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Town Planning, Environmental Law,
Local Government, Government Relations,
Property Law

ABN 47 350 401 635

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Our ref: BS\WL

The Chair
Water Law Review
PO Box 500
EAST MELBOURNE VIC 3002

Dear Sir

Re: Water Bill Exposure Draft

Thank you for the opportunity to comment upon this Draft Bill. Kellehers Australia (KA) specialises in environment, planning and local government law, with a sizeable *pro bono* practice assisting remote Aboriginals. Our submission responds to the Victoria Government's stated objective to "to establish Victoria as a world leader in whole of water cycle management".[1] KA strongly supports this goal, consistent as it is with Australia's national environmental legislation and international treaty obligations.

We rely on the depth of our firm's caseload experience and, in respect to groundwater, have drawn upon the research of our professional colleague and groundwater lawyer, Ms Rebecca Nelson.

General

Kellehers recognises the deep societal significance of water, watercourses and water bodies as, not only a source of life itself, but of aesthetic, spiritual and commercial value. Water is deeply felt in the arts (for example, Turner's series of river paintings). It has served as the key to exploration (Lewis & Clark in the United States, Stuart in central Australia and even the biblical story of Moses). Springs, water banks, underground rivers and caves have great mystery. Rivers such as the Franklin have been the subject of fierce community disputation. Multiple and conflicting commercial interests rely upon water. At the same time, the day-to-day control and management of water crosses multiple entities (public and private), is multi-disciplinary and involves activities ranging from water quality testing at tiny locations to national water resource preservation and allocation.

In our view, the setting is so multifaceted that chaos and complexity theories might well be employed to ensure that the goal of global water cycle management leadership can be fully addressed, confronted and achieved. In getting the detail right, there is a risk that an overview of system complexity and chaos may be overlooked, resulting in inappropriate future directions and strategies. The task of the Review is indeed formidable, but we urge that it seek advice from futurists and those familiar with managing complexity and chaos, in evolving a broad strategic approach.

[1] Water Bill Exposure Draft Information Sheet (WBEDIS)3, 1. Reflected in Ss1 (b) and (c), 4, 5 and 6.

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Whilst land use and pollution control are dealt with in the *Planning and Environment Act* 1987 and *Environment Protection Act 1970*, the Water Bill needs to provide complementary regulatory measures reinforcing land use and environmental elements in respect to water, including at least assessment, monitoring, reviewing and action when water resources are, or are potentially, placed at risk by such activities. Provisions in S567 for Ministerial involvement may address this, but even within these, there is potential for conflict with these key land use and environmental protection regulatory schemes that impact upon water.

References in Water Bill Exposure Draft Information Sheets (WBEDIS) hint at a human-centric approach to water regulation[2] rather than the eco-centric approach, that we submit is now required. The paper in Attachment 1 describes a trend in judicial and legal leadership for ensuring environmental assumptions are robustly revisited and an appropriate discretionary regime, affirmative duties, human rights, onus of proof and information provision is legislated to ensure environmental principles are strengthened. In this respect we refer the Review to the Paper by Chief Justice Preston (Land & Environment Court NSW) (Attachment 2) concerning the steps that need to be built in to reinforce this and ensure implementation of the objects and precautionary principles recited in Ss 1, 4 and 6 of the Bill.[3]

Water and the Environment

Reliance is placed in the Bill upon a series of separate instruments to achieve many of its important goals. These include:

1. Regional Resource Assessments (Part 2.3)
   S21 does not directly require assessment of risks to quantity of water, including water for environmental use

2. Strategic Reviews (Part 2.4)
   This process does not ensure that consideration of environment purposes or uses must be taken into account.

3. Targeted Reviews (Part 3.5)
   This process does not ensure that consideration of environment purposes or uses must be taken into account.

4. Water Resource Management Orders (Part 4.8 and Schedule 1)
   There is insufficient guidance and a need for clear mandatory elements and affirmatory duties to be considered within such an Order. Schedule 1, point 8 requires more detail to ensure that the precautionary approach required by S6 is robustly enshrined and vigorously implemented, particularly at times of financial and resource constraint and in the face of vigorous commercial pressures.

   At a time of rapid climate change, frequent depletion of water storages and with expansion of urban areas, a 15 year review of regional water resource

[2] For example, the emphasis on drinking water, agriculture and industry in WBEDIS 8,1.
[3] Complete reference

assistance appears to be too infrequent to properly assess both water quantity and water quality.

S.222 requires the Minister to consult with every Authority in all cases, Water Holders in respect of held environmental water and the Environment Minister in respect of planned environmental water. However, s.223, excludes this requirement where he or she is not of the opinion that it is not in the public interest to do so. The rationale for the restrictions in these sections and the absence or wider community and NGO consultation is not apparent. We submit that these elements are critical to the key objective of Victoria's water cycle leadership.

5. System Allocation Determinations (Part 4.9)
   This process, particularly S232, does not ensure that consideration of environment purposes or uses must be taken into account.

6. Special Water Supply Catchment Area Plans (Part 7.4, S449-452)

7. Environmental Plan (S475)

8. Regional Waterway Strategy (S482)

9. Flood and Building Line Declarations (S487 et seq)

10. Victorian Environmental Water Holder
    - Functions (S298) need to include preservation and protection of water both water quantity and water quality.

    - Composition of the Commissioners should also include lawyer experienced in environmental law (S302(2)).

    - Part 7.5 ought to also provide a water authority with a specific function to protect and conserve water resources and water-related ecosystems.

This 10-POINT strategic structure is complex, somewhat unclear and contains the seeds of considerable potential for conflict and overlap. This Bill provides no clear structure and guidance, mandatory components and limited affirmative duties or discretionary considerations as to what must be included in these instruments to achieve the Government's stated goal of world leadership in water cycle management. There appears to be a greater need to consider historical environmental change over a more fine-graded time period for both surface and groundwater to ensure the water regime is sufficient to realise environmental and ecological value. Monitoring should be more comprehensive and more frequent, including water quality and other elements of sound water and water health management.

Environmental valuation of water goes well beyond ensuring quality drinking water and supporting food and fire production and the protection of environmental water by bulk entitlements goes only part of the way to ensuring sustainable environmental values.

In our submission, the Bill does not appear to adequately address impacts on surface and groundwater quality for known 'risk' land uses such as landfill, closed landfill, spray usage areas, leaking underground petroleum tanks, mining (including coal seam gas), new urban development and coastal development, including flow of waters to seas and oceans.

Finally, in our submission, the Bill should clearly grant *locus standi* to recognised interested parties, including NGOs and public interest groups with demonstrable concern for water and the environment.

Aboriginal Culture and Heritage

Aboriginal cultural and heritage values associated with water appear to be encompassed within **Part 3.3 – Traditional Rights**. In our submission, Aboriginal cultural values associated with water need to be more broadly understood in the Bill. The paper comprising Attachment 3 provides an overview to Aboriginal relationship with land and water. In short, Aboriginal ownership of land and water rests with those who hold knowledge of stories, songs and dances. This is not a knowledge that regulators and public authorities can assume they will automatically be provided with, particularly given a widespread Aboriginal suspicion of Government. It is knowledge that must be earned by development of trusted relationships.

Particular issues that arise include identification of the Aboriginals given rights under the Bill (and those omitted), the breadth of Aboriginal association with water, notions of culture and heritage, rights requiring preservation and agreements. Each of these is dealt with below.

First, the Bill appears to only provide for a "traditional owner group" as defined in the *Traditional Owner Settlement Act* 2010 (TOSA). It further restricts this ambit to a subset comprising groups with a "natural resource agreement" under TOSA. Not all Aboriginals fall within the definition of the term 'traditional owner', let alone be a traditional owner group. Many Peoples do not have any agreement (TOSA or otherwise) and the effect of the provision may be to discriminate against Aboriginal persons who fall outside the umbrella of a 'traditional owner group'. This may impose upon these severe restrictions in their practice of culture. KA refers to, and strongly supports from its caseload experiences, the views of Aboriginal lawyer, Irene Watson, as to the need for the Review to ensure that conversations held by it, as well as the conversations it requires within the provisions of the Bill itself, go beyond popularly perceived Aboriginal 'leaders' who can (and frequently do) silence the voice of traditional and broader language-named identity groups.

Second, the Bill goes some way to recognise the breadth of Aboriginal water concerns. Attention is required to ensure that all elements of cultural heritage significance, eg river banks, trees and artifacts beside and beneath the water are appropriately treated through the many cross-references within this complex Water Bill. The Bill needs to address songs, stories and dances, knowledge and knowledge systems (ie the intangible heritage) associated with the waterways and water bodies such as lakes, ponds, springs, waterholes and soaks and it needs to clearly recognise that groundwater forms part of Indigenous knowledge systems and has considerable Indigenous cultural significance[4].

[4] Thus, groundwater is not only critical to water supplies, a provider of base flow to streams and support for wetlands and other groundwater dependent ecosystems as WBEDIS 8, 1 suggests.

Third, it is necessary to ensure that the understanding of 'culture' in land and water use is sufficiently broad to identify and protect Aboriginal cultural heritage. For example, spring water requires protection based on the cultural values associated with it[5]. Victoria's existing heritage regulatory schema separates Aboriginal and post-settlement heritage in the *Aboriginal Heritage Act 2006* and the *Heritage Act 1995* and this Bill, in combining both cultures, needs to accord equal weight, respectful of the unique requirements of each.

Fourth, the Bill appears to only provide for Aboriginal's right to take water – and this for non-commercial purposes. However, recognition is required of the traditional, cultural trading of water and water-related elements and the knowledge and knowledge systems associated with them, eg the Gunditj'Mirring's ancient traditional water harvesting and eel trading[6] (Appendix 3). All elements of Aboriginal culture, including traditional trading activities need to be permitted.

Finally in our view, the Bill must contain at minimum the following provisions to ensure that those seeking rights to or in water affected by native title must provide a minimum level of real and tangible economic benefit to the claim group. The paper comprising Attachment 4 refers to the complexities of fitting a multiplicity of western regulatory schemes with Indigenous legal arrangements. Aboriginals will not consider delegating responsibility for protecting the viability and sustainability of traditional waters and land. Minimum requirements should include unambiguous concrete goals, commitments and responsibilities supported by identified key representatives able to provide ongoing leadership within all parties, credible measures to deal with failure to fulfil obligations and long-term monitoring. Aboriginal people routinely seek minimal damage to country (ie protection) and return (ie business opportunities, employment, training). Aboriginal benefit needs to be commensurate with the scale and impact of any development operation and provide long-term benefit.

Groundwater

KA relies upon and supports the paper by Ms Nelson[7] (Attachment 5) and in particular her seven recommendations to improve the range of mechanisms to control the adverse impacts to groundwater dependent ecosystems with existing law and policy structures:

1. Re-emphasise the importance of licence-level consideration, in addition to water plan-level mechanisms (such as caps) in controlling adverse pumping impacts;
2. Consider lowering numerical thresholds of pumping impacts deemed to be worth preventing, using a long time horizon and encompassing all groundwater use, whether licencable or not;

[5] This was observed in an interstate study at Welcome Springs where rock engravings of considerable importance found 8km in distance from the springs were found to have formed an important link in the travels of the ancestors…http://www.deh.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;search=town%3DMaree … 5/10/2006.
Place ID = 103839. (Ed) Note: this database record seems to be no longer accessible in 2010.

[6] Builth, D., 2002, *The Archaeology and Socioeconomy of the Gunditjmara: a Landscape Analysis from Southwest Victoria*, Australia, Ph.D. thesis, Department of Archaeology, Flinders University of South Australia. *Lovett on behalf of the Gunditjmara People v. State of Victoria* [2007] FCA 474 (30 March 2007

[7] Nelson R, "Groundwater, rivers and ecosystems: comparative insights into law and policy for making the links, (2013), *Australian Environment Review* 558, 561.

3. Consider developing formal groundwater offset programs. Offset programs reduce the political risks of more robustly protecting surface waters in fully allocated catchments;
4. Increase the effectiveness of flexible, principle based thresholds such as the 'public interest test' and statutory environmental considerations by detailing locally specific, compulsory deliberative criteria in water plans or formal management guidelines;
5. Encourage community and NGO involvement in groundwater licensing and planning by emphasizing places, benefits and species that people can relate to;
6. Consider developing economic tools using existing powers to impose environment-related pumping fees;
7. Invest in methods and policies for prioritising the protection of groundwater-dependent ecosystems. Consider imposing a burden of proof on groundwater applicants to demonstrate that pumping will not result in unacceptable adverse impacts in high-priority areas.

A 'managed aquifer' scheme must include not only water quantity including recharge, quantities and timing (ie many ground water resources are, in effect, a non-renewable resource simply due to low, slow recharge) but also water quality and, in our submission, requires guided attention and affirmative duties in any strategic planning instrument and any exercise of discretion under the Act. Monitoring needs to be comprehensive and frequent, including flux, level and pressure as well as quality assessment and attention to all aspects of groundwater health and its management.

Contamination of groundwater via soil penetration or permeation or via fissure drainage from an 'upstream' contaminated source can be distant, deep and extremely expensive and difficult to source. Some relief to those seeking redress for losses arising from such contamination ought to be considered – even at minimum by providing prompt, free of charge information access to innocent persons who suffer loss and damage.

Groundwater dependent ecosystems, for example spring locations such as Hepburn Springs, require specific guidelines and affirmative duties to ensure application of the precautionary principle. Particular reference to the ecological value of groundwater systems so as to enable more meaningful and accurate calculation of environmental flow would assist. The Water Bill could also usefully address the limitation in available data regarding groundwater lines and tables, including perched tables, and the needs of groundwater dependent ecosystems. Such data may not even exist at all in some areas.

Economic Opportunities

Key regulatory change such as the Water Bill offers a significant opportunity for creation of new business opportunities. This is particularly the case, where the Government's clear objective is to position the State as a world leader in water cycle management.

New venture creation is widely considered to be a major determinant of a nation's economic health, being responsible for job creation and GDP growth within a region and having important social implications[8]. Governments seeking to stimulate their economies are

[8] Audretsch D & Thurik R, (2001), "What's new about the new economy? Sources of growth in the manged and entreprenuerual economies, *Industrial and Corporate Change,* Vol. 10 No. 1, 267-315. Birch D, (1987), "Job creating in America: How our smallest companies put the most people to work, *Collier Macmillan,* London, Chell N (2007) *A framework for constructing and defending a methology,* Notes prepared for DBA Course Swinburne

frequently pressured to reduce regulatory constraints[9]. Given the potential of new regulatory regimes to positively impact prosperity, it is important to use every opportunity to encourage productive economic activity so as to create a cumulative increase in entrepreneurial opportunities.
The significance of the regulatory change framework to contemporary business settings cannot be overstated.

> "*[P]olicy formation has displaced the incremental operation of the common law as our primary means of social regulation, and regulatory agencies have displaced the common law courts as the primary means by which that regulation is effectuated*"[10].

Various techniques, including specifying key elements and affirmative duties for consideration in any Regulatory Impact Assessment, can considerably open up and expand (rather than constrain) economic and new venture opportunities. This submission strongly argues that the Review should actively resist arguments suggesting that regulatory change increases costs and burdens. It should rather view the Water Bill as a vehicle for creating economic opportunities. The paper comprising Attachment 6, ***Regulatory Change to Optimise Entrepreneurial Opportunity***, sets out broad approaches to optimising such opportunities. The Bill in its current form could be changed without significant alteration to include some or all of the approaches described in Attachment 6 to significantly optimise its impact on productive (rather than destructive or unproductive) economic opportunity and new venture creation.

Liability
KA observes the linkages between insurance law and administrative law in evolving considerations of liability to parties suffering a vast array of loss and damage arising from complex and interwoven triggers of causations. It observes multiple existing authorities (continued through the Bill) that have overlapping duties and responsibilities, limited financial and other resources and competing demands.

There is an existing cross-over between administrative law principles and the principles of tortious liability (and more broadly the liability of public authorities generally) in the proper assessment of the reasonableness of an authorities' decisions, actions and omissions. In the context of the defences by a public authority for breach of statutory duty, the *Wednesbury* test[11] is now codified by s 84 of the *Wrongs Act 1958*. However, whilst the *Wednesbury* test has been characterised as effectively inviting the judiciary to pass judgment on the reasonableness of the conduct of the legislative or executive arms of government[12], in reality (and particularly in its *Wrongs Act* context), the law has currently evolved to permit in some circumstances the consideration of <u>all</u> factors relevant to an action, decision or omission, including financial and resource constraints:

University Hawthorn, January, Kumar S & Liu D, (2005) "Impact of globalization on entrepreneurial enterprises in the work markets", *International Journal of Management and Enterprise Development,* Vol. 2 No. 1 46-64.
[9] Acs, A, Audretsch D, Braunerhjelm P, Carlsson B (2004), "The missing link: The knowledge filter and entrepreneurship in endogenous growth, *CEPS Discussion Paper No. 4783,* Center for Economic Policy Research, London., Minniti M, Bygrave W, Autio E, (2006) *Global entrepreneurship monitor report,* London Business School and Babson College, London,: Babson Park, MA..
[10] Rubin E, (1989) Law and Legislation in the Administrative State, *Columbia Law Review,* Vol.89,, p. 369.
[11] "*If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere": Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, at 227 (Lord Greene MR).
[12] *Graham Barclay Oysters v Ryan* [2002] HCA 54; (2002) 194 ALR 337, at ALR 341, [6] (Gleeson CJ).

> *'What the Wednesbury test reflects is that the courts are not well placed to review decisions made by such bodies when, as is often the case, the decisions are made in the light of conflicting pressures including political and financial pressures. The Wednesbury test is very different from the test which must be applied in an action for negligence. The content of the objective standard which negligence requires, by its reference to "reasonable" care, is not readily identifiable in the case of a public body exercising public functions. It is not enough to say that the standard of care is that of the "reasonable authority in a similar position". That does not offer any guidance about how the court is to resolve the competition between the various factors which a statutory authority could properly take into account, for example, in ordering its priorities or allocating its budget.'*[13]

The codification of this evolving common law approach, to require consideration of the 'principles' that the proposed S677(6) would add to the existing S157 *Water Act 1989* approach, may be inappropriate in particular circumstances. In our submission, the proposed test goes beyond the pure question of *reasonableness* of an administrative decision, by effectively permitting a decision-maker to refer to financial constraints as a sole justification for what would otherwise be considered to be an unreasonable decision.

Other

1. **Policing**
   Attention may be required to liaison between affected owners, water authorities and policing agencies. It is KA's experience that Victoria Police, particularly in country areas, is significantly under-resourced to rigorously investigate deliberate interference with water channels. It is our experience that authorities are also poorly resourced to either receive prompt alert or provide speedy response to malicious damage so as to avoid loss and damage. Further, the authorities' primary interest tends to be recovery of the lost water (given its value) rather than addressing the source of criminal behaviour or its civil consequences.

2. **Special Rates and Charges: Drainage Schemes**
   It is unclear how the alteration of storm water rights and other legislative changes will alter the powers of Councils to levy special rates and charges schemes to provide for and upgrade local drainage.

3. **Definitions**
   The use of the term "Dictionary" for the overall terms and "Definitions" for terms within individual parts was found to be confusing. Also, it is somewhat difficult to fit the terms defined in Parts or sub-Parts with the 'Dictionary' and it is uncertain whether a defined term in one Sub-Part applies to the term when used elsewhere, including a Schedule. Key terms such as "area" (Schedule 1), "environmental purposes", "water ecosystems" (S297) appear to have no definition and it is unclear whether the important term 'environmental purposes" means the same as "environmental ... uses" used, for example, in S21.

In conclusion, whilst acknowledging the formidable work of the Review in so effectively updating and consolidating existing water law, water policy and environmental principles,

[13] *Brodie v Singleton Shire Council* (2001) 206 CLR 512; 180 ALR 145, at ALR 231, [310] (Hayne J).

our submission highlights areas of the Water Bill that could be enhanced so as to respond even more strongly and effectively to the Victorian Government's significant policy objective "to establish Victoria as a world leader in whole of water cycle management".

We would be pleased to expand further on our submission and otherwise assist the Review in any way it considered helpful.

Yours faithfully

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