

Groundwater

Groundwater procedures can be complex. Kellehers Australia is skilled in this area.

Our client CHECKLIST helps target key legal aspects, procedures and important information. Please call us with any queries

Are you: A commercial producer needing groundwater; or

Concerned about other persons using groundwater?

Why is groundwater important?

Groundwater is an important natural resource. It may be accessed and used in farming and primary production and in other major industries such as mining. Access to groundwater is an important component of land value. Groundwater also plays an important ecological role, for example through connections to rivers, or where groundwater emerges as a spring or supports ecosystems like forests. Its value then is also environmental, as well productive.

Pumping groundwater potentially causes damage. Controlling potential damage is a key purpose of groundwater regulation. Common concerns include:

- **Unsustainable pumping**
Groundwater law aims to ensure that groundwater withdrawals do not exceed sustainable levels, taking into account local aquifer “recharge”.
- **Bores drying up**
Groundwater pumping by one landowner can lower groundwater levels in nearby bores. This can require other bore owners to deepen their bores so water access is maintained, which can be costly.
- **Damage to rivers or other ecosystems**
Groundwater pumping can dry up important river pools as they are often connected. This can compromise river water access for other landowners or threaten ecosystems and water-dependant species such as frogs.

How is groundwater use regulated?

Groundwater, like water resources generally, is essentially a public resource owned by the State. The State grants licences to access the water resource. The exception is stock and domestic purposes where water access is a private right of the land occupier or where there is access via a public road or reserve. Licences are also required for related activities, such as constructing a bore.

The principal legislation regulating groundwater is the Victorian Water Act. Most licences related to groundwater use will be what are termed ‘take and use’ licences, granted under section 51 of the Water Act.

Who issues licences?

In practice, the granting of take and use licences is done by Victorian Government agencies, such as Southern Rural Water or Goulburn Murray Water. These organisations also grant construction licences for bores. They are also responsible for the monitoring and enforcement of licences and licence conditions.

It is worth knowing where the closest offices of these agencies are and who is actually responsible within the organisation for administering groundwater licences. Check this website to see which agency operates in your area.

What Information should I get?

Information is a key resource in the management of groundwater systems and the administration of groundwater licensing. Early on you must:

- Obtain a copy of the groundwater licence if relevant. This can be obtained from the Victorian Water Register.
- Obtain any relevant maps. Some good online sources are available, especially groundwater resources reports that include information about aquifer and water quality; maps of bores and groundwater levels, groundwater dependent ecosystems maps and biodiversity mapping, if relevant.
- If possible, obtain data on water use applicable to the particular licence. Policy in Victoria includes obligations on non-urban water users to meter their use if extraction is 20,000 ML or more of groundwater. Water corporations collect metered data. There are also strict rules on how much groundwater can be used for stock and domestic purposes.
- If relevant, the Environment Protection Authority maintains information on groundwater quality and pollution and restricted zones.
- Obtain any rules or guidelines, policies or Orders issued by government authorities if they are relevant to the issue. These may include policies for the granting of licences or applying to stock and domestic rights to groundwater.
- Check the local planning scheme to see if there are any relevant or useful planning controls or guidance applying to the site at issue. Many Clauses of the State Planning Provisions require consideration of water issues. Victorian planning schemes can be accessed online <http://planningschemes.dpcd.vic.gov.au/>
- Record your observations and collect this in as much detail as is possible. If your concerns relate to environmental impacts acquire as much data and information as possible on changes over time to ecological features, such as riparian vegetation or to faunal populations.
- It may be necessary, depending on the particular issue, to obtain expert information and reports, such as from a hydrogeologist (groundwater expert), ecologist or other expert. Hydrogeological expertise can be particularly important, because the precise impacts of withdrawing groundwater are often uncertain and subject to time lags. Expert ecological assessments can be important to assess impacts on protected species or ecological communities.

How do I resolve disputes?

Many disputes are resolved inexpensively, without going to court. Legal expertise is invaluable in identifying the nature of your issue, clarifying key points, gathering important data and resolving the matter with an appropriate authority, land holder or water rights holder. This may be as simple as analysing and advising on the issue and writing, on your behalf, to the agency or person concerned.

If the issue is more protracted, a fair and reasonable resolution can often be negotiated on your behalf.

Questions to ask include:

- Do you need to better understand what is going on, what rights and/or obligations you and others have and how they all interact?
- Does the issue concern the grant of a licence?
- Does the issue concern enforcement of a licence, a condition or some other provision of the law?
- Do you need assistance to write to other parties, eg, government agencies or individual land holders so your concerns can be put in the best, most persuasive manner?

What types of Groundwater disputes can arise?

Many disputes concerning groundwater will be dealt with and determined by the Victorian Civil and Administrative Tribunal (VCAT). In some situations, they come before a Court.

Generally speaking, there are three types of litigation to be aware of.

Review of statutory decisions

The granting of a groundwater licence by a government agency (for example, Southern Rural Water), is reviewed by VCAT. The Tribunal makes the decision afresh and can affirm, vary or set aside the original decision. Sometimes these decisions will deal with only factual issues, sometimes legal questions and sometimes both.

Civil action

Civil litigation determines legal rights and liabilities and orders remedies usually heard before a court. In the context of groundwater, they may relate to interference in groundwater causing adverse impacts. For example, extracting groundwater through a bore may reduce groundwater availability to neighbours, causing loss. Alternatively, a person may suffer loss from illegal taking of groundwater.

Prosecution

Various offences exist under the Water Act, eg illegally taking groundwater or illegally constructing a bore. Criminal prosecution is by authorised government officers, but individuals may complain to the relevant agency about any illegal activity and may need legal advice to best ensure prosecution proceeds promptly.

GROUNDWATER CHECKLIST:

What is the key issue?

- Application for a licence
- An existing licence
- Complying with a licence
- Stock and domestic right
- Other entitlement, eg bulk entitlement
- Impacts of withdrawing groundwater from an existing bore

Are there procedural issues?

- How long will it take?
- What information is required?
- What conditions might be applied?
- Cost?
- How long will it last?
- What does the licence allow, eg how much water, what purpose, what period of time)?

What needs checking?

- Location of proposed or existing bore
- Maps (aquifers, bores, water quality, groundwater levels, and ecosystems)
- Proposed or actual water use data
- Rules and guidelines the authorities will use in considering the application
- Local planning provisions
- Need for expert support
- Copy of any existing groundwater licence
- What are the impacts of an existing licence on groundwater use

What disputes can arise?

- Concerning a private landowner
- Concerning a water authority
- A challenge to a licence - yours or someone else?
- Is it a 'stock and domestic' bore?
- Are there unacceptable impacts from existing bores? What impacts?
- Does a government decision seem wrong? Details of decision and the error.

What do you want to achieve?

- What would a desirable outcome be?
- What data, information or potential evidence do you have or can you obtain?
- How can Kellehers Australia help?

What licence?

<i>Type of licence, right or entitlement</i>	<i>In general, what does the licence, right or entitlement allow in relation to groundwater?</i>	<i>To whom is the licence, right or entitlement granted?</i>
'Take and use' licence: Water Act, s 51	Take groundwater and use it for commercial, agricultural, industrial or other licensed uses	Any person applying for a licence
Private (stock and domestic) right: Water Act, s 8	Take water for stock or domestic use free of charge from a bore on your land or to which you have access by a public reserve or road (or a State observation bore)	Occupier of the land (eg landowner or leaseholder)
Licence to construct a bore ('works'): Water Act, s 67	Construct, alter, operate, remove or decommission a bore that accesses groundwater	A person proposing to take these actions in relation to a bore
Bulk entitlement: Water Act, s 34A	Allows, by Order, access to and use of large volumes of water from dams or other water supplies	An Authority, which is usually a water corporation but may be another large user, eg mining company or power station