

Regulating Groundwater Use in Victoria

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**FAIR, EFFICIENT JUSTICE
FOR ALL VICTORIANS**



Introduction

- **A quick overview of applicable law**
- **A focus on matters of merit in decision making**
- **Two case examples**
- **Some other aspects that may be of relevance**

The *Water Act* 1989

- **Purposes:**
 - Integrated management of...the terrestrial phase of the water cycle
 - Promote orderly, equitable and efficient use of water resources
 - Conserve and sustainably use water for the benefit of present and future Victorians
 - To treat surface waters and groundwater consistently
- **How?**
 - Managing allocations/share (declared systems)
 - Licensing extractions (undeclared systems)
 - Licensing bores (works)
 - Making various declarations such as Permissible Consumptive Volumes or declaring a WSPA and requiring Water Management Plans

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Other statutes ?

- ***Environment Protection Act 1970***
 - Protecting the quality of groundwater
 - The subordinate State Environment Protection Policies
 - Groundwaters of Victoria
 - Waters of Victoria
 - Design and siting of landfills
 - Management of contamination of land etc
- **Planning and Environment Act 1987**
 - Management of land that affects groundwater or considering how groundwater affects use and development of the land

Some definitions under the Water Act

Aquifer:

- means a geological structure or formation or an artificial land fill permeated or capable of being permeated permanently or intermittently with water

Groundwater:

- Means any water occurring in or obtained from an aquifer and includes any matter dissolved or suspended in any such water.

More definitions...

Bore:

- Means any bore, well or excavation or any artificially constructed or improved underground cavity used or to be used for the purposes of
 - The interception, collection, storage or extraction of groundwater; or
 - Groundwater observation or the collection of data concerning groundwater; or
 - The drainage or desalination of any land; or
 - In the case of a bore that does not form part of a septic tank system, the disposal of any matter below the surface of the ground; or
 - The recharge of an aquifer...
 - But does not include a bore that is used solely for purposes not [described above] [e.g. a mineral exploration bore or a geotechnical bore]

The allocation of water

Part 3A – Water Shares

- Applies to declared water systems

Part 4 of the Water Act 1989.

- Applies to undeclared water systems
- Encompasses
 - Bulk entitlements
 - Environmental entitlements
 - Licences to ‘take and use’ water

Offence to take water without authorisation under Part 3A or Part 4

Authorising the allocation of water

Matters to be taken into account:

- Depends on nature of allocation

- Some matters administrative (e.g. which system a water share may come from [s33G])

- Some matters go to merits, i.e. the sustainability of the resource or the impact of the allocation being used.
 - Water shares [ss 33I, 33J & 33K];
 - Environmental water allocations [s48F]
 - Bulk entitlements [s40]
 - Licenses [ss53 & 54 and s40]

Matters to be taken into account for a licence (s 53)

(1) In considering an application under section 51, the Minister must have regard to the following matters—

- **(b) the matters mentioned in paragraphs (b) to (m) of section 40(1);**
- **(e) any other matter that the Minister thinks fit to have regard to.**

(2) In considering an application under section 51, the Minister **must give effect** to—

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- (b) any relevant Order made by the Governor in Council under section 49A of the Groundwater Act 1969 specifying an **annual reserve volume of groundwater**; and
 - (c) any relevant prescription made under section 62(1) of the Groundwater Act 1969 in respect of a **groundwater conservation area declared under section 61 of that Act**; and
 - **(e) an approved management plan for any relevant water supply protection area.**

Determination matters for a licence (s55)

- (2) Subject to section 51A, the Minister must refuse the application if, in his or her opinion, the allocation or use of water under the licence would be in conflict with an approved management plan for any relevant water supply protection area.

- (2A) If an application under section 51 relates to a State observation bore, the Minister must refuse the application if, in the Minister's opinion, the exercise of rights under the proposed licence will or may interfere with the function of the bore as a State observation bore.

- (2B) Subject to section 51A, the Minister must refuse an application under section 51 if, in the Minister's opinion—
 - (a) the allocation or use of water under the licence will or may result in the **permissible consumptive volume** for the area for that year or a future year being exceeded; or
 - (b) the allocation under the licence is likely to have **an adverse effect on maintaining the environmental water reserve in accordance with the environmental water reserve objective**.

Section 40 of the Water Act

- (b) the existing and projected **availability** of water in the area;
- (ba) the permissible consumptive volume, if any, for the area;
- (c) the existing and projected **quality** of water in the area;
- (d) any adverse effect that the allocation or use of water under the entitlement is likely to have on—
 - (i) existing authorised uses of water; or
 - (ii) a waterway or an aquifer; or
 - (iii) the drainage regime within the meaning of section 12(1); or
 - (iv) the maintenance of the **environmental water reserve** in accordance with the environmental water reserve objective;

Section 40 continues....

- (e) any water to which the applicant is already entitled;
- (g) the need to protect the environment, **including the riverine and riparian environment**;
- (i) the conservation policy of the government;
- (j) government policies concerning the **preferred allocation or use** of water resources;
- (ja) whether the proposed source of water is within a heritage river area or natural catchment area within the meaning of the **Heritage Rivers Act 1992** and whether there is any restriction on the use of the area under that Act;

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and....

- (k) if appropriate, the proper management of the waterway and its surrounds or of the aquifer;
- (l) the **purposes** for which the water is to be used;
- (m) the needs of other **potential** applicants;

Alanvale Pty Ltd & Anor v Southern Rural Water & Ors [2010] VCAT 480

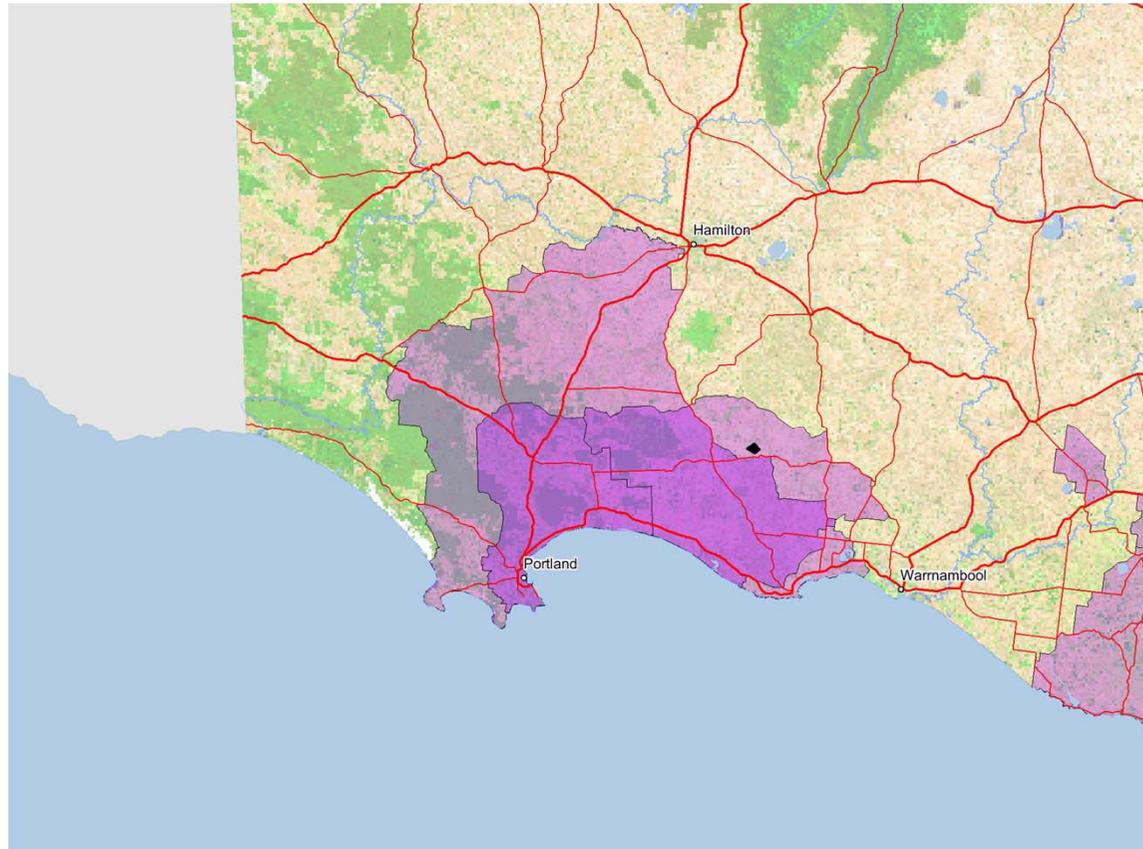
South-west Victoria - Review of refusal to grant a licence.

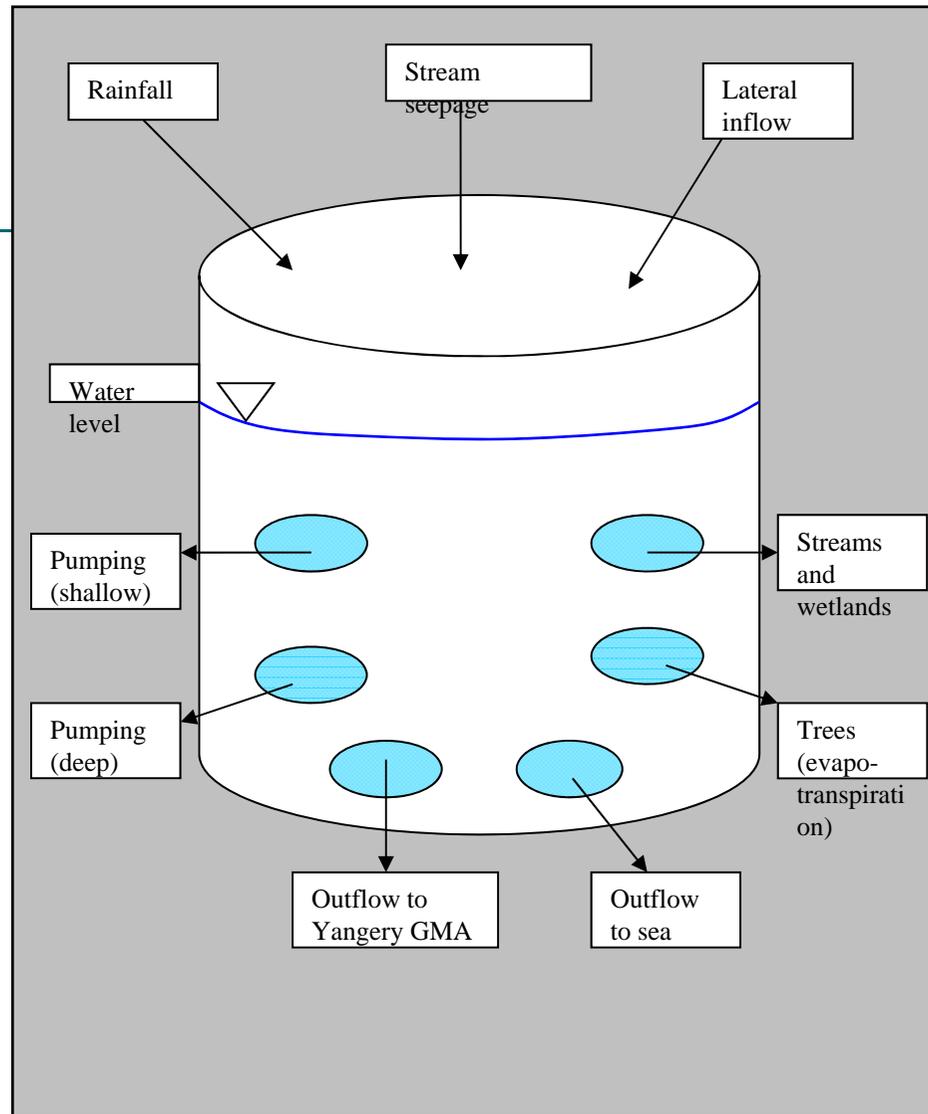
- **Extraction of a large annual volume proposed from a limestone aquifer for irrigation.**
- **Aquifer extends beyond coast and interconnected to overlying basalt formation.**
- **Existing use of resource for stock and domestic purposes.**
- **An area of increasing tree plantations.**

Issues:

- Impact to long standing (S&D) groundwater users.
- Impact to surface water systems (a stream and wetlands).
- Water quality (coastal intrusion, interaction with the basalt aquifer with high salinity water).
- Possible changes to recharge (water balance) arising from:
 - Changes in land use.
 - Climate change.

Alanvale continued





Alanvale (continued)

Findings:

- Insufficient quantification and characterisation of hydrogeology.
- Unable to reasonably determine sustainable yield (sustainability could not be defined).
- Impacts from proposed extraction on quantity and quality of resources available to future users could not be acceptably assessed.
- Question about certainty and serious or irreversible environmental impact – the precautionary principle was applied.

Paul v Goulburn Murray Water Corporation & Ors [2010] VCAT 1755

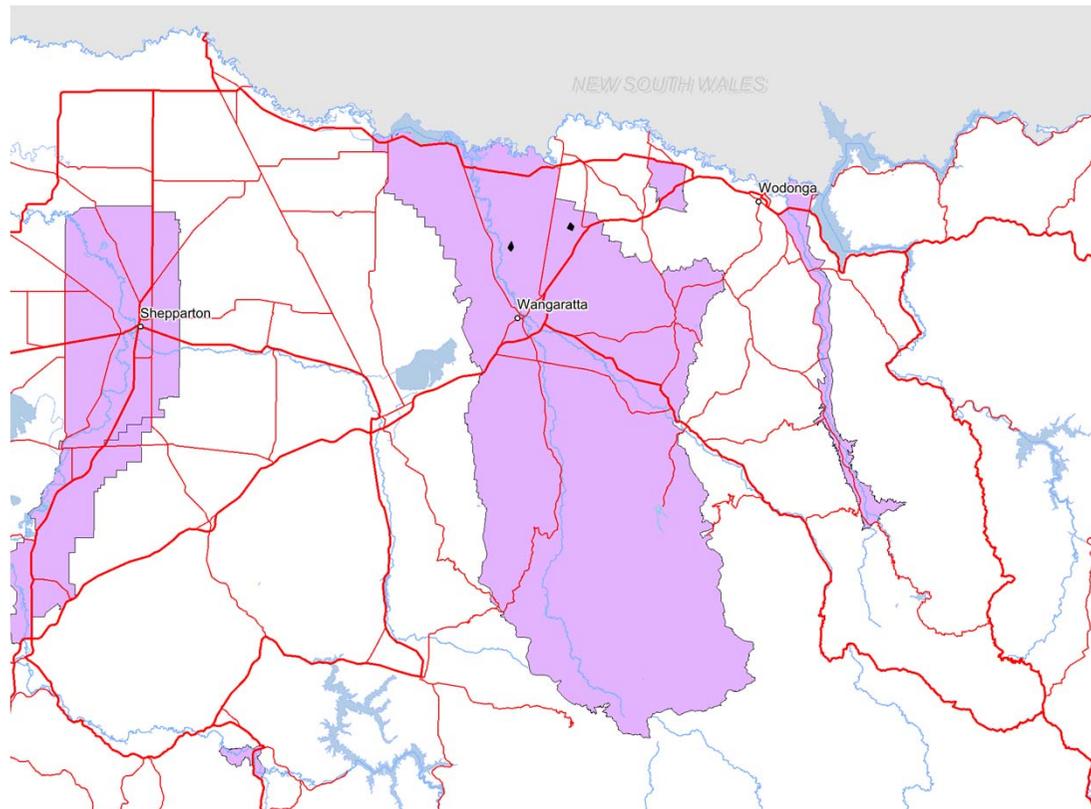
North-east Victoria - Review of decision to grant a licence.

- **Extraction of proposed from an deep lead (alluvial) aquifer for irrigation.**
- **Aquifer interconnected to overlying alluvial formation and surface water system (Ovens River).**
- **No immediately affected groundwater users – potential for future use from groundwater and surface water.**

Question of sustaining large volume of extraction for irrigation.

- Use – current and future (surface and groundwater resources).
- Interaction with and support to riparian environment (Ovens River and wetlands).
- Possible changes to recharge (water balance) arising from climate change.
- Application of the precautionary principle argued.

Paul (continued)



Paul (continued)

Findings:

- Question of pre-cautionary principle addressed by a sufficiently advanced understanding and characterisation of hydrogeology.
- Risks could be reasonably defined and impacts assessed on:
 - Current and future users.
 - The environment (river and wetlands).
- Affects of climate change could be quantified to a reasonably acceptable level.
- Reasonable and acceptable understanding of sustainable yield (sustainability defined) and projected impacts from proposed extractions.

Conditions may be imposed

- **Conditions on a licence may regulate (or compensate for) the use of groundwater**
- **Nature of conditions set out under s56.**
- **Conditions not a substitute for a proper determination in the absence of certainty.**
See: *Castle v Southern Rural Water* [2008] VCAT 2440
 - *[A] monitoring condition, in itself, is not inappropriate. It seems to be a prudent sort of condition and a suitable check on the operation of the licence. it should not take the place of a proper determination in the first place, either in isolation, or in association with other conditions.*
- **Conditions must also be lawful.** See: *Leonard v Southern Rural Water* [2007] VCAT 1562
- **Powers to fix conditions not unfettered.** See: *Pomona Farms v Grampians Wimmera Mallee Water Authority* [2011] VCAT 1378.

Works

- **Part 5 of Act**
- **Licences to construct works (bores etc) [s67]**
- **Matters to be taken into account [s68]**
- **A licence for works cannot be issued if a licence to take water is refused [s69(3)(a)] and must defer a decision for works until a decision is made about water allocation [s69(2)]**
- **Underground disposal [s76]**

Water Management Plans

Declaration of water supply protection area [s27]

- On motion of the Minister or an application by:
 - A licensed user.
 - An authority that holds a bulk entitlement, uses groundwater or supplies water.
 - A body that has responsibilities [..for..] conservation or management of water or land .
- To protect groundwater resources in the area (or surface water or both) [s27(3)]
- If an area is declared a consultative committee must be appointed to prepare a draft management plan for the area (subject to requirements under ss29, 30, 31, 32, 32A 32B)

Water Management Plans

Objective of a Management Plan:

- To make sure that the water resources of the relevant WSPA are managed in an equitable manner and so as to ensure the long-term sustainability of those resources.

A management plan for a WSPA:

- Has the status of a statutory rule (subordinate legislation).
- Sets our requirements that are enforceable:
 - Restrictions on extractions to prevent water levels dropping below set points.
 - Restrictions to prevent the relevant PCV from being exceeded.
 - Restrictions to ensure environmental water reserves are maintained.
- Directions to comply with a management plan are reviewable.
- Compensation arising from directions to comply is reviewable.