

# KELLEHERS AUSTRALIA

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## In-House Memo

### Section 40, Water Act

Section 40, *Water Act 1989* (Vic) provides a number of matters to which the Minister for Water (or his delegate) must have regard when considering applications for the issue, renewal, transfer or amendment of a wide range of licences and use permits. Proposed reform of the Act, currently tabled in the Victorian Parliament as the *Water Bill 2014* will alter the matters the Minister must have regard to in considering such applications, moving away from the uniformity of s40 to more situation-specific requirements.

The Bill is currently in the legislative assembly and, although second reading debate resumed recently<sup>1</sup>, no change in its status has yet occurred and the caretaker period commences at 6 pm on Melbourne Cup Day (4 November).

Key changes formally require a Minister and Authority to have regard to the precautionary principle (s6) in making most decisions. This requires that:

*"If there are threats of serious or irreversible environmental damage, lack of full scientific certainty is not to be used as a reason for postponing measures to prevent environmental degradation" (s6(2)).*

Their decision making must be guided by "a careful evaluation to avoid serious or irreversible environmental damage, wherever practicable" and "an assessment of the risk-weighted consequences of various options" (s6(3)). All decision-makers must have regard to the "core considerations" specified in the Act<sup>2</sup>.

Considerable regard is generally required to Water Resource Management Orders (WRMOs), new area-specific instruments. In making WRMOs, the Minister is required to have regard not only to the core considerations, but also to significant environmental, economic, social and cultural impacts as well as other matters the Minister considers relevant.

As Victoria's Water Law regime changes, parties will need to consider these changes in order to avoid legal uncertainty and possible missteps in the course of applying for new water entitlements or related licences or for the amendment of existing entitlements and licences.

Robert Forrester  
Cameron Algie  
30 October 2014

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<sup>1</sup> Notice Paper No. 197 (Legislative Assembly of Victoria, 16 October 2014)

<sup>2</sup> The **Core Considerations** are:

- a) Any adverse effect that the making of the decision is likely to have on –
  - (i) Any authorised use or taking of water, including environmental water; or
  - (ii) Any other water that contributes to the preservation of the environmental values and health of water ecosystems, including their biodiversity, ecological functioning and water quality; or
  - (iii) A waterway and its surrounds; or
  - (iv) An aquifer or the water within it; or
  - (v) The existing or projected availability of water;
- b) The need to preserve the environmental values and health of water ecosystems, including their biodiversity, ecological functioning and water quality, and the other values that depend on the health of water ecosystems;
- c) Any relevant regional resource assessment, strategic review or targeted review;
- d) Any relevant management plan made under a whole of water cycle management planning framework;
- e) Any relevant submission or comment received by the decision maker or report of a panel or committee established by the decision maker under this Act. (s5)