders of land that has contact with that watercourse from that point on will have statutory riparian rights.

5.77 As discussed at paragraphs 5.55 and 5.56, there is legal debate as to whether common law riparian rights survive in licensed surface water areas. If common law rights do

⁶⁷ Bill, clause 18 (proposed s. 5E).

⁶⁸ RIWI Act, ss. 6 and 19.

⁶⁹ RIWI Act, s. 2.

⁷⁰ See Gardner, sup. ch.5, fn 51, p. 5.

not continue, holders of statutory rights may not be able to take action to protect their rights from the landholder with control of the spring. The Commission also would be unable to act as the water flowing from springs does not come within the control of the RIWI Act until it passes the boundary of private land.

- 5.78 This is partially addressed in the Bill by the inclusion of a civil remedy – see paragraphs 5.70 and 5.71.

Changes Proposed by the Bill

- 5.79 The definition of spring is changed so that it “*does not include the discharge of underground water directly into a watercourse, wetland, reservoir or other body of water.*”⁷²

- 5.80 Under the Bill, springs and wetlands will be able to be brought within statutory controls where:⁷³

- the taking of the water from the spring or wetland will, in the opinion of the relevant water resources management committee, have a significant impact on the flow or level or a watercourse or wetland;
- the water resources management committee recommends to the Commission that the RIWI Act should apply to the spring or wetland; and
- the Commission recommends to the Minister that the RIWI Act apply to the spring or wetland.

- 5.81 The provisions of the RIWI Act will then apply to the spring or wetland, including the riparian rights and licensing provisions discussed at paragraphs 5.19 to 5.56. Landholders with a spring or wetland on their property will have statutory riparian rights set out in the RIWI Act to use the water from that spring or wetland. The rights will differ slightly (discussed at paragraphs 5.53 to 5.56) depending on whether the spring or wetland is located in a licensed or unlicensed area.

- 5.82 Because the Bill vests all surface water in the Crown, the bringing of a spring or wetland on private land within the control of the Act may have the effect of extinguishing common law riparian rights and replacing them with statutory riparian rights. (See discussion at paragraphs 5.55 and 5.56.)

⁷¹ See Bartlett, sup. ch.5, fn 51, pp. 43 – 44 and the cases referred to therein.

⁷² Bill, clause 5.

⁷³ Bill, clause 7, (proposed s. 5).

- 5.83 An issue arises regarding special licences. Special licences, discussed at paragraphs 5.22 to 5.24, are granted to allow the continuation of a use of water in excess of riparian rights when licensing is introduced into a surface water area.⁷⁴
- 5.84 The Committee notes that the special licence provision is specified to apply to watercourses and wetlands ‘wherever a proclamation is made’.
- 5.85 The Committee finds that, because a spring or wetland is brought under the control of the legislation through local by-laws rather than by proclamation, landowners will not be able to apply for a special licence when a spring or wetland becomes subject to the RIWI Act.**
- 5.86 The Commission has suggested that this is not a problem in practical terms as ordinary licences are now almost identical to special licences in that they are granted for ten years and, under the Bill, there will be similar compensation provisions.⁷⁵ (See Chapter 6 for a discussion of compensation provisions under the RIWI Act and under the Bill.)
- 5.87 Refer to the Recommendations at the end of this Chapter.

ON-FARM STORAGE OF WATER

- 5.88 There is a concern that the Bill will reduce rights to on-farm storage of water. Three submissions raise a concern that rights to on-farm storage will be affected and compensation will not be paid.⁷⁶ One submission also raises an issue regarding the recognition and licensing of current on-stream dams.⁷⁷
- 5.89 The issue of compensation relating to on-farm storage is dealt with in Chapter 6.

Current Act

Definition of ‘dam’

- 5.90 The RIWI Act does not define the word ‘dam’.

Licensed Areas

- 5.91 Landowners or occupiers of land can build a dam on their land provided the flow of water in any watercourse, or amount of water in any lake, lagoon, swamp or marsh, is not sensibly diminished.⁷⁸

⁷⁴ Bill, clause 25.

⁷⁵ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, April 10 2000, p. 14.

⁷⁶ Submissions 1, 4, and 7.

⁷⁷ Submission 4.

⁷⁸ RIWI Act, s. 8.

- 5.92 It is prohibited to obstruct, destroy or interfere with a watercourse flowing through or over private or Crown land except as authorised under the RIWI Act.⁷⁹ It is similarly prohibited to obstruct, destroy or interfere with a lake, lagoon, swamp or marsh wholly or partially on Crown land. As discussed at paragraphs 5.72 to 5.87, springs and lakes, lagoons, swamps or marshes on private land are outside the control of the RIWI Act.
- 5.93 It is prohibited to convey or discharge any sludge, mud, earth, gravel or other matter likely to obstruct the flow of the current, into any watercourse.⁸⁰

Unlicensed Areas

- 5.94 It is prohibited to obstruct, destroy or interfere with a watercourse flowing through or over Crown land except as authorised under the Act.⁸¹ It is similarly prohibited to obstruct, destroy or interfere with a lake, lagoon, swamp or marsh that is wholly or partially on Crown land. The RIWI Act does not specify controls on watercourses on private land, and lakes, lagoons, swamps or marshes wholly on private land are outside the control of the legislation.
- 5.95 The Commission has the power to issue directions to people taking water outside of or in excess of a right to do so either preventing or allowing them to take water. (For a discussion of directions in these circumstances see paragraphs 5.27 to 5.28.)

Riparian Dams

- 5.96 The RIWI Act does not contain a specific statement as to the extent to which riparian rights authorise the building of a dam to take water for riparian uses.

Changes Proposed by the Bill

- 5.97 The Bill defines the word ‘dam’ as “*including any artificial barrier or levee, whether temporary or permanent, which does or could impound, divert or control water, silt, debris or liquid borne materials, together with its appurtenant works.*” This definition applies only for the purposes of sections 17 and 17A, which concern a prohibition on dams that obstruct, destroy or interfere with a watercourse or wetland in certain areas without a permit – see discussion at paragraphs 5.100 to 5.101.
- 5.98 As discussed at paragraphs 5.7 to 5.10, the vesting of the use, flow and control of water is extended to all surface water, in both licensed and unlicensed areas. The

⁷⁹ RIWI Act, s. 17.

⁸⁰ RIWI Act, s. 18.

⁸¹ RIWI Act, s. 25.

statement that this does not prevent a landowner from building a dam is similarly extended to all areas, with the following changes:⁸²

- the provision is specified to apply to dams off watercourses;
- in addition to no ‘sensible diminishment’, there must be no significant adverse effect on the quality of water, or any ecosystem, in a watercourse or wetland; and
- the right is subject to local by-laws.

5.99 The Bill also introduces a right to build a dam off a watercourse or wetland for watering cattle or other stock (other than those being raised under intensive conditions) regardless of impact on water flow or the environment.⁸³

5.100 In licensed areas, the Bill allows dams to be regulated through permits.⁸⁴ Permits are required to construct or alter dams which obstruct or interfere with watercourses on Crown or private land or wetlands wholly or partially on Crown land. The Bill also allows specific watercourses or areas to be prescribed by regulations to be subject to this provision. A permit is not required for the construction or alteration of a dam that was commenced before the implementation of the reforms.⁸⁵ Local by-laws can exempt dams from requiring a permit.

5.101 The Bill therefore requires that interference or obstruction with watercourses or wetlands in certain areas (licensed areas and areas prescribed by regulations) must be authorised by a permit rather than ‘authorised under the Act’. This means that riparian rights will not authorise the building of a dam and riparian users in these areas will need a permit to do so. In unlicensed areas, the provisions remain the same.

5.102 The Committee finds that the extent to which riparian rights authorise the building of a dam to collect water for riparian uses in unlicensed areas and areas which are not prescribed is not made clear by the Bill.

5.103 The introduction of water resource management plans and local by-laws (see discussion at paragraphs 4.4 to 4.6) means controls could be implemented through these mechanisms.

⁸² Bill, clause 18 (proposed s. 5B).

⁸³ Bill, clause 18.

⁸⁴ Bill, clause 52.

⁸⁵ Bill, clause 53.

CONCERNS RAISED BY WITNESSES**Crown Vesting***Witness Concerns*

5.104 The West Australian Water Users Coalition raises a concern that the extension of the Crown vesting will remove current rights attached to land to use water.⁸⁶

Discussion

5.105 To summarise the foregoing discussion on this point:

- There is legal debate as to whether the vesting of water in the Crown under the current RIWI Act has extinguished common law riparian rights or whether these rights continue to operate along with the statutory riparian rights (see paragraphs 5.55 and 5.56); and
- the Bill partially addresses the issue of the ability of users to protect their rights in the absence of the common law entitlements by providing for a civil remedy in certain circumstances. (See paragraphs 5.70 to 5.71.)

5.106 The Committee finds that the extension of the Crown vesting may extinguish common law riparian rights.

Definition of ‘watercourse’*Witness Concerns*

5.107 The West Australian Water Users Coalition and the South West Development Commission each raise the issue of increased controls through the changes proposed to the definition of watercourse.⁸⁷

5.108 The changes to the definition of ‘watercourse’ are noted at paragraphs 5.11 to 5.18. The witnesses’ concerns relate to the ability of local by-laws to prescribe a ‘place where water flows’ to be a ‘watercourse’.

5.109 The West Australian Water Users Coalition also raises the following specific concerns:

- that the Commission and water resources management committees could prescribe any body of water on private land to be a watercourse and thereby remove a

⁸⁶ Transcript of Evidence from the WA Water Users Coalition to the Committee, May 8 2000, p. 2.

⁸⁷ Submissions 1 and 8.

landowner's right to access water stored on their land. That water could then be allocated to a third party or the environment; and

- that any flow of water into a dam, even if a dam is not situated on a river, creek, stream or brook, could be prescribed to be a watercourse and the water in that dam would then vest in the Crown.⁸⁸

Discussion

5.110 The Committee observes that the tabled clause notes to the Bill state that the by-law provision is intended to allow a water resources management committee to clarify any doubt as to whether a particular water body, such as a stream, is a watercourse.⁸⁹

Pre-existing Use of Water

Witness Concerns

5.111 The West Australian Farmers Federation and the West Australian Fruit Growers Association⁹⁰ raise concerns regarding the impact of the Bill on pre-existing water use. The specific concerns expressed by the witnesses are:

- that landholders currently using water without the need for a legislatively recognised right will be forced by the Bill to apply for licences;⁹¹ and
- that the Bill does not give any recognition or security to people who are currently using water without a right to do so.⁹²

Discussion

5.112 As discussed above at paragraphs 5.26 to 5.29 and 5.33 it is possible for people to take water without a statutory right to do so in unlicensed surface and groundwater areas. However, as the Commission has advised that the majority of groundwater areas are subject to licensing, the Committee notes that the water use discussed by the witnesses is likely to be surface water use.

5.113 The Commission advised that the decision of whether to introduce licensing into an area is a policy decision based on the amount of competition for water in an area and possible environmental impacts.⁹³ The Commission has also advised that it seeks to licence reasonable pre-existing uses when licensing is introduced into an area.⁹⁴

⁸⁸ Submission 1.

⁸⁹ Bill *Clause Notes*, p. 6.

⁹⁰ Submissions 3 and 4.

⁹¹ Submission 3.

⁹² Submission 4.

⁹³ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, April 10 2000, pp. 11-12.

⁹⁴ *ibid.* p. 21.

5.114 The Committee notes that, as discussed above at paragraph 5.36, the Bill amends the provision relating to the proclamation of a surface water area to require that water resources management committees and the public be given the opportunity to comment. The Committee further notes that both water resources management plans and local by-laws are subject to comment by a relevant water resources committee and the public.⁹⁵

5.115 The Committee finds that the Bill will not result in an immediate requirement to hold a licence. If licensing is introduced, users will be given due notice of the change.

Increased Powers to Remove Rights to Property in Water

Witness Concerns

5.116 The Pastoralists and Graziers Association raises the issue that the Bill increases the powers of the Commission to reduce or remove ‘rights to property in water’ – in particular, that the Commission should not be able to take water because it is not being used, or for a public good such as the environment, without going to Parliament.⁹⁶ As only water licences can be amended or cancelled on these grounds, it seems the submission is concerned with the powers of the Commission to reduce or remove water licences rather than water ‘rights’. See paragraph 5.6 for the distinction between water licences and water rights, as dealt with by the RIWI Act.

Discussion

5.117 The Committee notes that, as discussed in paragraphs 5.45 to 5.52, the Bill elaborates and clarifies the powers of the Commission to amend, suspend or cancel a water licence.

Riparian Rights

Witness Concerns

5.118 The Conservation Council of Western Australia raises the following issues with regard to riparian rights:

- removal of riparian rights on sale of land; and
- trading in riparian rights.⁹⁷

⁹⁵ Bill, clause 44 and 45 (proposed ss. 26GZ, 26GZA, 26GZB and 26N).

⁹⁶ Submission 2.

⁹⁷ Submission 9.

- 5.119 The Conservation Council raises the concern that, because of the importance of river beds and banks to the overall health of rivers, riparian rights should eventually revert to the Crown and the Bill should provide for riparian rights to revert to the Crown on sale of land. The Conservation Council suggests that trading in riparian rights should not be permitted.

Discussion

- 5.120 The Committee notes that the RIWI Act contains no provision for riparian rights to revert to the Crown and the Bill does not propose to address this issue.
- 5.121 The Committee notes that under the Bill, only water licences and entitlements held under those licences, are able to be transferred.⁹⁸

Licensing of Existing On-Stream Dams

Witness Concerns

- 5.122 The Western Australian Fruit Growers Association raises a concern that existing dams in unlicensed areas should be recognised and granted perpetual licences.⁹⁹

Discussion

- 5.123 The Committee notes that the Bill introduces the power to issue a perpetual licence.¹⁰⁰
- 5.124 The Commission has advised the Committee that when licensing is introduced it seeks to secure existing reasonable uses, and that licence tenure depends on a number of circumstances including understanding of the water resource.¹⁰¹ (See discussion at paragraph 5.113.)
- 5.125 The Committee finds that the issue of the recognition and licensing of dams, and the duration of licences, is a policy issue to be determined by the Commission when introducing licensing into an area.**

⁹⁸ Bill, clause 51.

⁹⁹ Submission 4.

¹⁰⁰ Bill, clause 51.

¹⁰¹ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, May 22 2000, pp. 7 & 12.

CONCLUSION**Recommendation 1:**

The Committee recommends that the *Rights in Water and Irrigation Amendment Bill 1999* be amended to ensure landholders with a spring or wetland on their property are eligible to apply for a special licence, if that spring or wetland is brought within the control of the *Rights in Water and Irrigation Act 1914*.

Recommendation 2:

The Committee recommends that the *Rights in Water and Irrigation Amendment Bill 1999* clarify the extent to which riparian rights authorise the building of a dam to collect water for riparian uses in unlicensed areas and areas which are not prescribed.

CHAPTER 6

COMPENSATION

INTRODUCTION

- 6.1 The issue of compensation was raised during the debate in the Legislative Council on the motion of referral of the Bill to the Committee, and was also raised in submissions received by the Committee.

CURRENT ACT

- 6.2 The RIWI Act provides for compensation in two circumstances:
- variation or removal of a special licence;¹ and
 - where damage is caused to riparian rights or by flooding.²
- 6.3 Special licences are discussed at paragraphs 5.22 to 5.24 and 5.42. Where a special licence is modified or cancelled ‘in the interest of the public’, the Commission may recommend that compensation be paid. The ‘interest of the public’ is not defined and both the decision to compensate and the amount of compensation are at the discretion of the Commission.
- 6.4 Other compensation provisions concern the payment of compensation where flooding or damage to water rights has been caused by the construction of works in irrigation districts.

CHANGES PROPOSED BY THE BILL

- 6.5 The Bill does not affect the current compensation provisions as they relate to irrigation districts. The provision relating to compensation for special licences is removed. Under the Bill, compensation for amendment or cancellation of a special licence will be governed by the general compensation provisions relating to licences.
- 6.6 The Bill addresses the issue of compensation in a range of ways:
- through licence conditions;
 - through trading by the Commission;
 - through specific compensation provisions; and

¹ RIWI Act, s. 12.

² RIWI Act, Part VI.

- through local by-laws.

6.7 In addition, information supplied by the Commission indicates that an ex-gratia payment can be made under the *Financial Administration and Audit Act 1985* where the government considers that a person has a claim for compensation based on injustice or moral grounds.³

Licence Conditions

6.8 Under the Bill, the Commission can place a condition on a licence requiring compensation to be paid if the grant or amendment of a licence will, in the opinion of the Commission, result in the quantity of water that another person can take being reduced.⁴ The condition can require the payment of money or periodical amounts of money by the licensee to the affected person for direct pecuniary loss and/or loss of profits suffered as a result of the reduction.

6.9 The amount of compensation can be agreed between the parties or, failing agreement, can be determined by the Commission or by arbitration under the *Commercial Arbitration Act 1985*.

Trading by the Commission

6.10 The Commission has the power to purchase water licences.⁵ A licence can be purchased by the Commission in a number of circumstances including where it is in the public interest to do so.⁶

Through Specific Compensation Provisions

6.11 The Bill requires compensation to be paid whenever a licence is amended, suspended or cancelled 'in the public interest'.⁷

6.12 There is no definition in the Bill of what constitutes the 'public interest'. However there are a number of other circumstances in which licences can be amended, suspended or cancelled and compensation is not payable, so these circumstances will be outside the public interest provision. These circumstances are:

- the detrimental effect of actions authorised on the licence on another person;

³ Water and Rivers Commission, *Issues Sheets: Compensation*, April 2000

⁴ Bill, clause 51, (proposed Schedule 1, clause 17).

⁵ Bill, clause 51, (proposed Schedule 1, Divisions 8 and 10).

⁶ Bill, clause 51, (proposed Schedule 1, clause 38).

⁷ Bill, clause 51, (proposed Schedule 1, clauses 24 and 25).

- to protect the water resource or the associated environment from unacceptable damage;
- in the case of amendment, to prevent serious damage to life or property;
- in the case of amendment, if the quantity of water that can be taken under a licence has consistently not been taken;
- in the case of amendment, if there is insufficient water to meet demand or expected demand, or to otherwise to more effectively regulate use of the resource;
- if there has been an alteration to a plan or local by-laws and the exercise of the power is necessary to prevent serious inconsistency with the plan or local by-laws (the licence must be amended rather than cancelled if this is possible);
- the exercise of the power is necessary to comply with another written law of the State or a law of the Commonwealth;
- in the case of amendment, the exercise of the power is necessary to give effect to a transfer;
- the licence confers authority for the Commission to do so;
- the licensee is convicted of an offence against the RIWI Act or, in the case of cancellation or suspension, fails to comply with a term of the licence; or
- in the case of cancellation, that prescribed circumstances apply.⁸

6.13 Amendments proposed will affect the amendment and cancellation provisions in the following ways:

- The provision relating to plans and local by-laws will be altered to provide that licences can be amended, suspended or cancelled wherever there is a serious inconsistency arising as a result of the approval, alteration, revocation or substitution of a plan or as a result of the making, amendment or repeal of local by-laws. A licence must still be amended rather than cancelled if this is possible.
- Licences will be able to be amended, suspended or cancelled where a person with whom the licence holder has an agreement allowing the taking of water is

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Bill, clause 51 (proposed Schedule 1, clauses 24 and 25.)

convicted of an offence under the RIWI Act (see paragraph 7.5 for a discussion of these agreements).⁹

- Licences can be suspended or cancelled where a person with whom the licensee has an agreement allowing the taking of water fails to comply with a term of the licence.
- Licences can be amended where necessary to give effect to a transfer or an agreement allowing another person to take water under a licence.

6.14 Although many of the circumstances listed in paragraphs 6.12 and 6.13 could be seen as the ‘public interest’ they do not constitute a public interest amendment or cancellation to which the compensation provision applies.

6.15 In the second reading speech in the Legislative Council, examples were given of the increase of the flow in a river for tourism, the resumption of water for town water supply or for a major public development as public interest actions for which compensation would be paid.¹⁰

Through Local By-laws

6.16 Compensation can be provided through local by-laws.¹¹ Supplementary information provided to the Committee by the Commission indicates that, where a water resources management plan requires a reduction in water allocations, the accompanying by-laws can provide for compensation to be paid.¹²

Compensation Principles

6.17 Compensation is payable if a person suffers damage, including loss of profit, due to a public interest amendment, suspension or cancellation of a licence, or in circumstances provided by local by-laws.¹³

6.18 Damage may be compensated for only if:

- it is due to the loss of a use which was reasonable, authorised by the licence and consistent with the objects of the RIWI Act; and

⁹ sup. ch.3, fn 1.

¹⁰ sup. ch.3, fn 2, p. 3820 ff.

¹¹ Bill, clause 51 (proposed Schedule 1, Division 9).

¹² Water and Rivers Commission, *Issues Sheets: Compensation*, April 2000.

¹³ Bill, clause 51, (proposed Schedule 1, clause 39(1))

- the person requesting compensation is not responsible for the damage and has attempted to offset or mitigate the damage as far as is practicable.¹⁴
- 6.19 Local by-laws can prescribe the time within which compensation may be claimed, the procedure for making claims, the types of damage for which compensation is to be made, and how compensation is to be assessed.¹⁵
- 6.20 A dispute about the amount of compensation is to be determined by arbitration under the *Commercial Arbitration Act 1985* unless the parties agree on some other method of determination.¹⁶

CONCERNS RAISED BY WITNESSES

- 6.21 Witnesses identify the following specific areas of concern:
- compensation for the amendment of a licence reducing water rights;¹⁷
 - compensation in relation to licensing of existing use;¹⁸
 - compensation for any reduction in private property rights caused by the Bill;¹⁹
 - compensation for any future reduction in rights to water;²⁰
 - appeal rights over compensation;²¹ and
 - the removal of compensation through local by-laws.²²

Compensation for the Amendment of a Licence Reducing Water Rights

Witness Concerns

- 6.22 The Australian Bankers' Association²³ raises the issue of compensation in the context of reviews of water rights. The submission states that reviewing a farmer's right to access water could have implications for long term finance if, after five years, there is potential that a farmer will not be able to access enough water to maintain a viable enterprise. The submission suggests that this issue would be alleviated if the farmers had access to compensation.

¹⁴ Bill, clause 51 (proposed Schedule 1, clause 39(2))

¹⁵ Bill, clause 51 (proposed Schedule 1, clause 39(3)).

¹⁶ Bill, clause 51 (proposed Schedule 1, clause 39(4)).

¹⁷ Submission 6.

¹⁸ Submission 3.

¹⁹ Submissions 1 and 8.

²⁰ Submissions 1, 2 and 3.

²¹ Submission 2.

²² Submission 8.

²³ Submission 6.

Discussion

- 6.23 The Bill does not contain a statutory requirement to review a water licence every five years. In the event that the submission is referring to the term of a licence – that is, the licence expires at the end of five years and is then renewed - the renewal of licences is discussed at paragraphs 5.44 and 5.51. A decision not to renew a licence, or as to the length of time a licence is renewed for, can be appealed – see Chapter 10.

Compensation in Relation to Licensing of Existing Use*Witness Concerns*

- 6.24 The Western Australian Farmers Federation suggests that, where licensing is introduced and a user is refused a licence or only granted a portion of what is currently being used, compensation should be paid. Licensing is discussed above at 5.19 to 5.39.²⁴

Discussion

- 6.25 The Committee notes that there is no legislative guarantee that a use will be licensed when licensing is introduced.
- 6.26 The Committee finds that, where a new area is licensed, and existing water use is reduced for a ‘public purpose’, compensation is discretionary. However if the use was already licensed, compensation would be mandatory.**
- 6.27 Refer to the Recommendations at the end of this Chapter.

Compensation for Reduction in Current Water Rights*Witness Concerns*

- 6.28 The West Australian Water Users Coalition, West Australian Farmers Federation, West Australian Fruit Growers Association and Preston Valley Irrigation Co-operative suggest that wherever a current right to water is reduced or removed, compensation should be paid. The West Australian Water Users Coalition and Preston Valley Irrigation Co-operative further suggest compensation should be paid where rights to on-farm storage are reduced or removed by the Bill.²⁵

Discussion

- 6.29 The effects of the Bill on current entitlements to take water – riparian rights, rights to public water, springs and wetlands, on-farm storage and licences – is discussed in Chapter 5.

²⁴ Submission 3.

²⁵ Submissions 1, 3, 4 and 7, respectively.

6.30 Refer to the Recommendations at the end of this Chapter.

Removal/Reduction of Water Rights

Witness Concerns

6.31 The West Australian Water Users Coalition and Pastoralists and Graziers Association suggest that, whenever a water licence is removed or reduced, including for environmental purposes, compensation should be paid.²⁶ The West Australian Water Users Coalition specifies that compensation should be provided whenever the Commission amends or cancels a licence.²⁷ Both, however, state compensation is not necessary where there is a 'pro-rata' reduction to all users for environmental purposes.

Discussion

6.32 Compensation provisions are discussed at paragraphs 6.2 to 6.20.

6.33 The Committee finds that the decision of the manner in which water allocations are reduced when there is a need to reduce for environmental purposes is a policy decision of the Commission.

6.34 Refer to the Recommendations at the end of this Chapter.

Concerns with clause 17

Witness Concerns

6.35 The West Australian Water Users Coalition raises concerns with clause 17, Schedule 1, discussed above at paragraphs 6.8 and 6.9. The witness raises the following issues:

- The Commission should not have a discretion to order compensation under this provision; it should be mandatory.
- The Commission should not be able to set the amount of compensation and how it is to be paid; the Commission should not act as an assessor of compensation to be paid in a commercial context.
- There is no automatic right to commercial arbitration under this clause.²⁸

Discussion

6.36 The Committee notes that the Commission can determine compensation only if the parties fail to reach agreement.

²⁶ Submissions 1 and 2.

²⁷ Submission 1.

6.37 Refer to the Recommendations at the end of this Chapter.

Appeals

6.38 The Pastoralists and Graziers Association raises the issue that there should be provision for an independent appeal related to compensation.²⁹ This is addressed in Chapter 10.

Removal of Compensation Through Local By-laws

Witness Concerns

6.39 The South West Development Commission³⁰ raises a concern that the requirement to pay compensation where a water licence is cancelled or amended in the public interest can be removed through local by-laws.

Discussion

6.40 Under the Bill, local by-laws can prescribe:

- the time within which compensation may be claimed and the procedures for making claims;
- the types of damage for which compensation is to be made; and
- how compensation is to be assessed.

6.41 The Committee notes that while local by-laws can specify the above matters they cannot remove the requirement to compensate.

CONCLUSION

6.42 The Committee views with concern the extent of water rights that can be removed without mandatory compensation.

Recommendation 3:

The Committee recommends that the term 'public interest' should be defined as including but not limited to 'social, planning and recreational purposes'.

²⁸ *ibid.*

²⁹ Submission 2.

³⁰ Submission 8.

Recommendation 4:

The majority of the Committee recommends that the payment of compensation be mandatory wherever a legitimate existing use, whether licensed or unlicensed, is reduced or removed, the scope of exemptions from such compensation to be decided by Parliament.

Recommendation 5:

The Committee recommends that compensation should take the form of any land or water exchanges, of financial recompense or any other mutually agreed form. Where agreement on compensation cannot be reached, the compensation claim shall be referred to arbitration under the *Commercial Arbitration Act 1985*.

Recommendation 6:

The Committee recommends that, in unlicensed areas, compensation should be considered only where the existing usage was in place on the date of the First Reading of the *Rights in Water and Irrigation Amendment Bill 1999* in the Legislative Assembly (June 30 1999).

CHAPTER 7

CAPITAL GAINS TAX

INTRODUCTION

7.1 The Second Reading Speech stated:

“Under the reforms, a licence will become a negotiable asset that the holder can trade solely at his or her discretion, provided this causes no environmental harm or other problems.”¹

7.2 The introduction of trading in water licences has raised concerns about the possible impacts of capital gains tax.

7.3 The Commission has provided the Committee with a copy of the advice it received from the Australian Taxation Office. This advice is referred to extensively in this Chapter and is attached to this Report at Appendix 2.

THE LEGISLATIVE FRAMEWORK

7.4 The Bill proposes to allow a water licence, or a water entitlement held under a licence, to be transferred.² A ‘water entitlement’ means all or part of the quantity of water that the licensee is entitled to take under the licence.³

7.5 Currently the Bill proposes that licences and water entitlements may be transferred permanently or temporarily. An amendment has been tabled which would remove the ability of a licensee to temporarily transfer the licence.⁴ Instead, a licensee will be able to enter into an agreement allowing another person to take water under the licence for a limited period of time.

SPECIFIC CONCERNS

7.6 Witnesses raise concerns in the following areas:

- the possible introduction of a new tax liability where none previously existed;⁵
- the licensing of pre-existing use;⁶
- the renewal or variation of a licence;⁷

¹ sup. ch.3, fn 2, p. 3820.

² Bill, clause 51 (proposed Schedule 1, Division 7).

³ Bill, clause 51 (proposed Schedule 1, Division 7, clause 28).

⁴ sup. ch.3, fn 1.

⁵ Submissions 2 and 3.

⁶ Submissions 1 and 8.

⁷ Submission 1.

- the tax liability of land purchased prior to 1985; and ⁸
- the transfer of a pre-1985 licence.⁹

7.7 The critical date for the application of capital gains tax is September 19 1985. Licences acquired prior to this date are not subject to capital gains tax.

The Introduction of a New Tax Liability

7.8 The Pastoralists and Graziers Association, the West Australian Fruit Growers Association and the West Australian Farmers Federation raise the concern that, while the value of a water licence was previously included in the value of the land, the ability to trade a water licence will separate land value from licence value and result in a new tax liability.¹⁰

7.9 The Australian Tax Office advised that water licences acquired after September 19 1985 already are assets for capital gains tax purposes.¹¹ That is, if a licensee currently sells land and water, capital gains tax is payable on the portion of the sale price that represents the water component.

7.10 The Committee notes that the introduction of the ability to transfer a licence will place a more tangible value on water licences, making tax liability easier to assess.

Licensing of Pre-existing of Water

7.11 The West Australian Water Users Coalition and the South West Development Commission raise the issue of tax liability where a user has been taking water prior to 1985 but is licensed for that use after 1985.¹² The concern is that, although a use has been taking place prior to 1985, the licensing of the use after that date means tax is payable.

7.12 **As the Australian Tax Office has advised that licences acquired after 1985 are assets subject to capital gains tax, the Committee finds that a licence granted after 1985 for a use which began prior to 1985 will be subject to capital gains tax. This may result in landholders having an increased capital gains tax liability as a result of the Bill.**

⁸ Submission 3.

⁹ Submission 7.

¹⁰ Submissions 2, 3, and 4.

¹¹ Letter from the Australian Taxation Office to the Water and Rivers Commission dated 31 March 2000.

¹² Submissions 1 and 8.

- 7.13 The Commission has advised the Committee that the Minister for Water Resources is pursuing this matter with the Federal Treasurer.¹³

Renewal or Variation of a Licence

- 7.14 The West Australian Water Users Coalition raises a concern that the renewal or amendment of a licence issued prior to 1985 will result in it becoming an asset for capital gains tax purposes.¹⁴ That is, a change in the terms of a pre-1985 licence upon renewal, or an amendment to a pre-1985 licence, will result in the licence conferring different rights and obligations so as to be considered a 'new' post-1985 asset.
- 7.15 The advice from the Australian Tax Office is that where a pre-1985 licence is renewed it remains a capital gains tax free asset.

Transfer of a Pre-1985 Licence

- 7.16 The Preston Valley Irrigation Co-operative raises a concern that, where a licence is acquired prior to 1985 but is transferred after 1985, the transfer will affect the capital gains tax status of the licence.¹⁵
- 7.17 The Australian Tax Office advice is that a capital gain or loss is disregarded if a licence that was acquired prior to September 19 1985 is permanently transferred.

CONCLUSION

- 7.18 The Committee notes that there are capital gains tax implications and finds that capital gains tax is a matter of Commonwealth policy that cannot be dealt with by amendment of the current Bill.**

¹³ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, April 10 2000, p.7.

¹⁴ Submission 1.

¹⁵ Submission 7.

CHAPTER 8

SPECULATION

INTRODUCTION

- 8.1 Concerns have been raised with the Committee that, in anticipation of the passage of the Bill, individuals have been engaging in ‘speculation’ in water licences – that is, acquiring licences for which they do not have a legitimate use in the hope of making a windfall profit once trading is introduced.
- 8.2 Witnesses have raised concerns relating to the accumulation of licences,¹ controls on speculation,² the removal of water that is not needed,³ and the need to prevent speculators from tying up water.⁴ In addition, a witness raises a concern that there are varying reasons for non-use of water allocations and that licences should not be removed without justification.⁵
- 8.3 The Committee notes that the extent to which speculation has been occurring is unclear.

LEGISLATIVE AND POLICY CONTROLS ON SPECULATION

Current Act

- 8.4 Currently, the Commission has a discretion as to whether to grant a licence and as to what conditions are imposed on the licence.⁶ In licensed surface water areas, licences can be applied for only by the owner or occupier of land⁷ and in groundwater areas a licence is deemed to be held by, and operate for the benefit of, the owner or occupier of land where the relevant well is situated.⁸
- 8.5 An application for a groundwater licence must be accompanied by prescribed plans and specifications, together with a statement of the purposes for which the water is to be taken.⁹ Before granting a licence, the Commission can require alterations to be made to, or in connection with, the work or the plans and specifications.¹⁰

¹ Submission 1.

² Submission 8.

³ Submission 12.

⁴ Submission 11.

⁵ Submission 7.

⁶ RIWI Act, ss. 12 and 13 (surface water) and s. 26D (groundwater).

⁷ RIWI Act, ss. 12 and 13.

⁸ RIWI Act, s. 26D(3).

⁹ RIWI Act, s. 26D(1).

¹⁰ RIWI Act, s. 26D(2).

- 8.6 The Commission has advised the Committee that it requires a licence applicant to demonstrate that the amount of water the applicant wishes to take is reasonable in the circumstances and that the proposed use of the water is a genuine one.¹¹ In addition, the Commission has indicated it will in some circumstances grant a short term licence for the amount of water needed for the initial development of a project and then issue a licence for a longer term once it can be demonstrated that the initial water was used.¹²

Changes Proposed by the Bill

- 8.7 Under the Bill, different processes apply to licences to take water and licences to construct or alter wells. The process for dealing with applications for a well licence remain the same as the current groundwater licence processes.¹³
- 8.8 The Bill sets out a list of people who are eligible to hold a licence to take surface or groundwater.¹⁴ The Commission can refuse to grant a licence if it is not satisfied that the person has the resources to carry out the activities to which the licence relates.¹⁵ In addition a licence can be amended if, in the opinion of the Commission, the quantity of water that may be taken under the licence has consistently not been taken.

SPECIFIC ISSUES

Accumulation of Licences and Removal of Water that is not Needed

- 8.9 Witnesses have raised the following concerns:
- that there are rumours in the community that individuals and companies are attempting to profit from the introduction of the Bill;¹⁶
 - that water that is not needed or used under a licence should be returned to the community and environmental needs;¹⁷
 - that speculators should be prevented from tying up water;¹⁸ and
 - that there are no controls on speculation.¹⁹

¹¹ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, April 10 2000, p. 25.

¹² *ibid.* p. 28.

¹³ Bill, clause 37.

¹⁴ Bill, clause 51 (proposed Schedule 1, clause 3).

¹⁵ Bill, clause 51 (proposed Schedule 1, clause 7(4)).

¹⁶ Submission 1.

¹⁷ Submission 12.

¹⁸ Submission 11.

¹⁹ Submission 8.

Varying Reasons for Non-use of Water Allocations

- 8.10 The Preston Valley Irrigation Co-operative raises the concern that there may be varying reasons for the lack of use of water and the total allocation may not necessarily be used immediately. The witness argues licences must be issued for longer periods and ‘water banking’ should be fully investigated before any removal of a water right.²⁰

CONCLUSION

- 8.11 **The Committee finds that the prevention of speculation is appropriately the responsibility of the Commission.**

²⁰ Submission 7.

CHAPTER 9

WATER RESOURCE MANAGEMENT COMMITTEES

INTRODUCTION

9.1 A major part of the reforms introduced by the Bill relate to water resource management committees.¹ These committees will assist the Commission in the management of water resources of an area.

9.2 Concerns have been raised over the powers and composition of these committees.

CONCERNS RAISED BY WITNESSES

9.3 The following concerns can be identified:

- The Bill does not ensure that commercial water users are adequately represented on water resource management committees.²
- The appointment of committee members should not be left to the discretion of the Minister.³
- The water resource management committees will be regional rather than local bodies.⁴
- Committees will have the power to charge for water use.⁵
- The establishment of committees is an abrogation of Commission responsibilities.⁶
- The costs of running committees will increase the costs of water resource management in the State and this cost will be passed on to the holders of licences that relate to water supply services.⁷
- Committees will be dominated by particular special interest groups.⁸
- The Minister has too much control over the establishment and appointment of committees.⁹

¹ Bill, clause 44 (proposed Division 3C).

² Submission 1.

³ *ibid.*

⁴ *Transcript of Evidence from the WA Water Users Coalition to the Committee*, May 3 2000, p. 28.

⁵ Submission 4.

⁶ Submission 5.

⁷ *ibid.*

⁸ *ibid.*

- Committees will not be independent of the Commission and will have the power to override compensation provisions.¹⁰
- There will not be sufficient representation of water users on committees.¹¹
- Provision should be made to explicitly include a community conservation representative on committees.¹²
- The ability of the Commission to delegate functions to committees will result in committees having inappropriate control over source protection issues in public drinking water catchments.¹³
- The role of committees, particularly in trading, is unclear.¹⁴
- Indigenous interests should be represented on committees.¹⁵
- The membership terms of committees should not be staggered.¹⁶

CONCLUSION

9.4 While the Committee recognises there may be some problems in water resource management committees, the Committee finds that most should be capable of an administrative rather than a legislative remedy.

⁹ Submission 7.
¹⁰ Submission 8.
¹¹ *ibid.*
¹² Submission 9.
¹³ Submission 10.
¹⁴ Submission 11.
¹⁵ Submission 12.
¹⁶ *ibid.*

CHAPTER 10

APPEAL PROCESSES

INTRODUCTION

- 10.1 Concerns have been expressed to the Committee regarding the appeal process contained in the Bill.
- 10.2 The Bill makes a number of changes to the current appeal process but does not substantially alter it. The Commission has advised that a review of the appeal system is in process.¹ The Commission has further advised that it has received a report from the consultant engaged to review the appeal system, and that the report will be used to prepare a proposal for review of the appeals system to be released for public comment by the Minister.²
- 10.3 Witnesses have raised the following issues:
- the independence of the appeal process;³
 - the inclusion of a broader range of matters to be appealed;⁴
 - the proposal of amendments to the appeal process; and⁵
 - cost and complexity.⁶

CURRENT ACT

- 10.4 Under the current RIWI Act, the following decisions of the Commission can be appealed:
- A refusal to grant a surface or groundwater licence or any condition imposed on a licence.⁷ Only the licence applicant can appeal.
 - A direction under section 22 (see discussion at paragraphs 5.27 to 5.29) can be appealed by the person to whom the direction is issued or any other person aggrieved by the issue of the direction.⁸

¹ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, April 10 2000, pp. 33–35.

² Letter from the Water and Rivers Commission to the Committee dated May 16 2000.

³ Submissions 1, 3, 4, 7, and 8.

⁴ Submission 1 and 5.

⁵ Submission 1.

⁶ Submission 12.

⁷ RIWI Act, ss. 14 and 26D.

⁸ RIWI Act, s. 23.

- 10.5 Appeals in both cases are to the Minister. The Minister must cause an inquiry to be conducted.⁹ In the case of a licence appeal, the inquiry is to be conducted by anyone the Minister chooses to appoint.¹⁰ In the case of a direction appeal, the people the Minister appoints must be chosen from among magistrates or people who, due to their qualifications and experience, are otherwise suitable to conduct the inquiry.¹¹
- 10.6 The appellant has the right to be heard by the inquiry. Once the inquiry is concluded, the Minister can make a decision on the appeal.¹²

PROPOSED CHANGES UNDER THE BILL

Decisions which can be Appealed

- 10.7 The Bill allows appeals relating to:
- licences to take water;
 - directions; and
 - licences to construct or alter wells.
- 10.8 With regard to licences to take water, the following decisions of the Commission can be appealed:¹³
- a refusal to grant or renew a licence, the duration of a licence or of a renewal, or any term attached to a licence;
 - an undertaking to grant a licence or as to any term undertaken to be included in the licence;
 - the amendment, suspension or cancellation of a licence; and
 - the refusal to approve the transfer of a licence.
- 10.9 Only the licence applicant can appeal, or, in relation to the transfer of a licence, the person to whom the licence would be transferred.
- 10.10 The Bill currently allows appeals relating to permanent and temporary transfers of a licence. An amendment that has been tabled in the Legislative Council will replace the ability of a licence holder to temporarily transfer a licence with an ability to enter

⁹ RIWI Act, ss. 14 and 23.

¹⁰ RIWI Act, s. 14.

¹¹ RIWI Act, s. 23.

¹² RIWI Act, ss. 14 and 23.

¹³ Bill, clause 64 (proposed s. 26GG).

into an agreement allowing a person to take water under the licence for a specified time.¹⁴ The appeal provision will also be amended to allow an appeal against a refusal to approve such an agreement. The appeal can be made by a person who is party to the agreement.

10.11 Directions issued in relation to use of water (see paragraphs 5.27 to 5.29, 5.34 and 5.35, and 5.65 to 5.69 for discussion of directions) can be appealed by the person to whom the direction is issued.¹⁵

10.12 With respect to licences to construct or alter wells, a decision of the Commission that relates to any of the following can be appealed:¹⁶

- a refusal to grant a licence;
- any terms included in the licence; and
- a requirement to require alterations to work or plans (see paragraph 8.5).

Appeal Processes

10.13 The Bill consolidates a set of processes for all appeals in a Schedule to the Act (Schedule 2).¹⁷ The following processes apply:

- A person brings an appeal by lodging a notice of appeal with the Minister. If the appellant so requests, the Minister must cause an inquiry to be conducted into the appeal by three or more people.
- The people appointed are to include a nominee of the appellant and a nominee of the Commission.
- Before holding an inquiry, the Minister may appoint a person to assist the appellant and the Commission to resolve the issues on appeal.
- The appellant, the Commission and the relevant water resources management committee must be given a reasonable opportunity to make submissions to the inquiry.
- The appellant is to be given a copy of the report of the inquiry.
- The Minister must have regard to the inquiry report in deciding an appeal.

¹⁴ sup. ch.3, fn 1.

¹⁵ Bill, clause 64 (proposed s. 26GH).

¹⁶ Bill, clause 64 (proposed s. 26GI).

¹⁷ Bill, clause 64 (proposed s. 26GJ) and clause 69 (proposed Schedule 2).

10.14 An amendment that has been tabled in the Legislative Council will require the Minister to:¹⁸

- give notice of the appeal decision and the reasons for it, including the reasons for departing from the inquiry report if the Minister has done so; and
- provide a copy of the inquiry report and the Minister's reasons for the appeal decision to any water resources management committee for the area to which the appeal relates.

SPECIFIC ISSUES

Independence of the Appeal Process

10.15 Five witnesses argue that an appeal process should be provided which is independent of the Minister, such as a system similar to the Town Planning Tribunal or Warden's Court, either instead of Ministerial appeal or as an alternative to Ministerial appeal.¹⁹

Inclusion of a Broader Range of Matters to be Appealed

10.16 The West Australian Water Users Coalition suggests that appeals should be available regarding the following decisions:²⁰

- compensation;
- disputes between Crown and private rights;
- local by-laws;
- water resources management plans; and
- in relation to any other possible areas of decision making where decisions affect private rights.

10.17 AqWest agrees that an appeal mechanism should be provided for water resource management plans,²¹ and the Pastoralists and Graziers Association agrees that appeals should be available for compensation.²²

¹⁸ sup. ch.3, fn 1.

¹⁹ Submissions 1, 3, 4, 7 and 8.

²⁰ Submission 1.

²¹ Submission 5.

²² Submission 2.

Proposed Amendments to the Appeal Process

10.18 The West Australian Water Users Coalition proposes a series of amendments to the appeal provisions. These amendments include:

- that, on receiving notice of an appeal, the Minister must cause an inquiry to be conducted by a tribunal;
- that the tribunal is to consist of three people, one appointed by the appellant, one by the Minister, and one appointed by the Minister and the appellant;
- that the tribunal can hold hearings;
- that the tribunal must give the decision and the reasons for it to the appellant;
- that the tribunal can award compensation; and
- that the tribunal's decision is final and must be given effect to by the Commission.

Cost and Complexity

10.19 One witness raised a concern that costs and complexity related to appeals should be kept to a minimum.²³

10.20 The Committee agrees that costs and complexity should be kept to a minimum.

CONCLUSION**Recommendation 7:**

The Committee recommends that consideration should be given to an independent appeals mechanism.

Recommendation 8:

The Committee recommends that the adapted appeal system proposed by the Bill, if adopted, should be reviewed if problems with fairness become apparent.

²³ Submission 12.

CHAPTER 11

NATIVE TITLE

INTRODUCTION

11.1 Concerns have been raised regarding the effect of the Bill on native title.

11.2 Witnesses have raised the following concerns:

- the relationship between water licences and native title rights;¹
- concerns of the effect of the Bill on native title rights;²
- guidelines for native title claims; and³
- that recent Federal Court judgments on native title could ‘upset’ the legislation.⁴

LEGISLATIVE FRAMEWORK

11.3 Native title is governed by Federal legislation - the *Native Title Act 1993*. Section 24HA of that Act applies to water, and relevantly provides:

- the making, amendment or repeal of legislation relating to the management or regulation of water is valid;
- licences or permits granted under legislation relating to the management or regulation of water are valid;
- native title holders are entitled to compensation for any damage to native title rights;
- compensation is payable by the State; and
- notification must be given to native title holders or registered native title claimants of the grant of a licence or permit and the renewal of a licence in certain circumstances.

11.4 The Commission has advised the Committee that it has a policy for compliance with the *Native Title Act 1993* and that this will not change if the reforms are implemented.⁵

¹ Submission 2.

² Submission 12.

³ Submission 7.

⁴ Submission 8.

CONCLUSION

- 11.5 The Committee notes that matters of native title are appropriately governed by the *Native Title Act 1993*.

⁵ *Transcript of Evidence from the Water and Rivers Commission to the Committee, April 10 2000, p. 36.*

CHAPTER 12

OTHER ISSUES

INTRODUCTION

12.1 The Committee received comment from witnesses on the following additional issues of interest. The issues have been divided into concerns specific to an area of the Bill and broader, more wide-ranging concerns.

12.2 Concerns specific to an area of the Bill were:

- charges for water collected on private property;¹
- environmental water policy paper;²
- the need to set aside water for certain purposes;³
- recognition of public water supply;⁴
- trading by the Water and Rivers Commission;⁵
- security interests;⁶
- leasing of water licences;⁷
- reliance on other legislation;⁸
- objects;⁹
- State Agreement Acts;¹⁰
- effect of trading on the environment;¹¹
- monitoring of bores;¹²

¹ Submission 3.

² Submission 4 and *Transcript of Evidence from the WA Water Users Coalition to the Committee*, May 8 2000, p. 20.

³ Submission 5.

⁴ *ibid.*

⁵ *ibid.*

⁶ Submission 6.

⁷ Submission 8.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Submission 9.

- public review of water resource management plans;¹³
- local by-laws;¹⁴
- licence conditions relating to the environment;¹⁵
- licence objections and access licences;¹⁶
- water allocation issues;¹⁷ and
- concerns with section 12 of the RIWI Act.¹⁸

12.3 Broader concerns were:

- Ecologically Sustainable Development framework;¹⁹
- duty of care;²⁰
- third party civil proceedings;²¹
- regulations;²² and
- protection of environment dependant on water.²³

ISSUES SPECIFIC TO AN AREA OF THE BILL

Charges for Water Collected on Private Property

Witness Concerns

- 12.4 The West Australian Farmers Federation raises a concern that charges will be made for water dammed on private property.²⁴

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Submission 10.

¹⁶ Submission 11.

¹⁷ *ibid.*

¹⁸ Submission 1.

¹⁹ Submission 9.

²⁰ *ibid.*

²¹ *ibid.*

²² Submission 11.

²³ *Transcript of Evidence from the Nyungah Circle of Elders, May 8 2000, pp. 2 - 5; & Transcript of Evidence from the Conservation Council of Western Australia (Inc) to the Committee, May 8 2000, pp. 8 – 11.*

²⁴ Submission 3.

Discussion

- 12.5 It seems the only avenue through which a charge could be made for water collected in a dam is through licence or permit fees in circumstances where a licence or permit is required. Licensing and permit requirements are discussed at paragraphs 5.19 to 5.39, 5.64 and 5.100.

Water for the Environment*Witness Concerns*

- 12.6 The West Australian Water Users Coalition and the West Australian Fruit Growers Association raise a concern that a policy paper concerning water for the environment has yet to be released.²⁵ One of the witnesses is concerned that the policy may restrict the availability of water for agriculture.²⁶

Discussion

- 12.7 The Commission has advised that a draft copy of this policy was released for public comment in February 1999 and that it is still being revised in light of submissions received.²⁷
- 12.8 The Commission has further advised that “*the environmental water provision policy is just documenting what we [the Commission] do now*” and that the Commission has “*developed it to ensure that the legislation sets the foundation, and the nuances of its implementation are...dealt with in the policy.*”²⁸

The Need to Set Aside Water for Certain Purposes*Witness Concerns*

- 12.9 AqWest raises a concern that there is a need to set aside water for public water supply purposes, possibly by issuing licences to cover future growth of public water supplies.²⁹

²⁵ Submission 4 and *Transcript of Evidence from the WA Water Users Coalition to the Committee*, May 8 2000, p. 20.

²⁶ Submission 4.

²⁷ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, April 10 2000, p. 14.

²⁸ *ibid.* p. 15.

²⁹ Submission 5.

Discussion

- 12.10 The Commission has advised the Committee that water can be reserved for purposes such as town water supply as part of the water allocation planning process.³⁰
- 12.11 The Committee notes that there is no specific legislative guarantee that water will be reserved.

Recognition of Public Water Supply*Witness Concerns*

- 12.12 AqWest suggests that the RIWI Act is prejudiced towards irrigation and that public water supply should be equally recognised.³¹

Discussion

- 12.13 The Committee notes that the Parts of the RIWI Act relating to irrigation are not the subject of the current reforms and are not significantly altered by the Bill.

Trading by the Water and Rivers Commission*Witness Concerns*

- 12.14 AqWest has raised the issue that the ability of the Commission to trade in water licences is a conflict of interest.³²

Discussion

- 12.15 The Bill allows a licence to be transferred to the Commission in certain circumstances including in the public interest or where authorised by regulations.³³ The Commission can transfer a licence for a premium where the regulations authorise it or the original licence is transferred to the Commission.³⁴
- 12.16 The Commission can issue a licence at a premium where the regulations authorise the Commission to do so, or where the Commission has established the facilities by the use of which water may be taken under the licence.³⁵

³⁰ Transcript of Evidence from the Water and Rivers Commission to the Committee, April 10 2000, p.14.

³¹ Submission 5.

³² *ibid.*

³³ Bill, clause 51 (proposed Schedule 1, Division 8).

³⁴ Bill, clause 51 (proposed Schedule 1, Division 10).

³⁵ Bill, clause 51 (proposed Schedule 1, Division 10).

Security Interests

Witness Concerns

12.17 The Australian Bankers' Association raises the issue of security interests and recommends:

- that licensees should not be able to deal with a licence in a manner detrimental to the holder of a security interest without the consent of the holder of the security interest;
- that the holder of a security interest should have the right to sell, and otherwise deal with, the licence in the event of a default under the loan agreement; and
- that there should be a method of determining priority between security interests.³⁶

Discussion

12.18 The Bill establishes a public licence register and provides for the registration of security interests.³⁷ Where a security interest is registered, the person who has the security interest is to be notified if:

- a licensee is convicted of an offence against the RIWI Act;
- an application is made to amend the licence or transfer the licence or water entitlement under the licence;
- the Commission proposes not to renew the licence, to amend the licence, or to cancel or suspend the licence; or
- the Commission is notified that the licensee wishes to surrender the licence.

12.19 The Commission cannot approve the transfer of a licence or water entitlement without the consent of the person who holds the security interest. An amendment that has been tabled in the Legislative Council will replace temporary transfers with agreements to take water under a licence for a limited time and will require the Commission to obtain the permission of the person with the security interest prior to approving the agreement.³⁸

12.20 The Committee notes that these issues are a matter of normal commercial practice.

³⁶ Submission 6.

³⁷ Bill, clause 48v (proposed Division 3E).

³⁸ sup. ch.3, fn 1.

Leasing of Water Licences

Witness Concerns

- 12.21 The South West Development Commission raises a concern that the tradeable water entitlements should be by lease rather than by absolute transfer.³⁹

Discussion

- 12.22 Currently, the Bill allows permanent or temporary transfer of licences. An amendment that has been tabled in the Legislative Council will replace the ability to temporarily transfer a licence with an ability to make an agreement allowing another person to take water under the licence for a limited period of time.⁴⁰ A licence holder will therefore have a choice as to whether to absolutely transfer the licence or simply allow another person to take water under the licence for a limited time.

Reliance on Other Legislation

Witness Concerns

- 12.23 The South West Development Commission raises a concern that the legislation is not self-contained in that it relies on definitions from other legislation.⁴¹

Discussion

- 12.24 Under the current RIWI Act, terms which are not defined in the Act but which are defined in the *Water Agencies (Powers) Act 1984* have the meaning assigned by that Act.⁴² This provision is not changed by the Bill.

Objects

Witness Concerns

- 12.25 The South West Development Commission raises a concern that the objects of the RIWI Act apply only to Part III rather than the entire Act.⁴³

³⁹ Submission 8.

⁴⁰ sup. ch.3, fn 1.

⁴¹ Submission 8.

⁴² RIWI Act, s. 2.

⁴³ Submission 8.

Discussion

- 12.26 Part III of the RIWI Act contains the majority of provisions relating to water management including licensing requirements, plans for the management of water resources, water resource management committees and local by-laws.

State Agreement Acts*Witness Concerns*

- 12.27 The South West Development Commission suggests that the RIWI Act, as reformed by the Bill, should not be able to be overridden by State Agreement Acts.⁴⁴

Discussion

- 12.28 The Committee notes that State Agreement Acts must pass through Parliament.

Effect of Trading on the Environment*Witness Concerns*

- 12.29 The Conservation Council of Western Australia raises a concern that the ability to trade in water licences will have a detrimental effect on the environment.⁴⁵

Discussion

- 12.30 The Commission has advised the Committee that environmental water allocations will be addressed through the planning process and the draft environmental water provisions policy (discussed at paragraphs 4.4 to 4.6 and 12.7 to 12.8).⁴⁶

Monitoring of Bores*Witness Concerns*

- 12.31 The Conservation Council of Western Australia suggests that bore pumping can have substantial environmental impacts and that owners of bores for large scale commercial use should be required to meter the bores and report on the amount extracted in areas where licences have not been introduced.⁴⁷

⁴⁴ Submission 8.

⁴⁵ Submission 9.

⁴⁶ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, April 10 2000, p. 15.

⁴⁷ Submission 9.

Discussion

12.32 The Commission has advised the Committee that the majority of groundwater areas are subject to licensing.⁴⁸ Supplementary information provided by the Commission indicates that all bores are monitored, either by specifying the type and level of water use or by metering.⁴⁹ The Commission has further advised that bores are metered in some areas but not in others, and that bores which use over a certain amount of water are metered.⁵⁰

Public Review of Water Resource Management Plans

12.33 The Conservation Council of Western Australia raises a concern that regional water resource management plans should be subject to a public review every five years.⁵¹ (See paragraphs 4.4 to 4.6 for a discussion of plans.)

12.34 Refer to the Recommendation at the end of this Chapter.

Local By-laws*Witness Concerns*

12.35 The Conservation Council of Western Australia raises two concerns relating to local by-laws:

- that any making, amendment or repeal of local by-laws should be tabled in Parliament; and
- that the Commission's report to the Minister on public submissions received on local by-laws should be made available to the public.⁵²

Discussion

12.36 The Committee notes that under the *Interpretation Act 1984*, by-laws must be laid before each House of Parliament and can be disallowed by either House of Parliament.⁵³

⁴⁸ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, April 10 2000, p. 6.

⁴⁹ Water and Rivers Commission, *Additional Information Sheets: Monitoring of Bores*, May 2000.

⁵⁰ *Transcript of Evidence from the Water and Rivers Commission to the Committee*, May 22 2000, pp. 17 - 18.

⁵¹ Submission 9.

⁵² *ibid.*

⁵³ *Interpretation Act 1984 (WA)*, s. 42.

Licence Conditions Relating to the Environment

Witness Concerns

12.37 The Water Corporation expresses concerns that licence conditions can relate to water resources and their ecosystems.⁵⁴ The witness suggests that environmental conditions are the responsibility of the Department of Environmental Protection rather than the Commission and that there is the potential for double regulation.

Licence Objections and Access Licences

Witness Concerns

12.38 The Chamber of Minerals and Energy raises a concern that there is insufficient detail in the Bill to determine how a number of matters will operate, including:

- a possible increasing scope for objection to the issue of licences; and
- access licences.⁵⁵

Discussion

12.39 Under the current RIWI Act, applications for special licences (see paragraphs 5.22 to 5.24 for a discussion of special licences) must be advertised and an owner or occupier of land within 4.8 km can object.⁵⁶

12.40 Under the Bill regulations can provide for the advertising of an application for a licence to take surface or groundwater. Where an application is advertised, submissions can be made to the Commission.⁵⁷

12.41 The Bill does not appear to statutorily recognise a licence to ‘access’ water. It allows licences to be granted to take water and to construct or alter wells.⁵⁸

Water Allocation Issues

Witness Concerns

12.42 The Chamber of Minerals and Energy raises concerns over a lack of clarity about how a number of water allocation issues are to be dealt with under the Bill – that is:⁵⁹

⁵⁴ Submission 10.

⁵⁵ Submission 11.

⁵⁶ RIWI Act, s. 12.

⁵⁷ Bill, clause 51 (proposed Schedule 1, clause 5).

⁵⁸ Bill, clause 18 (proposed section 5C) and clause 37 (amendment of current section 26D).

⁵⁹ Submission 11.

- allocation between existing and future users;
- allocation as between small and large users; and
- the role of the Commission in determining the best allocation outcomes.

Discussion

12.43 The Commission has advised the Committee that it currently drafts allocation plans for the water resources of an area.⁶⁰ The Bill introduces statutory plans for the management of water resources, discussed at paragraphs 4.4 to 4.6.

Concerns Relating to section 12 of the RIWI Act*Witness Concerns*

12.44 The West Australian Water Users Coalition has expressed a concern that section 12 of the RIWI Act is deficient and that the Bill should seek to correct it.⁶¹

12.45 Section 12 applies to allow a riparian user to be licensed for a non-riparian pre-existing use of water, where licensing is introduced into an area. See discussion at paragraphs 5.22 to 5.24.

12.46 The witness has raised the following specific concerns:

- that the grant of a section 12 licence should be mandatory rather than at the discretion of the Commission, or in the alternative, compensation should be provided if a licence is not granted; and
- that the ten year tenure is too short. The Act should require special licences to be granted for a commercially feasible term.

Discussion

12.47 Refer to the Recommendations at the end of Chapter 6.

BROADER ISSUES

12.48 The Committee brings the following matters to the attention of Parliament:

⁶⁰ Transcript of Evidence from the Water and Rivers Commission to the Committee, April 10 2000, p. 14.
⁶¹ Submission 1.

Ecologically Sustainable Development Framework

- 12.49 The Conservation Council of Western Australia expresses a concern that the Bill should include a specific Ecologically Sustainable Development framework within the RIWI Act by incorporating ecologically sustainable development principles in the objects of the Act.⁶²

Duty of Care

- 12.50 The Conservation Council of Western Australia suggests that the Bill should establish a duty of care on all water users to take all fair and reasonable measures to ensure water resources are not damaged.⁶³

Third Party Civil Proceedings

- 12.51 The Conservation Council of Western Australia suggests that the civil remedy provision introduced by the Bill, which allows people with rights under the RIWI Act to take civil action to protect those rights, should be extended to allow any person who is concerned about environmental protection to take action.⁶⁴

Regulations

- 12.52 The Chamber of Minerals and Energy raises a concern that too much of the detail of the legislation is left to regulations to make an accurate assessment of the effect of the Bill.⁶⁵
- 12.53 The Committee notes that regulations must be laid before each House of Parliament and can be disallowed by Parliament.⁶⁶

Protection of Environment Dependent on Water

- 12.54 The Conservation Council of Western Australia and the Nyungah Circle of Elders each raise the issue of the degradation of water related ecosystems. The Nyungah Circle of Elders raises a particular concern regarding the protection of the Yanchep caves.⁶⁷

⁶² Submission 9.

⁶³ *ibid.*

⁶⁴ Bill, clause 18 (proposed s. 5E).

⁶⁵ Submission 11.

⁶⁶ *Interpretation Act 1984 (WA)*, s. 42.

⁶⁷ *Transcript of Evidence from the Conservation Council of Western Australia (Inc)*, May 8 2000, pp. 8 – 10, and *Transcript of Evidence from the Nyungah Circle of Elders to the Committee*, May 8 2000, pp. 1 – 3.

CONCLUSION

- 12.55 The Committee recognises the scope and importance of some of the issues raised in Chapter 12 of this Report. The Committee, noting the time constraints of this Report, brings these issues to the attention of the Legislative Council for its consideration.

Recommendation 9:

The Committee recommends that consideration be given to a periodic review of regional water resource management plans.

B. K. Donaldson.

Hon Bruce Donaldson MLC

Chairman

Date: 15-6-00

APPENDIX 1**Part 1****List of Individuals and Organisations Invited by the Committee to Make a Submission**

AqWest

Busselton Water Board

Carnarvon Irrigators

Chamber of Commerce and Industry

Chamber of Minerals and Energy of Western Australia Inc

Conservation Council of Western Australia Inc.

Grape Growers Association of WA (Inc)

Greenhouse Growers Association

Nyungah Circle of Elders

Pastoralist and Graziers Association of Western Australia (Inc.)

Preston Valley Irrigation Co-operative Limited

South West Irrigation

Water Corporation

Western Australian Farmers Federation (Inc)

Western Australian Fruit Growers Association Incorporated

Western Australian Water Users Coalition (Inc)

Western Australian Municipal Association

Western Australian Vegetable Growers Association

Wine Industry Association

Mr Clary Isaacs, and Mr Noel Mourich

Part 2**List of submissions received by the Committee**

Submission No	Individual/Organisation and Date of Submission
1.	Western Australian Water Users Coalition (Inc) dated April 20 2000.
2.	Pastoralists and Graziers Association of Western Australia (Inc.) dated April 20 2000.
3.	The Western Australian Farmers Federation (Inc) dated April 20 2000.
4.	Western Australian Fruit Growers Association Incorporated and Western Australian Vegetable Growers Association dated April 20 2000.
5.	AqWest-Bunbury Water Board dated April 18 2000.
6.	Australian Bankers' Association dated April 26 2000.
7.	Preston Valley Irrigation Co-Operative Limited dated April 27 2000.
8.	South West Development Commission dated April 28 2000.
9.	Conservation Council of Western Australia Inc. dated May 1 2000.
10.	Water Corporation dated May 1 2000.
11.	The Chamber of Minerals and Energy of Western Australia Inc dated May 2 2000.
12.	Mr Clarrie Isaacs JP dated May 1 2000.

Part 3

Witnesses who appeared before the Committee

April 10 and May 22 2000

Water and Rivers Commission –

Mr Roderic Banyard, Manager of Strategic Projects Branch;

Mr Tim McAuliffe, Director of Policy and Planning; and

Ms Cheryl Leyland, Policy Officer.

May 8 2000

Nyungah Circle of Elders –

Mr Robert Bropho, Custodian of Nature's Concerns;

Mr Greg Garlett; and

Mr Kelvin Garlett.

Conservation Council of Western Australia (Inc) –

Mrs Joan Payne, Executive Member, Spokesperson on Water; and

Mr James Duggie, Water Policy Officer.

Western Australian Water Users Coalition (Inc) -

Mr David Wren, Secretary/Treasurer;

Mr Graeme Waugh, Chairman; and

Mr Eric Phillips, Farmer.

APPENDIX 2

**Letter from the Australian Taxation Office to the Water and Rivers Commission
dated 31 March 2000**

45 Francis St, NORTHERIDGE WA 6003
GPO BOX 9990 PERTH WA 6001

Telephone: 9268 5422
Facsimile: 9268 5020

Our Reference: LBI (CGT)
Contact Officer: Sue Owen
Your Reference: CSO 619/99

31 March 2000

The Crown Solicitor's Office
Attention: Mr B Prentice
GPO Box B83
PERTH - W.A. 6838

Dear Sir

RE: CAPITAL GAINS TAX IMPLICATIONS OF PROPOSED AMENDMENTS
TO THE *RIGHTS IN WATER AND IRRIGATION ACT 1914*

We refer to your letter of 30 April 1999, subsequent correspondence and meetings with your Mr Prentice and Mr Banyard of the Water And Rivers Commission and the taxation matters raised by them. We apologise for the delay in replying.

Although the opinion given below is not legally binding on the Commissioner of Taxation, it is our policy to stand by the advice we give unless there is a change in the law, the factual situation changes or our opinion is shown to be incorrect following a decision of a Court or a Tribunal. Subject to this necessary qualification, the following advice is given:

- (a) a water licence which is acquired by a taxpayer after 19 September 1985 ('post-CGT') is an 'asset' as defined under section 160A of *Income Tax Assessment Act 1936* (ITAA 1936) even if it was acquired pre-26 June 1992;
- (b) no CGT event happens for an existing licence-holder when the proposed amendments to the *Rights in Water and Irrigation Act 1914* (RIWI Act) are passed;
- (c) an existing licence-holder will not be taken to have acquired a new asset when the amendments mentioned in (b) are passed;
- (d) the roll-over provision of section 124-140 of *Income Tax Assessment Act 1997* (ITAA 1997) can apply if an existing licence-holder obtains a 'new' licence under the amended RIWI Act on expiry of the 'old' licence;

- (e) CGT event D1 happens when a licence-holder enters into an agreement with a third party relating to the taking of water under the licence by the third party temporarily or for a limited period;
- (f) CGT event A1 happens where a licence-holder transfers (permanently) his or her water licence or water entitlement (or part thereof) to another person; and
- (g) where a licence-holder acquires (permanently) an additional water entitlement, there is an acquisition of a CGT asset that merges into the licence for the purposes of subsection 112-25(4), but where the holder acquired the licence pre-CGT, the additional water entitlement would be deemed to be a separate CGT asset if the conditions in subsection 108-75(3) are satisfied.

To elaborate on some of the views above, we provide the following comments:

Licence – an ‘asset’

Section 108-5 of the *Income Tax (Transitional Provisions) Act 1997* (ITTP Act) states that a capital gain or loss from a CGT asset is disregarded if the asset was last acquired before 26 June 1992 and was not an asset for the purposes of Part IIIA of ITAA 1936. It is our view that a statutory licence acquired before 26 June 1992 is an asset for Part IIIA purposes.

It would appear that, prior to the amendment in June 1992 to the definition of ‘asset’ in section 160A (Part IIIA) of ITAA 1936, there appeared to be some doubt as to whether the CGT provisions would apply to a disposal of a right which was not proprietary in nature. The amendment to section 160A made it very clear that a right need not be a form of ‘property’ to qualify as an asset [subparagraph 160A(a)(iv)].

The indicators which are normally used in determining whether a right is ‘property’ are definability, identifiableness, capability of being assumed (assignability) and permanence or stability – *National Provincial Bank v Ainsworth* [1965] AC 1175. However, in *FC of T v. Orica Ltd* 98 ATC 4494, the majority of the High Court rejected the earlier decision of the Full Federal Court which held that the right in question was merely a personal right incapable of assumption by a third party and therefore not ‘property’. The majority of the High Court referred with approval to the statement by Kitto J. in *National Trustees Executors and Agency Co of Australasia Ltd v FC of T* (1954) 91 CLR 540 at 583 in concluding that alienability is not an indispensable attribute of a right of property according to the general sense which the word ‘property’ bears in law.

Our view therefore is that a statutory licence constitutes ‘property’ and an asset for Part IIIA purposes even under the ‘old’ section 160A, that is, prior to its 1992 amendment. The presence in ITAA 1936 of section 160ZZPB (roll-over relief for statutory licences) lends further support to our argument. In ITAA 1997, a statutory licence would be a ‘CGT asset’ as defined in section 108-5.

Roll-over of statutory licences

We agree that the roll-over provision of section 124-140 of *Income Tax Assessment Act 1997* (ITAA 1997) can apply when an existing licence-holder obtains a 'new' licence under the amended RIWI Act on expiry of the 'old' licence. The new licence must be obtained by the renewal or extension of the original one and this has to be due mainly to the licence-holder having the original licence.

Temporary taking of water

CGT event D1 (section 104-35) happens when a holder of a licence enters into an agreement with another person (the third party) relating to the taking of water under the licence by the third party for a limited period of time. CGT event D1 happens if a person creates a contractual, legal or equitable right in another entity. The time of the event is when the contract is entered into or the right created. Thus the fact that the licence was a pre-CGT asset is irrelevant.

The cost base or reduced cost base of the asset would comprise only the incidental costs and where the 'capital' proceeds from creating the right exceed the incidental costs incurred in relation to the event, there is a capital gain. There is a capital loss if those 'capital' proceeds are less than the incidental costs.

However, as the proceeds received in respect of the event would, generally speaking, be assessable under the income provisions, section 118-20 would operate to eliminate or reduce the capital gain.

At the end of the limited period, that is, on expiry of the right, CGT event C2 (section 104-25) would happen for the third party. A capital loss could be incurred. However, if the third party had deducted or could deduct the expenditure in relation to the right acquired, the capital loss would be reduced due to the operation of subsection 110-55(4).

Permanent transfer of a licence or water entitlement (or part thereof)

We agree that CGT event A1 (section 104-10) happens on the (permanent) transfer of a licence or water entitlement (or part thereof). A capital gain or capital loss is disregarded if the licence was acquired before 20 September 1985 (pre-CGT). If the licence disposed of was acquired post-CGT but was a renewal or extension of an original licence and the roll-over provision of section 124-140 applied, the licence is taken to have been acquired pre-CGT.

The date of acquisition of the associated land does not affect the CGT implications arising in respect of the licence or the underlying water entitlement.

Acquisition of additional water entitlement

Where a licence-holder acquires, permanently, an additional water entitlement, there is an acquisition of a CGT asset that merges into the licence for the purposes of subsection 112-25(4). However, where the licence-holder acquired the licence pre-CGT, the acquisition of an additional permanent water entitlement would be deemed

to be a 'separate' CGT asset if the conditions in subsection 108-75(2) are satisfied. In such a case, the additional water entitlement (being a capital improvement) would be taken to have been acquired by the licence-holder post-CGT.

If you need clarification on any of the matters mentioned in this letter, please contact Sue Owen of this office on telephone number 9268 5422.

Yours faithfully,

(Bob Coulson)
for Jim Killaly
DEPUTY COMMISSIONER OF TAXATION
Large Business & International

*Original copy signed off by
Bob Coulson*

*Sue Owen
31/3/00*



**MINORITY REPORT OF THE
HON GIZ WATSON MLC**

STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

Rights in Water and Irrigation Amendment Bill 1999

Report 51 – Minority

Dissent from Recommendation 4

I dissent from the majority Recommendation 4 on the basis that, if enacted, it will broaden the scope of mandatory compensation, thereby providing a disincentive to the equitable and sustainable use of water resources. Further, it will recognise an assumed right to take water that does not exist under current law. I therefore support the approach taken in the Bill.

Explanation

The *Rights in Water and Irrigation Amendment Bill 1999* (Bill) provides for **mandatory** compensation only where a license is amended or cancelled ‘in the public interest’, and for **discretionary** compensation through license conditions, trading by the Water and Rivers Commission, or local by-laws (see Chapter 6 of the Report).

Recommendation 4, if enacted, will increase the scope of compensation to:

- a) all reductions or removals of a license, not just those ‘in the public interest’; and
- b) all reductions or removals of a current use of water when licensing is introduced into an area (subject to possible exemptions introduced by Parliament).

The current use of surface water in an unlicensed area may be taking place pursuant to a right recognised by the *Rights in Water and Irrigation Act 1914* (RIWI Act) (riparian rights or rights to public water – see Chapter 5 of the Report) or may be taking place outside of, or in excess of, such a right. I note that the Commission can issue a direction preventing a use where there is interference to another person’s rights, damage to land, or the Commission decides the use should not be permitted to continue in the public interest. However, such a direction can also allow the use, provided there is no impact on other rights or any damage to land (See Chapter 5 of the Report).

The use of non-artesian groundwater in an unlicensed area is not prohibited by the RIWI Act or the Bill. However, no right to use that water is specified by the RIWI Act. Rather there may be a common law right to use groundwater – see Alex Gardner, *Water Resources Law Reform*, National Environmental Law Association (WA Division) 1998 State Conference. At the same time, the Bill includes a set of rights to use non-artesian groundwater in certain licensed areas without a license.

The effect of Recommendation 4, if enacted, will be to extend compensation to unlicensed areas and, therefore, there will be compensation for current use (from the date of the First Reading of the RIWI Act – see Recommendation 6) whether or not that use is based on a statutory right. On this matter I note the comment by Alex Gardner in *Note on Water Rights, Sustainability & Compensation*, October 28 1999, as submitted to the Committee:

“Statutory rights relating to the use of natural resources may be regarded as mere personal privileges if they simply grant to the rights holder a license to do something that is otherwise illegal; for example, the right to take some natural resource from

Crown land. There is no legal restraint on Parliament's powers to legislate to cancel or reduce the rights held under these statutory privileges."

In summary, my concerns are:

- a) that in extending this right to mandatory compensation there will be a financial disincentive to the Water and Rivers Commission to act to conserve or protect a water resource in circumstances other than 'in the public interest', due to suspension or cancellation of a license, or in circumstances provided by local by-laws; and
- b) that the provision of mandatory compensation for the removal of any existing use, even where such an existing use can be regarded as an 'assumed' rather than an 'actual' right, creates an excessively broad area of compensation and acts as a disincentive to the Commission to introduce controls on use where they are necessary.

Minority Recommendation:

Recommendation 4 of the Report states:

Recommendation 4:

The majority of the Committee recommends that the payment of compensation be mandatory wherever a legitimate existing use, whether licensed or unlicensed, is reduced or removed, the scope of exemptions from such compensation to be decided by Parliament.

I dissent from this recommendation and make the following alternative recommendation:

Minority recommendation 4:

The scope of the compensation provisions in the Bill is adequate and no expansion is necessary.



Hon Giz Watson MLC

Date: 16.6.00