



# **Protecting WA's Water Resources**

**Patrick Pearlman, Principal  
Solicitor**

**Environmental Defender's  
Office WA (Inc.)**

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# What Water Resources Are We Talking About?

- Freshwater (Limnic) Systems
  - Surface Water
    - Lakes, watercourses, drains, dams
  - Groundwater
    - Artesian and non-artesian wells
    - Saline groundwater
  - Wetlands
- Saltwater (Marine) Systems
  - Estuaries, Mangrove swamps, Coastal seas

# Relevant Cth Laws

- EPBC Act
  - Primary Federal environmental law
  - Commonwealth Waters = MNES; waters > 3 nautical miles from low water mark
  - Ramsar (Convention) wetlands = MNES
    - 12 Ramsar wetlands in WA (4 in Kimberley; 4 along coast south of Perth; 4 in Southeast). *See* <http://www.environment.gov.au/water/publications/environmental/wetlands/pubs/ramsar-sites.pdf>
- Other Laws – some related to maritime shipping and transport

# Relevant WA State Laws

- *Rights In Water and Irrigation Act 1914*
  - Basic water law; *Rights In Water and Irrigation Regulations 2000* (WA) (complements statute)
- RIWI regulates “taking” of:
  - Surface Waters (watercourses and wetlands, their banks and beds); and
  - Groundwater (artesian and non-artesian)

# Surface Waters Under RIWI

- Watercourses (RIWI s 3)
  - Watercourse = A stream, creek, brook or river through which water flows
    - Includes the bed and banks of that watercourse, and any reservoir or other collection of water on a watercourse.
    - Includes watercourses that only flow occasionally (e.g., systems of the Pilbara) and watercourses that have been artificially modified.

# Surface Waters Under RIWI

- Wetlands (RIWI s 2)
  - Wetland: “A natural collection of water (permanent or temporary) on the surface of any land and includes any lake, lagoon, swamp or marsh; and a natural collection of water that has been artificially altered.
  - A wetland is **NOT** a watercourse (*i.e.* any river, creek, stream, brook or reservoir in which water flows into, through or out of; or any place where water flows that is prescribed by local by-laws to be a watercourse).

# Groundwater Under RIWI

- Defined: “Water that percolates from the ground into a well or other works” (RIWI s 2)
  - Includes both artesian and non-artesian water.
  - Artesian water: “Groundwater that flows to the surface through a bore under its own pressure and without the need for a pump.
- Excluded:
  - Water flowing naturally to the surface through a natural spring or sump (this is surface water).
  - Drains constructed to take away, discharge groundwater because of salinity.

# Who Implements the RIWI?

- Department of Water (DoW) manages “use, service and health of water and waterways” to meet RIWI’s objectives.
- RIWI objectives require DoW to:
  - provide for sustainable use and development of water resources;
  - protect the environment and water resource ecosystems;
  - promote the orderly, equitable and efficient use of water resources;
  - foster consultation with local communities; and
  - assist with integrating management of water resources with other natural resources (RIWI s 4).

# “Taking” Water Under the RIWI

- “Taking” water: To remove water from, or reduce the flow of water in, a watercourse, wetland or underground water source by —
  - pumping or siphoning;
  - stopping, impeding or diverting the flow of water;
  - releasing water from a wetland
  - permitting water to flow under natural pressure from a well; or
  - permitting stock to drink from a watercourse or wetland; and
  - storing water ancillary to any of the above (RIWI s 2).
- 2 licensing schemes – one for taking surface water (i.e., water from watercourse or wetland), and one for taking underground water.

# “Taking” Surface Water Under the RIWI

- A licence is required to take water from watercourses or wetland in a “proclaimed area” (under the act) or “prescribed area” (under the RIWI Regulations) (RIWI s 5C)
  - Most major river systems in WA are within one of these areas
  - Location of proclaimed areas and prescribed areas available from DoW.

# “Taking” Underground Water Under the RIWI

- Licence required to take groundwater from a non-artesian bore within a proclaimed groundwater area (RIWI s 26B).
- Licence required to take groundwater from an artesian bore in any area (that is, a bore where the water flows to the surface without pumping) (RIWI s 26A).
- Most of WA within a proclaimed groundwater area.
- Governor may declare licensing provisions do not apply to a certain bore, or certain types of bores, within proclaimed areas (RIWI s 26C).

# **Exemptions: No Licence Required to Take Surface Water**

- Licence not required for taking water from a watercourse or wetland outside “proclaimed” or “prescribed” areas.
- No licence required when taking is a “landholder’s (riparian) right” or a “public right”.

# Riparian Rights Exemptions

- Person whose land adjoins a watercourse or wetland (i.e., “riparian owner”) may take water without a licence for following purposes:
  - for owner’s domestic and ordinary use;
  - for watering cattle and stock (but not stock under intensive conditions, that is stock held in confinement and fed by hand); and
  - if land title granted before September 1914, for watering a garden not exceeding 2 Ha, provided the produce is used for domestic purposes and not offered for sale (RIWI s 9).
- Riparian owners outside proclaimed area may take water for any other purpose provided the amount or flow of water in the watercourse is not “sensibly diminished” (RIWI s 20).

# Public Rights Exemption

- No licence needed to take water from Crown land accessible by road, or public reserve, for
  - domestic and ordinary use; or
  - watering stock under non-intensive conditions (RIWI s 10).
- Outside proclaimed areas, a person may take water for any other purpose, provided the flow of water in the watercourse is not sensibly diminished (RIWI s 21).
- Right to take water under public right does not authorise person to install works (e.g., a dam or pump) or do anything that causes interference or obstruction to the watercourse (unless DoW issues a permit).

# Obtaining Licence to “Take” Water (Procedure)

- Who may apply for “take” licence (RIWI Schedule 1, clause 3):
  - Owner or occupier of land;
  - A person authorised by owner or occupier of land; or
  - A public authority with power to take water from land, may apply for a licence to take water.
- Applications must be publicly advertised in a State newspaper and a newspaper in area where water to be taken unless:
  - An approved “water management plan” specifies advertising not required, or
  - DoW believes advertising not warranted due to the small impact (RIWI Schedule 1, clause 5; RIWI Regs, r 23).

# Public Opposition to “Take” Water Applications

- “Interested persons” may make written submissions to DoW regarding advertised applications (RIWI Regs, r 23(4)).
- 2 elements public should work into objections:
  - (1) In considering applications for a licence to take water, Minister is to have regard to all matters considered relevant, including whether proposed taking and use of water is ecologically sustainable and environmentally acceptable (RIWI, Schedule 1, clause 7).
  - (2) Licence must be consistent with any relevant local by-law or water management plan.

# Public Opposition to “Take” Water Applications (cont’d)

- Public may also urge conditions on any licence to “take” water (fallback to outright refusal to issue licence).
- Conditions can be placed on a licence regarding:
  - use, management, protection and enhancement of
  - any water resource and its ecosystem,
  - or the environment in which the water resource is situated (RIWI Appendix to Schedule 1, clause 2).

# Other Opportunities for Public Action – Water Directions

- DoW may give directions to a person who is taking water from a water resource (watercourse, wetland, or underground water source) under licence, landholder's rights or public rights, if:
  - the quantity of the water resource is, or is likely to be, insufficient to meet demand, including any environmental demand;
  - a water shortage exists in the area in which the water resource is situated;
  - the taking is having a harmful effect on the water resource;
  - the water being taken is being wasted;
  - the taking is having a harmful effect on the water source; or
  - the water is not being used to best advantage (RIWI s 26GD).

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# On-Stream Dams Regulation Under RIWI

- Permit from Minister (or authority under another Act) required to:
  - build or alter
  - a temporary or permanent dam on a watercourse
  - within
    - a proclaimed area or irrigation district,
    - on any land “prescribed” by local by-laws to be subject to this provision;
    - and on any Crown land outside a proclaimed area (RIWI ss 17 & 25).

# On-Stream Dams Regulation (cont'd)

- Development approval may also be required under a local planning scheme
- Public authority constructing on-stream dam or weir must notify Minister for Fisheries, and make alterations if Minister directs that a fish by-pass be established (RIWI s 254)
- Exemptions: Permit is not required where:
  - construction of the dam commenced before 10 January 2001, or
  - the dam is exempted from a permit under local by-laws (RIWI ss 17 & 17A)

# Off-Stream Dams Regulation

- Off-stream dams do not require approval from the Minister if:
  - the flow of water in a watercourse, or the amount of water in a wetland, is not “sensibly diminished” or there is no significant adverse effect on the quality of water, or any ecosystem, in a watercourse, or a wetland; or
  - it is used only for watering cattle or other stock, other than those being raised under intensive conditions (RIWI s 5B)

# Water Management Plans (WMPs)

- WMP is a statutory plan developed for a particular water resource.
- WMPs are intended to guide the allocation of water resources and include factors to be considered when granting licenses and approvals in particular regions to ensure water resource's condition is maintained or improved.
- WMPs may be regional, sub-regional or local.
- Development or amendment of WMP requires consultation with any water resources management committee in the region, sub-region or area, public advertisement and public submissions to DoW.
- Public opportunity to participate on water resources management committee to consult on any WMP or amendment (RIWI Part 3, Division 3D).

# Other WA Laws Impacting Water Resources

- *Environmental Protection Act 1986:*
  - Referral and environmental impact assessment of “significant”, “strategic” and “derived” proposals (those with potentially significant adverse environmental impacts)
  - Enforcement action for pollution, unreasonable emissions resulting in serious or material environmental harm.
  - Provision for EPA to create Environmental Planning Policies (EPPs) which is legally enforceable policy for protection of environment or for the prevention or control of pollution and environmental harm.
  - To protect underground water, EPA established the *Gnangara Mound Crown Land Policy 1992*, setting rules for the prevention of the discharge of contaminants, clearing of vegetation and abstracting groundwater from the Gnangara Mound area (the largest source of Perth’s groundwater), as well as setting environmental and water quality objectives.
  - To protect wetlands, EPA has established 3 EPPs (Swan Coastal Plain Lakes EPP, South West Agriculture Zone Wetlands EPP, and Peel Inlet – Harvey Estuary EPP).

# Other WA Laws (cont'd)

- *Swan and Canning Rivers Management Act 2006 (WA)*: Special development controls apply to land and waters within the “Development Control Area”, defined as the Swan and Canning Rivers and their catchment areas.
  - A person (including a public authority) is required to obtain approval (either Environment Minister or, in some cases, the Swan River Trust) before commencing “development” entirely within the boundaries of the management area.
  - “Development” includes the carrying out of any building, excavation, or other works in, on, over, or under land or waters.
  - Proposals to fill in (“reclaim”) more than one hectare of any waters of the management area must be approved by both Houses of Parliament (s 71).

# Other WA Laws (cont'd)

- *Waterways Conservation Act 1976* :
  - Allows Governor to issue “stream conservation orders”, setting aside, on EPA’s recommendation, management areas for conservation of a watercourse and associated land (s 10).
  - Five management areas have been established in WA (Peel/Harvey Estuaries, Leschenault Estuary and associated rivers, Albany Harbour and associated rivers, the Avon River and Wilson Inlet and associated rivers).
  - Environment Minister has power to preserve the waters and land, and control or prevent acts or omissions that may cause pollution.
  - Environment Minister can request a local government to refer development applications relating to a management area.
    - Environment Minister may make recommendations on that development proposal, and
    - Planning authority shall not make a decision on proposal until it has received Minister’s recommendations.

# Other WA Laws (cont'd)

- *Metropolitan Water Supply, Sewerage, and Drainage Act 1909:*
  - Allows for the proclamation of “Underground water pollution controls areas” (UWPCAs) to be proclaimed in the Perth metropolitan region, to which certain controls on activities that might endanger the purity of the water may apply (s 57A).
  - UWPCAs can be classified as priority 1, 2 or 3 depending on the conservation importance of the particular groundwater area. For example, underground storage tank systems and automotive businesses cannot be established in priority 1 or 2 source protection areas (*Metropolitan Water Supply, Sewerage and Drainage By-Laws 1981*, regulation 5.6).
- *Country Areas Water Supply Act 1947*
  - DoW has same powers as a local government to control pollution of watercourses within and under catchment areas and water reserves under *Metropolitan Water Supply, Sewerage and Drainage Act 1909* and the *Country Areas Water Supply Act 1947*.
  - Includes the power to make local laws to control polluting activities within a catchment (*Metropolitan Water Supply, Sewerage and Drainage Act 1909*, s 17; *Country Areas Water Supply Act 1947*, s 12).

# Other WA Laws (cont'd)

- *Health Act 1911*
  - makes it an offence for any person to pollute any water supply or water catchment containing water intended for human consumption (Health Act 1911, section 129).
- *Soil and Land Conservation Regulations 1992*
  - Proposals to build drains or discharge saline water directly or indirectly into a watercourse or wetland is subject to a notification process.

# Protection of Marine Waters

- *Fish Resources Management Act 1994*
  - Person engaging in activity polluting or likely to pollute aquatic environment may be served with notice prohibiting their actions by Minister. Notice may apply generally, at specified times or in specified circumstances.
- *Environmental Protection Act 1986.*

# Judicial Remedies - Limited

- Most WA legislation leaves enforcement in the hands of regulatory agencies – and enforcement is discretionary
- Even the penalties – for “taking” water without licence or breaching conditions of licence, for example – government may seek are slight (\$10,000 max. penalty + \$1,000/day). Requires judicial action to impose.
- Public’s legal remedies limited.
  - For violations of legislation, actions without licence, etc. → injunctions, possibly prerogative writs (mandamus)
  - For common law nuisance (public or private) or trespass → injunctions, possible damages

# Other Opportunities for Public Action

- Despite glaring deficiencies in the legislation outlined above, there are opportunities for public involvement in the administration of water protection laws to consider, including:
  - encouraging development of water management plans for the protection of water sources and making submissions on plans;
  - monitoring media for water licence applications and making submissions to DoW if you or member of organisation are likely to be adversely affected (“interested person”);
  - reporting unlawful taking of water, interference with beds or banks, wastage or improper use of water to the DoW;
  - where a licence or development approval has been granted, determining what conditions imposed and, if the conditions violated, making a complaint to the agency that imposed the conditions (this may require FOI request to obtain conditions); or
  - joining local water resource management committee or other catchment group in local area.