MANAGING AND PROTECTING WESTERN AUSTRALIA'S MOST VITAL RESOURCE

RIGHTS TO WATER AND ASSOCIATED LAND

A Review

WATER AND RIVERS COMMISSION

RIGHTS TO WATER
AND ASSOCIATED LAND

A Review

WATER AND RIVERS COMMISSION
HYATT CENTRE
3 PLAIN STREET
EAST PERTH
WESTERN AUSTRALIA 6004
TELEPHONE (08) 9278 0300
FACSIMILE (08) 9278 0301

Rights To Water And Associated Land

A Review

Written for the
Water and Rivers Commission
Policy and Planning Division
by
Katie Winterbourne

WATER AND RIVERS COMMISSION
WATER REFORM SERIES
REPORT NO WRS 6
1998

Acknowledgments

This report was prepared by Katie Winterbourne for the Water and Rivers Commission with advice and assistance from Alex Gardner (UWA Law School) and Rod Banyard (Water and Rivers Commission).

For more information contact:
Rod Banyard
Manager Strategic Projects Branch
Water and Rivers Commission
3 Plain Street
East Perth
WA 6004
Telephone: 9278 0300

Reference details

The recommended reference for this publication is: Water and Rivers Commission 1998, *Rights to Water and Associated Land: A Review,* Water and Rivers Commission, Water Reform Series No WRS 6.

ISBN: 0-7309-7412-X
ISSN: 1329-3028

Text printed on recycled stock
May, 1998

Foreword

This paper attempts to unravel some of the confusion surrounding the water related legislation in Western Australia. It also seeks to establish the place of common law in the administrative system of water law. Many inconsistencies and uncertainties remain and these emphasise the need for a complete review and clarification of Western Australian water law by the legislature. No attempt has been made in this paper to make suggestions or recommendations for change.

Writing this paper involved extracting the law relating to water resources from the vast web of Western Australian and Commonwealth legislation and the common law. There are many areas where a definitive statement of the law is unable to be made and the complexity of other areas is beyond the scope of this paper. It should also be recognised that this paper is only the writer's interpretation of the law relating to the management of Western Australian water resources. It cannot be read in isolation and should be used as a guide only. Legal advice should be sought for specific problems. The views expressed in this paper are not necessarily those of the Water and Rivers Commission.

This paper is targeted towards readers without a legal background, who are interested in aspects of the law relating to the management of water resources in Western Australia. Strict referencing procedures have not been employed as the paper is not intended to be an academic thesis. Case law references have generally not been included. Although some useful points have been made in Australian and English cases relating to the interpretation of water law, it is envisaged that most people reading this paper do not intend to investigate the law to that level of detail.

The paper is part of a larger work *Legal Aspects of Water Resource Management in Australia* prepared by the writer which is to be published by the Water and Rivers Commission.

Contents

1. Property in land associated with water

"The swamp behind our place had become an important place for me. It was now part of me, part of what I was as a person. When I was in the swamp, I lost all track of time. I wallowed in the small, muddish brown creek that meandered through on its way to join the Canning River. I caught gilgies by hanging over an old stormwater drain and wriggling my fingers in the water".

Sally Morgan, *My Place.*

The regime for the management of water resources affects private rights to land associated with water and the water itself. This report firstly addresses the rights of a landowner to land which is associated with bodies of water and the changes in land ownership caused by the changing path of a watercourse. A brief description of the legal notion of property highlights the difficulties of including water within traditional notions of property due to its transience. The framework of public and private rights to water, which is a fundamental issue in a water management regime, is also discussed along with some problems commonly associated with determining water rights.

The legal framework of private rights to water has evolved from English common law principles adopted upon colonisation, to statutory regulation primarily under the *Rights in Water and Irrigation Act 1914.* This report examines how the framework has changed and to what extent the *Rights in Water and Irrigation Act* replaces the common law. The effect of the Commonwealth *Native Title Act 1993* on the current framework of water rights is also briefly considered.

The water legislation provides a framework for the management of water in the State and necessarily determines the rights of water users. The regime under the *Rights in Water and Irrigation Act* provides a means for obtaining rights to use water. It does not provide a system for obtaining access to water. Access to water will depend upon property rights over land which arise primarily under the regime of the *Land Act* and to a limited extent under the *Mining Act* and the *Petroleum Act.* However, the issue of land ownership can be affected by the presence of water flowing over land.

The migratory nature of surface water and variation in the path of flow leads to changes in the area of land covered by water. This can lead to changes in the area of land subject to ownership. Surface water bodies have also traditionally been used to establish property boundaries despite not providing a fixed boundary line.

1.1 Crown ownership of the bed

Under common law the bed of a tidal watercourse remained the property of the Crown. This was mainly to ensure that the public right of navigation and fishing in these waters continued. Tidal waters include those waters where there is a horizontal ebb and flow or where the tide flows so as to cause a vertical rise and fall in water level. The Crown ownership of the bed of a watercourse has now been extended in Western Australia by statute to include some non-tidal watercourses. In a proclaimed surface water area under the *Rights in Water and Irrigation Act*, the bed of the watercourse, lake, lagoon, swamp or marsh remains the property of the Crown where the body of water forms the boundary or part of the boundary of a parcel of land. This applies even if the same person owns land either side of the water. There are a couple of exceptions which are discussed below. Conversely, if a watercourse passes through a parcel of land the ownership of the land which comprises the bed of the watercourse remains with the landowner.

During the parliamentary debates preceding the passage of the *Rights in Water and Irrigation Act*, it was stated that the bed of a river was to revert to the Crown notwithstanding that the surveyed boundary of the land was determined along the middle of the bed. This suggests that the bed is vested in the Crown regardless of whether the legal boundary is formed by the banks of the watercourse or a surveyed line anywhere along its bed, provided that the physical boundary of the land is the watercourse.

1.1.1 The extent of crown ownership of the slope and soil of the bed

The bed of a watercourse is generally described as that part of the land which confines the water in a defined channel. The question then arises whether the ownership of the bed includes the soil beneath the water channel or merely its slope. This will have implications for the construction of works and catchment management. The more recent water legislation, such as the *Waterways Conservation Act* and the *Swan River Trust Act*, include the subsoil beneath water within the definition of 'water'.

It is arguable that the ownership of the bed does include all associated soil, at least for the purposes of the Water and Rivers Commission. One of the original reasons for retaining property of the bed in the Crown was to ensure that irrigation works could be undertaken successfully within proclaimed irrigation districts. This necessarily involves use of more than simply the slope of the bed.

Conversely, the *Mining Act* clearly contemplates that the owner of the surface of the land may be different from the person who obtains a licence to mine its depths. The *Mining Act* also provides that mining may be carried out beneath a navigable watercourse with the written consent of the Minister for Mines, upon consultation with other ministers. The Minister for Water Resources is not named as one of the ministers to be consulted. The Commission may be able to prevent any mining activity if it would detrimentally affect a watercourse, although this depends upon the extent of the Commission's management powers. Alternatively, the EPA could choose to assess the proposed mining activity under the environmental impact assessment procedures.

The only instance where there is the possibility of ownership of the subsoil remaining with a private landowner is where the land title was granted before the current Torrens system of land administration was introduced in Western Australia. Under the current system land title does not include subsoil of the land. Under the old system, land ownership was subject to the common law and included the depths beneath the land.

1.2 Private ownership of the bed of a watercourse

The rule at common law in relation to the ownership of the bed of non-tidal watercourses is that the owners of the banks of the watercourse, the 'riparian owners, are presumed to each own half of the bed of the river. The conveyance of land bound by such a watercourse passes the bed up to the middle line or *medium filum*. This rule has been applied in the past despite the fact that the prescribed area of a property could have been satisfied without including any of the river bed and also where a map of a land grant did not include the bed. The common law rule continues to apply in areas of the State which are not proclaimed surface water areas under the *Rights in Water and Irrigation Act*.

As mentioned above in the section dealing with Crown ownership of the bed, the bed of any body of water found entirely within a parcel of land or of a watercourse flowing through a parcel of land, is owned by the landowner.

There are some instances of properties alienated in the early days of settlement in which a river was set as the boundary between allotments. In these cases, ownership of the bed to the middle line will continue unless this right has been removed by statute.

The Rules and Directions for Survey of Lands under the Land Regulations 1872 were amended in 1875 to provide that a water boundary should be a surveyed line. Subsequent directions to surveyors included this provision. These boundaries maintained a fixed line which did not, at the time of the survey, include any of the bed of the watercourse.

The section of the *Rights in Water and Irrigation Act* which retains ownership of the bed of proclaimed watercourses in the Crown does not apply in two circumstances. It does not apply to the bed of a natural collection of water into and out of which flows a river, stream or creek. However, the ownership of the bed remains with the landowner only to the extent that the width of the natural collection of water is greater than that of the river, stream or creek. The landowner retains ownership of all the land beneath the water except that which can be attributed directly to the flow of the watercourse. The flow in the watercourse is limited to the width of the inlet and outlet of the watercourse.

This provision would apply where a watercourse drains into and flows out of swamp lands. Crown ownership of the bed also does not apply to a natural collection of water which is cultivated at any time of the year or is capable of being drained and cultivated. The collection of water may be part of a watercourse. It is unclear what exactly is required before a collection of water is considered to be capable of being drained and cultivated. A physical capability may be quite different from a legal capability given the restrictions on interference with proclaimed watercourses under the *Rights in Water and Irrigation Act*. It may also be questioned whether it is necessary for a landowner to have an intention of cultivating the land before the provision applies, or whether the capability is sufficient.

These rights do not take into account the potential effects of the land holder's use of the bed on the watercourse itself. The use of the bed of a watercourse during periods of low or no flow is permitted without acknowledging the impact of that use during periods of normal flow and on the resource generally. The land holder is able to alter the bed of the watercourse physically and chemically during cultivation by tillage and fertilisation. The land holder is also not prevented from removing or destroying any natural vegetation found in the bed or surrounding banks of the watercourse.

1.2.1 The statutory private right to use the bed

The *Rights in Water and Irrigation Act* bestows certain rights on landowners living adjacent to watercourses which have been proclaimed. A landowner has access to that portion of the bed which is adjacent to his or her land and may use it as if common law rights had subsisted. The common law rights provided that the riparian landowner owned the bed up to the middle of the watercourse and so this provision gives the landowner rights which are analogous to proprietary rights. An exception is where the bed has been actually appropriated by, or under the sanction of, the Crown for the purposes of the Act. As all beds of watercourses in proclaimed surface water areas are under the general sanction of the Crown, it is presumed that there must be additional acts of appropriation by the Crown to satisfy the exception. An example might be irrigation, flood mitigation or other types of works.

The Act also enables the landowner to pursue an action in trespass against any person, other than the Crown or its representatives, over the bed of the watercourse as if the landowner was actually in possession of the bed.

The landowner may also seek the permission of the Commission, with the approval of the Minister, to carry out works to protect the land from damage by erosion or flooding. The Commission, in granting permission, must be of the opinion that the works will not affect the bed injuriously or obstruct the watercourse.

1.3 The natural alteration of a watercourse and the changes in land ownership

Under common law, if a watercourse shifts its boundary gradually and imperceptibly, the ownership of the bed remains with the former owners (even though it has moved) and the middle line of the watercourse remains the boundary. This is known as the doctrine of accretion because the land which is added to the bank of one riparian landowner becomes the property of that owner. Likewise, the land of the owner on the opposite banks of the watercourse may be lost through encroachment. A similar result occurs after the gradual retreat of water to expose new land. This is called dereliction. The courts have held that the doctrine of accretion also applies to still waters such as lakes and ponds. The doctrine is unlikely to apply where land boundaries have been surveyed.

Conversely, if the change in the path of the watercourse is sudden and the original boundary is reasonably ascertainable, the right to the land remains as before the change occurred. This is called avulsion. Through avulsion a landowner may lose or gain riparian entitlements as he or she loses or gains access to the banks of a watercourse. Similar results would occur on most Western Australian waterside properties as these have fixed, surveyed boundaries.

What happens to the ownership of the bed of a watercourse which shifts its path if the bed had been formerly vested in the Crown? The *Rights in Water and Irrigation Act* provides that the bed of a proclaimed watercourse is deemed to be vested in the Crown if it forms the boundary or part of the boundary of a parcel of land.

Presumably, if the watercourse ceased to form a boundary to a title but passed through the allotment, the bed of the watercourse would be owned by the landowner.

In an effort to limit ensuing riparian rights and the ownership of the bed of watercourses, a boundary setback of 50 links (about 10 metres) was required under the Survey Regulations 1897. This was altered to 100 links in the Regulations for the Guidance of the Surveyors in the Department of Lands and Surveys 1961. Furthermore, the regulations under the various Land Acts since 1886, for surveying Crown land for release, have always required setbacks of 50 - 100 links from rivers.

The main problem arising from this practice is that surveyors were required to judge what was a river or watercourse and consequently required a setback. In the Swan/Avon river system many watercourses were considered to be insignificant streams or were settled before boundary setback was in practice.

2. Property in water - notions of property and the nature of water

The common law accepts that a person may have enforceable rights giving rise to a form of control over 'property'. Important aspects of property include the right to exclude all others from access to and use of the property and the right to transfer this power of control to another person. Property rights establish the relationships between individuals and their use of objects of value. They are an incentive for efficient resource use.

The approach of the common law to property in land is derived from the Latin maxim *cuius est solum eius est usque ad coelum et ad inferos*! Basically this means that whoever owns the surface of land also owns the depths below it to the centre of the earth and the skies above it to the 'heavens'. This approach has been both modified at common law by the courts and altered by legislation. However, property in land is easy to comprehend because fixed boundaries in an allotment may be defined and it is simple to exclude all others from setting foot on that allotment.

Both common law and civil law have refused to acknowledge property in the body of running water. It is difficult to accommodate water within the traditional common law notions of property because of its inherent mobility. Water does not remain attached to the land but is distributed by natural or artificial means and autonomously leaves its original site. Similarly, in the case of underground waters the amount, extent and location cannot be determined precisely by the owner of the above land. Ownership of property requires an exact delimitation as to these physical characteristics.

Despite the conceptual difficulties in permitting property in water, this has been achieved by legislation in a number of Canadian jurisdictions. It is generally accepted in most other jurisdictions that private rights were limited to a right to use the water rather than any property in the fluid itself. This has been described as a usufructuary property right which is essentially a person's right to enjoy something in which that person has no property.

State control of water as a public resource incapable of 'ownership' is logical. Individuals may obtain rights of usage to water but these do not equate to ownership of the water. The licence itself may be regarded as property if it accords exclusive rights on the licence holder and can be transferred. Under the *Rights in Water and Irrigation Act*, the Crown is given the right to use, flow and control of water in some parts of the State, but even this does not amount to property rights over the water itself.

Rights to use water will depend upon access to the resource. This includes physical access arising from the proximity of water to land the subject of ownership, as well as permissive access from the ultimate regulatory or controlling body. If one individual holds the only available access to the water then he or she generally has exclusive rights to the water. Likewise if water is removed from a public source and stored upon private land, the rights over it are equivalent to property rights.

3. Surface water rights

"But where' said I 'is the blooming stream?'
And he replied, 'We're at it!'
I stood awhile, as in a dream,
'Great Scott!' I cried, 'is that it?"

Henry Lawson.

3.1 Riparian rights at common law

Rights to surface water in Western Australia were based on the common law system of 'riparian rights'. Under common law, surface and groundwater were treated separately. Although, in the interests of integrated catchment management rights to water use should be addressed in the context of a single water resource, they have been treated separately in this report to enable the common law and current statutory law to be compared.

The common law provides that a riparian land holder, including a lessee, is entitled to certain rights to use the water which is available by access through his or her property. 'Riparian' is derived from the Latin word 'ripa' which means 'bank'. Land must reach the banks of a watercourse before the land holder can attract any of these rights at common law. Riparian rights are not property rights in themselves but are incidental to ownership of land forming the banks of a watercourse. As they are attached to land, they must pass with the land and cannot be separately divested. The rights do not depend upon the ownership of the soil covered by water or the bed of the watercourse as they are founded on the right of access.

The riparian landowner has a right against any upstream riparian owner that the water should flow to his or her land in its natural state in terms of quality and quantity. The riparian owner also has a right against any downstream riparian owner that the water should flow from his or her land without any interference or obstruction.

Each riparian owner has the right to use the water for ordinary domestic purposes. Rights of abstraction for these purposes are absolute and there is no duty to conserve any water for the use of downstream riparian owners.

Water can only be abstracted for purposes beyond ordinary domestic purposes if the rights of other riparian owners are not affected. This includes both the quantity of the water naturally flowing to a downstream user and its natural quality.

At common law additional usage rights may be acquired by obtaining an easement from all downstream riparians. This may be obtained either by consent or prescription (20 years of uninterrupted use). The *Rights in Water and Irrigation Act* limits the rights to take and divert water to those acquired under the Act or any other Act. This effectively removes any water rights which may otherwise have been obtained through an easement by consent and these common law rights will not be discussed further. This is different from an easement which may still be granted over land and may provide access to a water supply.

It is unlikely that the *Prescription Act 1832* will apply. This is an imperial Act which was adopted upon colonisation and has not been repealed. It provides that a claim which could be made at common law by custom, prescription or grant to any watercourse, could not be defeated by showing that some other party held that right more than 20 years before. By virtue of its wording, no rights are actually acquired under that Act.

A 'watercourse' must exist before a land holder's rights to use the water are subject to the rights of his or her neighbour to also use the water. A land holder has absolute rights over a body of water found upon his or her land that does not form part of a watercourse. The elements of a watercourse, particularly its bed and banks, will also help to determine whether or not a land holder has access to the water and consequently riparian rights. The definition of a watercourse has been addressed separately in the section dealing with the statutory regime of water rights under the *Rights in Water and Irrigation Act*. In that section both the common law and statutory definitions will be discussed.

3.1.1 The distinction between use and flow

The difference between the riparian rights to use and to flow focus upon what the land holder is entitled to do and what he or she can compel other riparian land holders to do or not to do.

The rights to use govern the amount of water which the riparian owner may take and the extent to which he or she may pollute the water. The rights to use may also extend to the obstructions that may be put in a channel and the degree to which the natural flow may be regulated and the natural course diverted to facilitate the use of the water.

The rights to flow enable the land holder to compel others to act within their rights of use. The right operates to ensure that riparian land holders have access to water which is not sensibly diminished in quantity or quality or prevented from flowing away from the land.

If rights to flow can exist independently of rights to use then they may be enforced for non-consumptive reasons. Rights to flow could then extend to regulate activities affecting aesthetic or instream values and other environmental concerns. A right to flow may also be relevant to the production of hydroelectric power. It has been held at common law that a riparian owner has the right to resist interference with a natural flow of water. To exercise this right it did not need to be shown that there was any impairment of the actual use of the water.

The dichotomy between the concepts of the right to use and the maintenance of flow has been considered a basic contradiction within the riparian doctrine. Each common law jurisdiction has had to decide which element to emphasise. Consequently some judicial decisions refer to the natural flow of water where others focus on reasonable use.

3.1.2 Quantity limitations over the rights to use water

At common law a riparian landowner is entitled to take any quantity of water for ordinary purposes to be used on the riparian land. The extent of ordinary use has not been settled, however, a large range of purposes have been included. The primary limitation appears that it is not to be used directly for commercial purposes. Indirect commercial purposes such as water used to grow crops to provide animal fodder are less clear. Uses which have been considered to be domestic purposes include drinking, cooking, washing, sanitation, operation of domestic appliances, washing of vehicles, lawful home brewing, watering a garden attached to the home and filling swimming pools, fountains and ornamental ponds.

A use may also be considered ordinary in a particular area if it has reached the point of custom that riparian owners do not deem it necessary to seek the consent of downstream owners to abstract water for that purpose. Custom is established through time by consistent and widespread practice and it is unlikely in Australia that any extraordinary use has become customary.

The watering of an ordinary quantity of stock is also within a riparian's rights at common law. Further qualifications which have particular relevance to stock are that the entitlement is one of reasonable use and that the purposes must be connected with the riparian tenement. The 'ordinary quantity of cattle' implies that there may be a limit to what is reasonable, but in this case, the issue of commercial benefits accruing will not preclude the use of water. Therefore, it has also been suggested that rather than a commercial benefits limitation, the common law rationale was a recognition of a supervening right to sustain human and animal life.

The requirement that use was connected to the riparian tenement applied so that water may be used only in the vicinity of the watercourse. This was intended to prevent landowners who only had access to the water from a narrow strip of land or who had a very large allotment of land, from taking water for use over their entire property.

It also meant that a non riparian owner could not have free use of the water simply by obtaining permission for access from the riparian owner. This requirement is closely connected to the requirement of reasonableness and would preclude a riparian landowner from taking water for large quantities of stock grazing over a very large property.

Riparian land holders at common law may divert water for extraordinary purposes provided that the water is used on the riparian tenement, the quantity of the water taken and the nature of the use are reasonable and there is no sensible alteration in the quantity or quality of flow in the stream.

3.1.3 The limits on obstruction of free flow, removal of obstructions and diversion of a watercourse

At common law riparian owners are not entitled to use the bed of a watercourse in such a manner as to interfere with the flow of water, abridge the width of a stream or interfere with its natural course. An exception is that a person could alter the course of a channel whilst it was on his or her land as long as the water was returned to its original course before the flow left the property.

A riparian owner is not permitted to obstruct the flow of the watercourse so that it floods the land of an upstream landowner. The upstream owner is not required to prove that damage had been or was likely to be sustained as a result of the obstruction. A dam cannot be constructed so that the natural pattern of flow is substantially altered. For example, a person cannot cut off the flow temporarily and release it in a concentrated volume later. A riparian owner is under no common law duty to clear the channel of a watercourse which has become choked with weeds due to natural causes, and an adjoining owner whose land becomes flooded as a result has no action for damages. Although a channel may be cleared of recent obstructions, the level or flow of water may not be altered by the removal of obstructions which, through the passage of time, have become embedded and form a part of the bed.

At common law a riparian owner may raise the river banks to prevent large, seasonal volumes of water from overflowing onto his or her land. This work may only be carried out if it does not cause injury to the property of others, particularly the property on the opposite side of the watercourse. By contrast, in the actual event of an extraordinary flood a riparian owner may enclose his or her land without regard to the consequences to neighbours.

3.1.4 The right to water of its natural quality

The general right of a riparian owner is to receive the flow of water without sensible alteration in character or quality. Thus at common law it has been held that a riparian owner was not permitted to discharge water into a stream which, although not impure, was hard in quality. Actionable pollution will also encompass physical changes to the water such as raising its temperature. Lower riparian owners do not need to prove actual damage to maintain an action, however it must be established that the contamination is not of an insubstantial nature.

3.2 The operation of the *Rights in Water and Irrigation Act 1914* in relation to surface waters

Common law riparian rights have been replaced or limited to some extent by legislation in all Australian States. In Western Australia the Act intended to do this is the *Rights in Water and Irrigation Act 1914*. This Act suffered a long and turbulent beginning and consequently many of its provisions either inadequately cover some issues or are unclear.

The control of waters in the State, described under Part III of the Act, is separated into three divisions. The first two apply to surface waters and the third division applies to groundwater.

The two surface water divisions will be described in more detail here but groundwater, which is traditionally examined separately in water law, is addressed towards the end of this report.

3.2.1 Proclaimed surface waters

Part III Division 1 of the Act only applies to watercourses, lakes, lagoons, swamps or marshes situated within an area that has been proclaimed by the Governor as an Irrigation District, or an area or watercourse specifically proclaimed to fall within the scope of the division. It excludes any collection of water existing entirely within the boundaries of one parcel of land, including water flowing from a spring. Areas are proclaimed because there is a specific need for the Commission to become involved in the management of the resource and regulate its use.

Areas that have been proclaimed in the past include:

- large watercourses and their catchment areas which may be used for public water supply;
- where there are disputes between riparian landowners regarding the use of a particular watercourse;
- watercourses suitable for the irrigation of intensive agriculture and horticulture; and
- watercourses which need to be managed for flood control.

It was intended that in proclaimed surface water areas the Minister would have absolute control over the water. To achieve this, the Members of Parliament who originally introduced the Bill, considered that riparian rights between individuals, existing at common law, would need to be abolished. It was also suggested that removing common law riparian rights would solve burgeoning problems with litigation. However, it cannot be argued that litigation problems were the primary reason for abolishing common law application because it was agreed that limited riparian rights would continue in unproclaimed lands.

The Act vests the right to use, flow and control of watercourses, within a proclaimed area, in the Crown. The right to control the water gives the Crown the regulatory power necessary to ensure that the objectives of the Act are met. The right to the use and flow gives the Crown the power to carry out its public functions. It has also been suggested that this section operates to divest land holders of their common law riparian rights, however, this has not been determined conclusively.

A statutory form of riparian rights provides similar rights to use water as previously existed under common law. The *Rights in Water and Irrigation Act* provides that the owner or occupier of any land, through or contiguous to which runs any watercourse (or lake, lagoon, swamp or marsh) may take water:

(a) for the domestic and ordinary use of himself and of his family and servants; and
(b) for watering cattle or other stock.

The various uses which have been attributed to ordinary purposes at common law can probably also be applied under the Act in relation to "domestic and ordinary use".

The parliamentary debates preceding the passage of the Act address the problem of indirect commercial uses of water. It was ultimately decided to limit the irrigation of a garden to an area of 2 hectares which is used in connection with a dwelling.

Besides the irrigation of a garden, the Act does not have any express requirement that water uses must be connected with the riparian tenement. It is open to argue that a riparian landowner could divert water for the use of a neighbour's stock. The Act also does not require that water is taken for an ordinary or reasonable number of stock.

A right to the flow of water is not expressly stated under the Act. Such a right may be implied from the section which states that vesting the rights to use, flow and control of the water in the Crown should not operate to prevent any person from draining any land, or making any dam or any tank upon any land, of which he is the owner or occupier if the flow of water in any water-course or the amount of water in any lake, lagoon, swamp or marsh is not thereby sensibly diminished.

The Act also states that it is an offence to obstruct, destroy or interfere with any watercourse, race, drain, dam or reservoir or the bed and banks of any watercourse. These activities would also affect the flow in the watercourse. However, a private right does not necessarily follow from the prohibition of an activity by others.

Any extraordinary or additional use of water in a proclaimed area must be licensed by the Water and Rivers Commission. Licensed use is not restricted to riparian landowners, however access to the water must be obtained. One of the reasons behind the passage of the Act was to enable Irrigation Districts to be proclaimed. In these Districts irrigation works could be carried out to ensure that a broader group of landowners had access to water.

3.2.2 Surface waters which are not found within a proclaimed surface water area

Surface waters which do not fall within a proclaimed area are subject to the provisions of Part III Division 2 of the Act. Once again, this division does not apply to waters found entirely within the boundaries of a single parcel of land. Waters within this Division are not vested in the Crown unless they fall within a Crown land reserve created under other legislation. Therefore, the Crown does not have supervening powers of management or regulation over these waters and an individual's rights as against other riparian owners will prevail. This may have native title implications.

The Commission is able to intervene if it is of the opinion that water is not being used within the authority of the Division. The Commission may direct a person to cease the unauthorised activity and ultimately a fine may be imposed. The Commission is also entitled to bring court proceedings for any civil remedy (generally an injunction or damages) or for the enforcement of a penalty which has been imposed. In bringing these proceedings, the Commission does not need to establish that any damage was suffered, that it is a riparian owner or that it is otherwise entitled to the use of or protection over the watercourse.

As with proclaimed lands, the riparian right to use is defined in the Act and there is no right to divert water for use on land except as provided under the Act. There is also no requirement that the use is reasonable or in connection with the riparian tenement. Extraordinary use of the waters in unproclaimed areas is permitted provided that the flow of the watercourse is not sensibly diminished. There is no opportunity to obtain rights to the use of water beyond the statutory entitlements through a licence under the *Rights in Water and Irrigation Act.*

A right to flow is implied to a greater extent than in the first Division which deals with Proclaimed Areas. The section states that the riparian owner may take water to the extent that the flow of water in the watercourse or the amount of water in the lake, lagoon, swamp or marsh is not thereby sensibly diminished for any other purpose.

Once again, this is defined in terms of use, imposing an obligation on the user rather than a right to flow enjoyed by a downstream landowner. If this provision is the definitive statement on rights to flow under the Act it is necessary to establish the meaning of "any other purpose". It may only extend to a right of flow for purposes related to water use, or otherwise it may extend to aesthetic, environmental, recreational or water quality purposes.

In unproclaimed areas any obstruction of or interference to a watercourse is only expressly prohibited by the Act on Crown land.

3.3 Have common law riparian rights been replaced?

The question arises as to whether common law riparian rights have been successfully abolished or whether they continue to survive in a limited form.

Generally provisions appearing to diminish or remove private rights will be interpreted narrowly unless they expressly state that this is the object of the legislation. A specific interpretation of a provision may be adopted if there is no feasible alternative. The *Rights in Water and Irrigation Act* does not expressly abolish common law riparian rights. However, the combination of four critical provisions may achieve this end in relation to proclaimed surface water areas. These provisions are:

- vesting the right to the use, flow and control of water in the Crown;
- vesting of the bed in the Crown;
- redefinition of the riparian land holder's right to use water; and
- prohibition of unauthorised diversions.

The vesting of the bed of a watercourse in the Crown does not play a significant role in the abolition of common law riparian rights. This is because riparian rights depend upon the ownership of the banks of a watercourse to enable access to the water. One of the concessions made to the Legislative Council during the passage of the Act was to remove the reference to banks in the vesting provision. The bed was permitted to be vested in the Crown to ensure that the Crown had access to undertake various works. It is likely that the Legislative Assembly conceded to this amendment because they believed that other provisions had already eliminated existing riparian rights.

Vesting the right to use, flow and control of water in the Crown gives paramount powers to the Crown. However, it does not follow that simply because these rights are vested in the Crown that individuals will be divested of their pre-existing private rights. Various cases have held that where an interest is vested in a body, that body has control over incidental issues only to the extent necessary to protect the body's vested interest.

It has been suggested that common law riparian rights may continue until they conflict with the Crown's exercise of control over a specific watercourse. Such an exercise of control may include the provision of licences or carrying out maintenance or works.

The redefinition of the riparian right to use water is not so much a provision that abolishes common law application as it is a substitution of one source of law for another. Various principles of interpretation may be used to argue two opposite views. It may be argued that this provision was intended as a definitive statement of the law, intended to cover its field of application. Alternatively, it may be argued that the provision was intended to crystallise and clarify the current law only. Under the second interpretation any vestiges of common law not specifically covered by the provision remain in force. The first interpretation is not preferred as it involves an implied removal of existing private rights rather than the expressly stated intention of the legislature.

The Act also provides that unauthorised diversions from a watercourse are prohibited in proclaimed surface water areas. This section removes any doubts that common law rights to use might remain in these areas. It places absolute control of proclaimed watercourses in the Water and Rivers Commission as no person is entitled to take and use water without permission under the Act.

After combining each of these sections it is difficult to establish the continuation of any non-statutory rights to the use of water in proclaimed areas. In unproclaimed areas ownership of the bed of a watercourse generally remains with the landowners, so the access requirement for common law riparian rights has not been removed. The use, flow and control of the water is also not vested in the Crown. Diversions are, however, not permitted under the Act.

Permitted use of the water is defined under the Division, however this is in substantially the same terms as the common law.

It is necessary to consider that at common law riparian landowners enjoyed a right to use and a right to flow. It is not clear anywhere in the *Rights in Water and Irrigation Act* that the common law right to flow has been abolished. The consequences of the survival of the common law right to flow are uncertain. The nature of the right may be a right to the natural flow, not sensibly diminished in quantity, for non-consumptive purposes and it is likely to have an impact upon water quality rights. A right to flow may be important for environmental and recreational reasons and for potential hydroelectric operations.

3.4 The obstruction of water flow; private dam construction

A dam could not be constructed in a watercourse under common law if the flow of water was 'sensibly' diminished as a result. To determine whether private dams can be constructed under the *Rights in Water and Irrigation Act*, the effect of a number of its provisions must be considered. The first two Divisions of the Act will be assessed separately.

3.4.1 Dam construction in proclaimed surface water areas

The Commission does not have any power under the *Rights in Water and Irrigation Act* to license the damming of water. Any rights to construct a dam associated with a watercourse must be determined from the application of other rights granted under the Act.

The section which vests the use, flow and control of surface water in the Crown, does not prevent any person constructing a dam on his or her land as long as the flow of water in any watercourse (or lake, lagoon, swamp or marsh) is not sensibly diminished. The section does not permit a land holder to build a dam in a boundary watercourse as the bed remains the property of the Crown. Of course, if the watercourse flows through a person's land the Crown does not have property in the bed.

Although the bed of a boundary watercourse is the property of the Crown, the adjacent land holder is given certain rights.

The owner or occupier of adjacent land is stated to have use of the bed as if the Act had not been passed. This right is subject to the proviso that the portion of the bed has not been appropriated or placed under the sanction of the Crown for the purposes of the Act. The meaning of this proviso is not clear. It was probably intended to refer to works carried out on the bed rather than merely the proclamation of an area for general management purposes. As the land holder only has use of the bed "as if the Act had not been passed" then he or she can only do to the bed that which he or she was permitted to do under the common law. The extent to which the common law permitted use of the bed must be determined in order to establish whether this section allows the construction of a dam on a bed vested in the Crown. Under the Common law the bed could only be used consistently with riparian rights. A dam could only be constructed if the flow of water was not sensibly diminished.

The Act also provides that a person must not obstruct, destroy or interfere with any watercourse unless authorised by the Act or any other Act. It may be argued that the permitted use of the bed under the Act implies permission to obstruct the watercourse. This argument is unlikely to be successful because, under common law, obstructions which sensibly diminished the flow of a watercourse were not permitted and the land holder can only use the bed to the extent permitted under common law.

The provision prohibiting obstruction of a watercourse may also apply to prevent the construction of a dam in a watercourse that flows through a single parcel of land even though the bed remains the property of the land holder.

The Act also provides that an offence is committed by any person who conveys into any watercourse, matter which is likely to obstruct the flow of the current. This particular section is not stated to be subject to the operation of any provision of the Act or any other Act. The section quite clearly prohibits the construction of a dam in any proclaimed watercourse.

If water was diverted away from the watercourse, the Act would not appear to prevent damming and storage of the diverted water. It must then be determined whether a land holder has any rights to divert water in proclaimed surface water areas.

Although the land holder is entitled to take water for domestic and ordinary use, this provision does not specifically refer to any rights to divert water. The use of the words "take" and "divert" throughout the Act suggests that they do not have an interchangeable meaning. The Act states that: No right to take and divert water from any watercourse, lake, lagoon, swamp or marsh for use on any land adjacent to the bed thereof shall be acquired by any owner of such land, and no right to the permanent diversion or to the exclusive use of such water shall be acquired by any person, by length of use or otherwise, except under this or any other Act.

It then goes on to state that a person who takes or diverts water without authorisation under the Act or by licence, commits an offence. The licensing provisions state that a general licence may be granted by the Commission to *take, use* or *dispose* of water. The Act also makes limited provision for the grant of special licences. If a land holder has permanently diverted water in an unproclaimed area for purposes other than domestic or ordinary use, he or she may apply within 12 months of the proclamation of the area for a special licence authorising the continuation of the diversion. The Commission does not have a specific power to grant a general licence for the *diversion* of a watercourse.

The other alternative is to examine whether the damming or diversion is authorised by the *Prescription Act 1832*. This Act merely protects some existing common law rights arising under custom, prescription or grant and does not, itself, give damming or diversion rights to land holders adjacent to a watercourse.

3.4.2 Dam construction in unproclaimed areas

The private ownership of the bed of a watercourse generally subsists in unproclaimed areas. If the common law has residuary effect in these areas, the bed may be dammed as long as the flow of water is not sensibly diminished. If the *Rights in Water and Irrigation Act* is the definitive statement of the law, a land holder may be able to dam any water on his or her land without consideration for the effects on downstream land holders.

Section 20 of the Act provides that a riparian landowner may take water for ordinary and domestic purposes to the extent that the flow is not sensibly diminished. It may be argued that the damming of water is not taking water if the water remains in the watercourse. This could enable a land holder abutting a watercourse which does not flow all year, to dam the flow of water in the wet season and use the water supply for domestic and ordinary purposes throughout the entire year. In unproclaimed areas, limitations on the obstruction of free flow and interference with a watercourse are expressly prohibited on Crown land. In areas where the bed of the watercourse remains the property of the Crown it is unlikely that a dam could be constructed under the Act. There are no similar restrictions under the Act in respect of watercourses which are not on Crown land.

The Act states, as with respect to proclaimed areas, that in unproclaimed areas no rights to take and divert water exist except under the Act or any other Act. Division 2 also provides that the Commission may issue directions against a person who has diverted water without authorisation. Although it may be possible to construct a dam within a watercourse in an unproclaimed area, it is difficult to find a general authority to divert the flow away from the watercourse and into a dam. It is also difficult to determine how the Commission could derive the power to authorise diversions in an unproclaimed watercourse.

The situation where a dam can legitimately be constructed in the bed of an unproclaimed watercourse but is not permitted if that watercourse is proclaimed will be rare. It will only occur if the watercourse, rather than a surveyed boundary, formed the boundary of the parcel of land. If that is the case, the ownership of the bed will change upon proclamation from the land holder (to the middle of the watercourse) to ownership by the Crown. A dam may exist on private, proclaimed land as long as the flow of water in the watercourse is not sensibly diminished. It may be argued that if the dam existed before the proclamation, then the flow of water after the proclamation has not been sensibly diminished.

3.5 Problems in defining a watercourse

To attract riparian rights, both at common law and in their statutory form, water must be flowing in a watercourse. However, it should be noted that many of the rights to water under the *Rights in Water and Irrigation Act* also apply to lakes, lagoons, swamps and marshes.

The definition of a watercourse at common law depends upon:

(a) the existence of a defined channel comprising bed and banks;
(b) the channel being natural;
(c) frequent and regular flow; and
(d) continuity of flow.

The definition has been slightly modified in Australia to take account of the differences in climate between Australia and England and the effects on the flow of surface water. The *Rights in Water and Irrigation Act* defines a watercourse as meaning:

(a) any river, creek, stream or brook, whether artificially improved or altered or not;

(b) any conduit that wholly or partially diverts a river, creek stream or brook from its natural course and forms part of the river, creek, stream or brook;

(c) any natural collection of water into, through or out of which anything referred to in paragraph (a) or (b) flows, whether artificially improved or altered or not, in which water flows or is contained whether permanently, intermittently or occasionally, together with the bed and banks of any thing referred to in paragraph (a), (b) or (c).

The rights of riparian owners apply only to watercourses flowing in known and defined channels either above or below the ground. These rights have no application with respect to water percolating through the soil strata or surface water in undefined, unrestricted flow.

3.5.1 The natural channel of a watercourse

Common law riparian rights do not apply to artificial watercourses unless it can be established that the watercourse is permanent and intended to have the status of a natural watercourse. Constructed drainage channels do not attract riparian rights.

Rights to an artificial watercourse do not arise as a natural right of property as they are generally constructed under statutory powers and will be governed by the relevant statutory body. Any rights to an artificial watercourse must be established by an easement. As a land holder generally has no legal rights in relation to an artificial watercourse he or she may only sue an upstream or downstream landowner if their activities damage his or her property in some way.

The *Rights in Water and Irrigation Act* includes any artificial improvements or alterations within the definition of 'watercourse' but does not cover an entirely artificial water conduit unless it is wholly or partially diverting a river, creek, stream or brook. The conduit must also form part of the river, creek, stream or brook. It is not clear exactly what that means but it is likely to at least exclude many drains from the definition of watercourse.

3.5.2 The bed and the banks of a watercourse

A defined channel at common law comprises a bed, also called the *alveus*, and two banks. While this appears to be a simple concept, substantial practical difficulty arises in determining exactly where the bed and the banks are positioned. This is one particular issue where English doctrines should not be applied to peculiarly Australian conditions. The definition of beds and banks strongly depends upon the water flow and this is markedly different between Australian and English watercourses.

The English common law defines the bed as that part of the sub-aquatic land which constitutes the channel between its banks and which accommodates the flow of water at its ordinary levels. It has been specifically stated that the definition does not include the land beneath the water level at times of extraordinary flooding.

There is some discrepancy as to whether the bed refers to the portion of soil beneath the ordinary high water mark or the low water mark. Generally, it is considered that the bed is the portion of the soil which is adequate to contain the river at its average and mean stage during the entire year without reference to the extraordinary freshes of winter or spring, or the extreme droughts of summer or autumn.

The banks of a watercourse have been stated to be that part of the river bed which confines the waters in their natural channel. At common law, the banks are generally distinguished from the bed of a watercourse. The banks are considered to include as much of the land adjoining the river which is necessary to contribute to the function of containing the river. This may include an artificially constructed embankment or wall.

The *Rights in Water and Irrigation Act* defines the bed as: the land over which normally flows, or which is normally covered by, the water thereof, whether permanently or intermittently; but does not include land from time to time temporarily covered by the flood waters of such watercourse, lake, lagoon, swamp or marsh and abutting on or adjacent to such bed.

Although the Act provides a rather long, confusing definition of a bed, the word "bank" is not defined in the Act. There is a reference made to "banks" in the definition which suggests that it has a different meaning to "bed" but it is not clear what that meaning is. One aspect of the English common law that is difficult to apply to Australian watercourses is that the banks of a watercourse will not extend to the land confining extraordinary freshes or floods. In northern Australia watercourses are often flooded seasonally and it is not uncommon to observe two defined banks in a watercourse; those confining a dry season flow, and those confining a seasonal flood.

Despite climatic differences, similar rivers may also be found in New Zealand where wet season freshes form their own banks which may be some distance from the channel through which the dry season flows pass. Therefore, it may be appropriate to adopt the New Zealand interpretation of the common law in this respect, which defines the bed as comprising all soil below the ordinary high water mark.

It also distinguishes between freshes of predictable proportions which form part of the regular, annual behaviour of the river and those exceptional freshes which constitute floods and inundate the adjacent countryside.

3.5.3 Frequent and regular flow

The mere fact that water follows natural contours does not mean that every depression through which surface water flows constitutes a watercourse. In a drainage depression water can be expected to flow in the lowest portions of the contours, yet the existence of such a defined channel will not make the drainage depression a watercourse. However, in one judicial decision, a hollow was held to be a watercourse because of the regularity with which substantial volumes of water flowed through it.

At common law the frequency, continuity and regularity of the flow determine whether a channel of water is a watercourse.

The most important criteria, which distinguishes a watercourse from a lake, lagoon, swamp or marsh, is that in a watercourse the water flows. The whole length of the channel must appear as a unified whole and be sufficiently long, continuous, substantial and permanent to qualify as a watercourse. A lake, lagoon, swamp, or marsh is defined as a natural collection of water that is not part of a watercourse. Of course, such a body of water may become part of a watercourse (ceasing to be a lake, lagoon, swamp or marsh). In proclaimed surface water areas where the bed is vested in the Crown, the bed of the collection of water will only be vested to the width of the channel at its inlet or outlet and where it is not capable of being drained and cultivated. This is probably the major reason for distinguishing between a watercourse and a lake, lagoon swamp or marsh because the most of the other provisions of the Act apply to all the above listed types of water bodies.

Australian courts have held that continuous flow is not necessary but the requirement of regularity is not clearly defined. Many rivers only flow seasonally but their significance as a source of water will not permit them to be disregarded as a watercourse.

Nevertheless, there is some uncertainty as to the degree of permanence required and there is little consistency between the definitions in legislation of other States and countries. It appears that the test is to distinguish between a watercourse and a drain which only flows after heavy rainfall. A watercourse must have a sufficient catchment so that it does not merely flow during and immediately after heavy rainfall. It has been held that there was no watercourse in a place where there was no usual and customary flow of water and the place was dry land during three quarters of the year. It has also been stated that the flow of water after seasonal events which may occur with some regularity from season to season was not a watercourse. Following that decision, it would appear that a channel of water which only flows after the heaviest rains of the wet season would not constitute a watercourse even if rains of this intensity occur every season.

It should be emphasised, however, that the definition of watercourse in the *Rights in Water and Irrigation Act* includes water flowing intermittently or occasionally. The reference to occasional flow was included recently, during the 1995 amendments to the Act and is likely to overcome many of the problems associated with irregular flow.

The broad definition of a watercourse enables a classification to be adopted which suits the particular circumstances.

In practice, factors such as the extent of the river when the water does flow, the existence of aquatic ecosystems, the soil structure and composition and the perceived need for the channel to be deemed a watercourse will be considered.

3.6 Rights to surface water wholly within land boundaries

It has been traditionally considered that if a body of water does not leave a single allotment of land, then there is no need for a system regulating the rights and obligations between individuals. The body of surface water is available for the unrestricted use of the landowner under common law. No express restrictions have been placed on the use of this water by statutory law either.

The right to use the water is subject to any rights of an adjacent landowner to bring an action in nuisance or negligence if the property of that landowner is damaged by the water. The right may also be subject to any intervention by the Environmental Protection Authority under the *Environmental Protection Act 1986*.

The right of unrestricted use disregards any effect that the use of a surface water body may have on an associated groundwater system. The unsuccessful Water Bill 1990 was intended to remove the unrestricted right to use water contained on a single property in respect of lakes in a groundwater management area. This provision acknowledged that many lakes in a groundwater management area are fed by groundwater rather than merely surface runoff.

The *Rights in Water and Irrigation Act* states that the provisions of the Act do not apply to:

(a) the water flowing from a spring, the water of which rises to the surface on land granted or demised by the Crown, until it has passed beyond the land boundaries; or

(b) the water in any lake, lagoon, swamp or marsh, the bed of which is wholly within the boundaries of land granted or demised by the Crown.

The definition of 'spring' in the Act requires that it naturally rises to and flows over the surface of land.

At common law a spring may or may not be subject to the riparian rights of downstream land holders depending upon whether it feeds a defined watercourse which flows across the land of at least one other landowner.

3.6.1 Problems related to rights over spring water

The *Rights in Water and Irrigation Act* does not apply to spring water which rises on the surface of land that has been granted or demised by the Crown until it has passed beyond the boundaries of that land. The landowner has an absolute private right to this water subject to the provisions of the *Environmental Protection Act 1986*, rights of civil action for negligence or nuisance and the common law riparian rights.

An action in negligence or nuisance may arise if a neighbour's property has been damaged because of the use of the water by the landowner or the landowner's failure to keep the water under control.

The *Rights in Water and Irrigation Act* regulates, to some extent, all watercourses in the State other than those created by a spring before it has passed over the boundary of a single allotment of land.

Private rights to spring water include the right to take an unlimited quantity of water (subject to availability) and to use it for any purpose. These rights are likely to affect the quantity of water flowing from a spring which would otherwise flow through a watercourse beyond the landowner's boundary. It is unlikely that in any proclaimed surface water areas common law riparian rights continue and so a downstream landowner has no right to the flow of this water. If some residuary common law riparian rights do remain, a downstream owner may retain the right to the flow of the watercourse. The landowner may then bring a common law action to prevent the use of the water for anything other than ordinary purposes. The Commission, however, has no power to control the use of the spring within the land upon which it rises.

Section 20 of the Act, which addresses the statutory rights of riparian landowners in unproclaimed areas, includes the proviso that the permitted uses of the water must not sensibly diminish the flow. This proviso is not included in respect to proclaimed areas. The Commission has been advised that the test to establish "sensibly diminished" flow is whether the flow of water has diminished to a reasonably perceptible extent. It has also been suggested that a higher riparian landowner cannot alter the usual flow in a watercourse simply because the alteration results in the same volume leaving the property as the flow at the point of entry to the property. It may be argued that an obligation not to sensibly diminish the flow for other purposes, equates to a right to receive an undiminished flow by the downstream landowner.

If that argument is successful, the section may be applied to prevent the use of spring water in unproclaimed areas if the downstream flow is sensibly diminished.

There is also uncertainty as to the rights of a landowner to spring water which flows from within a watercourse passing through an allotment of land.

The Commission has been advised that the amount of water which can be attributed to the spring should be available to the landowner even if the spring is located in a watercourse. This is because the Act intends the volume of water flowing from a spring to be available until the flow passes the boundary.

Alternatively, it has been suggested that once a spring arises in a watercourse it ceases to fall within the definition of a spring as it does not flow over the surface of the land. Although this appears to be a tenuous argument, in practice it would be difficult to prove to the satisfaction of the law which waters arose from the spring and which were watercourse waters. In the past, the difference in water volume between the water flowing onto an area of land and that which ultimately leaves the land has been used to determine the rights of a landowner to a quantity of spring water.

3.7 Public rights to surface water

3.7.1 Navigation

At common law the bed of a tidal watercourse belongs to the Crown and the public have a right to use it for purposes of navigation or fishing. The right of public navigation does not extend to small pleasure craft. Tidal waters include those waters where there is a horizontal ebb and flow or where the tide flows so as to cause a vertical rise and fall. The flow of the tide is strong evidence of a public navigable river.

At common law, neither the Crown nor the public have any rights of access in relation to a non-tidal watercourse. However, navigable rights may be created through customary public usage, grant by the riparian owners or by statute, similarly to rights of way on land.

3.7.2 Domestic use permitted by statute

The *Rights in Water and Irrigation Act* provides a general right of the public to take water for domestic, ordinary or stock use from a proclaimed watercourse. To make use of this right there must be access to the watercourse by a public road or reserve.

4. Groundwater rights

"There was a well at Kunjin - it was ninety feet deep and had a solid granite stone bottom. Beautiful fresh water was seeping into the bottom but the settlers and the men who were carting water supplies couldn't get enough water for their horses. There wasn't enough pressure to force the water up to make a large enough catchment".

A.B. Facey, *A Fortunate Life.*

4.1 No rights to groundwater at common law

Common law distinguishes between underground water flowing in a known, defined channel and percolating water. The former, although rare, will attract similar riparian rights to surface water flowing in a watercourse. In Australia it has been held that a course will be known and defined if its existence is demonstrated by excavation or can be inferred by observable facts. An example is where a surface stream disappears underground and emerges again lower down the slope. The onus is on the person claiming the riparian right to prove that an abstraction is from a known and defined channel and this must be to the satisfaction of a 'reasonable person'. Scientific evidence is not in itself sufficient if a reasonable person would not assume that abstraction was from a defined channel.

The owner of land through which water percolates in the subterranean strata has no proprietary interest in this water at common law. The landowner cannot maintain an action against another landowner who interferes with the quantity of the water supply. A landowner has an absolute right to take any quantity of percolating water, on his or her land, for any purpose. This right may be tempered by a requirement of reasonableness preventing the extraction of water with malicious intent to harm a neighbour or an activity leading to pollution. As with the storage of surface water, if percolating water filters into a well it is subject to private ownership under common law.

4.1.1 No right to support from groundwater

Although a landowner has a right to the support of the soil of a neighbour's property at common law, there is no similar right to the support of groundwater. A claim of negligence will not be successful even though the extraction of percolating water may cause subsidence and damage to a neighbour's property. This is because a landowner is entitled to exercise his right to abstract subterranean water flowing in undefined channels regardless of the consequences. Australian courts have managed to circumvent problems arising from this principle by finding that the loss of support was due to the removal of wet sand, running silt, or dissolved rock salt. Although the physical differences between these substances and groundwater is actually minimal, the legal consequences are significant.

4.2 The rights to groundwater Under the *Rights in Water and Irrigation Act*

The right to use, flow and control over all groundwater is vested in the Crown by the *Rights in Water and Irrigation Act*. As with surface water, the right to use, flow and control does not equate to ownership of the water and the common law may have residuary application where the groundwater is not directly controlled through statutory powers. However, the Crown can assume control of a groundwater source at any time regardless of the application of any common law rights. It has also been suggested that the right to use, flow and control enables the Commission to interfere with a landowner's use of groundwater without compensating the landowner. It was argued that the use of groundwater is a privilege, rather than a right, bestowed upon the landowner by the Crown pursuant to its superior control over the water. It has also been claimed that control may be assumed whether or not a particular water use is subject to licensing by the Commission.

The *Rights in Water and Irrigation Act* provides licensing requirements for the use of groundwater according to location and method of withdrawal. Licensed use of groundwater may also be required under the provisions of the *Metropolitan Water Supply, Sewerage and Drainage Act*.

5. Water rights arising under other legislation

The *Rights in Water and Irrigation Act* and, to a lesser extent, the *Metropolitan Water Supply, Sewerage and Drainage Act* and the *Country Areas Water Supply Act* provide the regime for the allocation of water rights. Some other Acts provide limited water rights, usually for specific purposes. Some examples of water rights arising under other legislation are provided below, however the list is not intended to be exhaustive.

5.1 Private rights

Some other pieces of legislation confer rights to water on private individuals and corporations. The regimes under which these rights appear are not always consistent with the *Rights in Water and Irrigation Act.* Although generally other Acts are stated to be subject to the *Rights in Water and Irrigation Act*, it is often difficult to determine how the rights arising under other Acts may be exercised.

The rights to a water supply under a State Agreement Act will depend on the actual terms of the agreement rather than the *Rights in Water and Irrigation Act.* Examples of some of the provisions relating to water supply which are provided under Agreement Acts are as follows:

- *Broken Hill Proprietary Company's Integrated Steel Works Agreement Act 1960* - provides that the State will make available to the work site such quantities of potable water as will meet the requirements of the Company. The Act also provides that the State agrees that the Company may sink on the work site such wells and bores as the Company thinks fit, subject to some restrictions.

- *Alumina Refinery (Worsley) Agreement Act 1973* - provides that up to 3 million gallons per day and any additional requirements will be supplied to the Joint Venturers from the Wellington Dam. The Joint Venturers may also develop a local source of water in accordance with proposals approved by the Minister.

- *Wundowie Charcoal Iron Industry Sale Agreement Act 1974* - provides that the State will cause all reasonable water requirements necessary for the operation of the industry to be made available at Wundowie.

The common law right to take water found beneath private land was reaffirmed by the *Land Act 1933.* This permits landowners to sink wells to any depth and gives the landowners the "right to enjoy" the well, regardless of the limited depth of land included in the grant of land by the Crown, subject to the *Rights in Water and Irrigation Act 1914.* The *Rights in Water and Irrigation Act 1914* vests the use, flow and control of all underground water in the Crown. This does not in itself remove any private rights to percolating water but it enables the Crown to vary any existing rights by proclamation of the Governor.

The Water Corporation is given some water rights under the *Metropolitan Water Supply, Sewerage and Drainage Act* and the *Country Areas Water Supply Act* which would not exist under the regime of the *Rights in Water and Irrigation Act.* These Acts provide that the Corporation may divert, intercept and store water from a Water Reserve or Catchment Area which is not subject to surface licensing requirements under the *Rights in Water and Irrigation Act,* and may take water in these areas which is not subject to groundwater licensing requirements. Under the regime of the *Rights in Water and Irrigation Act,* only the owner or occupier of land from which there is access to the water, would be entitled to do these things and only in a limited capacity.

5.2 Rights afforded to other government departments

Various other Acts afford other statutory bodies or government departments water rights which are inconsistent with the regime under the *Rights in Water and Irrigation Act.* Generally, rules of statutory interpretation are applied so that the provisions of the most recent statute prevail and a specific provision will prevail over general provisions.

Where the rights apply to a government department, it may be necessary to determine whether the *Rights in Water and Irrigation Act* was intended to be binding over the Crown.

A reference to 'the Crown' in this context is to what the ordinary person would probably consider to be the government and it includes government departments. The courts tend to regard a statutory authority as distinct from the Crown unless Parliament has expressly given it the character of a servant of the Crown. Local government is not considered to be a part of the Crown.

There is a presumption that the Crown is not intended to be bound by an Act unless it provides so expressly or by necessary implication.

Although a number of more recent Acts explicitly bind the Crown, there is currently no similar provision in the *Rights in Water and Irrigation Act.* If the Crown is not bound by the Act, other government departments may not need to abide by the Water and Rivers Commission's licensing requirements. If the Crown is bound by the Act, government departments will be subject to all the rights and obligations arising under the Act unless another Act expressly provides otherwise.

A High Court decision, *Bropho v WA* (1990) 171 CLR 1, has claimed that even if an Act does not bind the body which is the agent of the Crown, the employees and contractors of the Crown will be bound by the general language of the statute. It appears that the Crown is more likely to be bound by necessary implication today than it has been in the past. However, it has been suggested that this implication will be drawn more readily in respect of Acts enacted after 1990, which was the date of the High Court decision.

It is not clearly established what the result will be if an activity of a Crown department is permitted by one Act but conflicts with another Act which is not expressly binding on the Crown. This would probably depend upon which of the two Acts is more recent and the nature of the activity permitted.

Some of the Acts which provide water rights are:

- *Land Acquisition and Public Works Act* 1902 provides wide powers to acquire water for any public work. 'Public work' is defined under the Act to include any work that the State Government or a local authority is empowered to undertake under the Act or any other Act. It specifically includes water supply, sewerage and drainage works and river improvement. Some works which may indirectly affect water management are public buildings, transport facilities and parks or gardens for recreation.

- *Bush Fires Act* 1954 provides that a bush fire control officer appointed under the Act may take and use water, other than that for use at a school or contained in a private tank, from any source, whether private property or not.

5.3 Native title

Recently the Commonwealth Parliament passed the *Native Title Act 1993* to address the native title issues which arose from the High Court decision in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1. The Act affects proprietary rights in land and influences the extent to which certain activities may be carried out on land. It is an example of how Commonwealth legislation may affect an otherwise State regulated regime.

5.3.1 The Mabo decision and subsequent native title legislation

In *Mabo No. 2*, the High Court acknowledged that the rights of Aboriginal people to their traditional usage of land had survived British sovereignty in Australia, except where these rights had been interrupted or removed by the Crown. This was a statement of common law and consequently could have been overridden by statute. However, in *Mabo v Queensland (No. 1)* (1988) 166 CLR 186, the High Court held that the *Racial Discrimination Act 1975* (Cth) operated to prevent an enactment of legislation which extinguished native title without adequate compensation to the Aboriginal people affected by the legislation.

The enactment of the *Native Title Act* gave effect to the common law principles described by the High Court. The validity of the Act was challenged in the High Court by the Western Australian Government, which had attempted to enact its own legislation to address the issue of native title, but the Commonwealth Act was ultimately upheld.

The Act defines 'native title' to mean the rights and interests in relation to land or waters that are possessed under traditional laws and customs, recognised by the common law and including hunting, gathering and fishing rights or interests. The Act provides that these rights can exist over land or water. 'Waters' are defined to include rivers, subterranean waters and the bed and subsoil of watercourses.

5.3.2 Has native title been extinguished?

If native title has been extinguished after the passage of the *Racial Discrimination Act*, the *Native Title Act* requires that compensation is paid to the previous native title holders.

The *Rights in Water and Irrigation Act* does not expressly extinguish native title rights to use the water from a watercourse. It has been suggested, however, that native title over minerals may have been extinguished by statutes reserving those minerals to the Crown. As the *Rights in Water and Irrigation Act* vests the use, flow and control of all surface water in proclaimed surface water areas in the Crown, it should be considered whether those provisions also operate to extinguish native title in the proclaimed areas. This would have particular significance over surface water areas which were proclaimed after the *Racial Discrimination Act* was enacted as they may be subject to compensation claims. It may be argued that the *Rights in Water and Irrigation Act* does not extinguish native title rights of water use as it preserves the right of both the owners and occupiers of land adjacent to a watercourse and the general public to use water for domestic purposes. The vesting of water in the Crown is not necessarily inconsistent with native title because the public right to take surface water for domestic purposes cannot be removed without enacting further legislation.

The *Native Title Act* provides that no future grant of water rights, for example licences under the *Rights in Water and Irrigation Act*, can extinguish native title rights to a watercourse. Water rights which have been granted in the past will also not extinguish native title. Native title will continue to apply once these water rights lapse. Native title rights may be exercised concurrently with other grants of water rights if the exercise of both rights is consistent. If native title rights are impaired by the grant of inconsistent water rights then the government is obliged to pay compensation under the *Native Title Act.*

In proclaimed surface water areas, the bed of a watercourse is generally vested in the Crown. This provision is more likely to be held to extinguish native title, than would simply the proclamation of a watercourse, because the Act also provides that a person shall not obstruct, destroy or interfere with any watercourse or discharge any matter likely to obstruct the flow of current in any watercourse. These provisions effectively prevent any person from interfering with the bed of a watercourse, including Aborigines who may wish to carry out traditional fishing methods.

5.3.3 The native title tribunal

The Act establishes the National Native Title Tribunal. The main role of the Tribunal is to assist the parties involved in native title or compensation claims to resolve the issues by agreement. An application may be made to the Tribunal for a determination of native title, a revocation or variation of an approved determination of native title or a determination for compensation. The Tribunal must then decide whether to accept the application. If the application is accepted, notice must be given to all persons whose interests may be affected. There is a 2 month period after notice has been given for any person to notify the Registrar of the Tribunal of that person's wish to be a party to the determination of the application. The Tribunal may then hold a mediation between the parties. If no agreement is reached then the Tribunal must refer the application to the Federal Court for determination.

A successful native title claim does not prevent other activities, which are not related to traditional usage of the area, being carried out as long as they are not inconsistent with the native title rights.

It merely recognises that a particular native group has an interest in the area and should have a say in how the area is to be managed or used. This interest is obviously significant in relation to the management of water resources. A recent example is the native title application over the Swan and Canning Rivers, which has been accepted by the Tribunal. The Nyungar tribe claims to have an interest in the area and wants to have some input into how the rivers are managed.

The Commission has been notified by the Department of Land Administration of a large number of applications over land and water throughout the State which have been accepted by the Tribunal and which may be of relevance to the Commission. The Commission responds to these referrals by listing its relevant interests within the area. These interests may range from declared management areas under the water legislation and Crown reserves, to water management works in these areas. The Tribunal has not yet decided any of these applications.

Bibliography

Clark S.D. and Renard I.A., *The Law of Allocation of Water for Private Use*, Vols 1 - 4, Australian Water Resources Council Research Project 67/16, Melbourne, 1972.[1]

Howarth W., *Water Pollution Law*, Shaw and Sons, London, 1988.

Howarth W., *Wisdom's Law of Watercourses*, 5th ed., Shaw and Sons, London.[2]

Bartlett R.H. and Meyers G.D. eds, *Native Title Legislation in Australia*, The Centre for Commercial and Resources.[3]

[1] These volumes provide an extensive overview of Australian water law. As there have not been many significant changes in the rights and obligations under Western Australian water law it is still relevant despite being written some time ago. Clark and Renard pay particular attention to common law riparian rights and whether these have been abolished by statute or not.

[2] Both of these provide a good account of common law water rights and the rights to land associated with water.

[3] This includes a number of conference papers which discuss various issues related to native title.