STANLEY RURAL COMMUNITY INC v STANLEY PASTORAL PTY LTD

Court of Appeal
Osborn, Santamaria and Ashley JJA
20 October, 20 December 2017
[2017] VSCA 385

Administrative law — Appeal — Questions of law — Decision of the Victorian Civil and Administrative Tribunal — Whether rights conferred upon holder of a 'take and use' licence under the Water Act 1989 limited by the Planning and Environment Act 1987 or by planning scheme — Water Act 1989 (Vic) ss 8(4), 8(6), 51, 55, 67, 69 — Planning and Environment Act 1987 (Vic) s 6(2)(b).

Town and country planning — Planning permit granted for a 'utility installation' to holder of a 'take and use' licence under the Water Act 1989 — Whether rights conferred upon holder of a 'take and use' licence under the Water Act limited by the Planning and Environment Act 1987 or by planning scheme — Water Act 1989 (Vic) ss 8(4)(a), 8(6), 51, 55, 67(1)(b), 69 — Planning and Environment Act 1987 (Vic) s 6(2)(b).

The respondent held licences issued to it by a water authority: (i) under s 51 of the *Water Act 1989* (Vic) (**the Water Act**), to take and use groundwater for 'Industrial or commercial use — as well as domestic and stock use' (**take and use licence**); and (ii) under s 67(1)(b) of the Water Act, to operate works to use a bore on its land to extract the groundwater. The take and use licence contained a preliminary statement to the effect:

> This licence does not remove the need to apply for any authorisation or permission necessary under any other Act of Parliament with respect to anything authorised by the take and use licence.

The land in which the bore was to be operated was zoned as 'Farming Zone' under the Indigo Planning Scheme (Vic) (**the planning scheme**) and the proposed water operations were a use of land for which a planning permit was required under the *Planning and Environment Act 1987* (Vic) (**the PE Act**). Allowing an appeal from a refusal of a permit by the planning authority, the Victorian Civil and Administrative Tribunal (**the Tribunal**) held that, because of provisions of the Water Act, the applicant (**the objector**) could not object to the planning permit on the ground of the impact of extraction upon the groundwater resource. The primary judge reached the same conclusion, albeit for different reasons. The objector sought leave to appeal to the Court of Appeal from the order of the primary judge on questions of law.

Section 8(4)(a) of the Water Act provided that a person had the right to use water taken or received by that person in accordance with a licence issued to that person under the Act. Section 8(6) provided to the effect that a right conferred by s 8 was limited only to the extent to which an intention to limit it was expressly (and not merely impliedly) provided in the Water Act or regulations or certain subsidiary instruments; in any other Act or any permission or authority granted under any other Act; in the conditions of a licence issued under the Water Act; or in prescriptions contained in an approved management plan drawn up under the Water Act.

Section 6(2)(b) of the PE Act provided to the effect that a planning scheme for an area under that Act might make any provision which related to the use, develop-

doi: 10.25291/VR/54-VR-676

ment, protection or conservation of any land in the area.

Held, refusing leave to appeal:

(1) Neither the PE Act, nor the planning scheme made under it, limited the relevant right to use water under s 8(4) of the Water Act. [23]:

(a) Pursuant to s 8(6) of the Water Act, the rights conferred by s 8(4) could only be limited to the extent expressly provided for by the provisions of other legislation or a statutory instrument. [36]–[37].

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic) (2001) 207 CLR 72, 78 [11] applied.

(b) The power in s 6(2) of the PE Act to regulate or prohibit the use of land, although broad, did not expressly demonstrate an intention to limit the rights conferred under s 8 of the Water Act. [53]–[54].

(c) The planning scheme controls did not have the effect of limiting rights created under s 8 of the Water Act. A planning scheme could not go beyond the field of operation of the PE Act. The Tribunal erred in concluding that the planning scheme might have made express provision to limit water rights under the Water Act. [55]–[57], [140]–[141].

Per curiam. It was doubtful that a planning scheme met the description of 'any permission or authority granted under any other Act', in s 8(6)(b) of the Water Act. [57], [142].

(2) The Tribunal did not commit an error of law unless the characterisation at which it arrived was not reasonably open to it. In the circumstances, it was open for the Tribunal to characterise the proposed land use as falling within the broad definition of 'utility installation'. [75]–[80].

Cascone v City of Whittlesea (1993) 80 LGERA 367, 381–2; *Learmonth Springs Pty Ltd v Yarra Ranges Shire Council* [2002] VCAT 1043 [28]–[29] applied.

Hope v Bathurst City Council (1980) 144 CLR 1; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; *S v Crimes Compensation Tribunal* [1998] 1 VR 83; *Francheschini v Melbourne and Metropolitan Board of Works* (1980) 57 LGRA 284; *City of Springvale v Heda Nominees Pty Ltd* (1982) 57 LGRA 298; *St Kilda City Council v Perplat Investments Pty Ltd* (1990) 72 LGRA 378 referred to.

Per curiam. Whether the relevant use of the land was characterised as 'utility installation' or as an innominate use, the planning scheme made no express provision in the relevant sense with respect to rights to use water granted under s 8(4) of the Water Act. It could not be an express limitation under s 8(6). [89], [144].

(3) The take and use licence authorized both the taking and use of water and there was no requirement for a separate permit (such as under the planning scheme) to take the water with its use authorized by s 8(4). The licence specified and defined the source from which water might be taken for the purpose of, and incidentally to, use in accordance with s 8(4)(a). The licence stated the content of the right granted by s 8(4)(a), including the source and quantity of the water which was the subject of the right. [103]–[106].

(4) The preliminary statement contained in the take and use licence was not a condition of the licence within the meaning of s 8(6)(c) of the Water Act and did not form part of the substantive licence. [125].

Per curiam. Even if the preliminary statement contained in the take and use licence were regarded as a condition of the licence, it simply directed the reader to the possibility of express limitation upon water rights created in accordance with s 8(6) of the Water Act; it did not create such limitation itself. It did not express an intention to limit the relevant right to use water save by reference to what is 'necessary under any other Act'. Nor did s 6(2) of the PE Act evidence any express intention to limit the rights granted under the Water Act. [126]–[127], [130].

(5) The requirement under the planning scheme to obtain a planning permit for use of the land did not authorise restrictions on extraction of groundwater. By reason of s 8(6) of the Water Act any limitation upon the right to use land for a particular purpose under the PE Act could not incidentally or impliedly limit the right to use water as such under the Water Act. The objector could not raise a planning objection to the use of groundwater as such in accordance with the Water Act. [135]–[138].

(6) 'Extraction of ground water' was not a use of land defined in the planning scheme or an activity that was either expressly referred to or expressly controlled by any provision of the planning scheme. [145].

Application for leave to appeal

This was an application for leave to appeal against the orders of the primary judge on an appeal from VCAT on questions of law. The facts and relevant statutory provisions are stated in the judgment.

D M Robinson for the applicant.

N J Tweedie SC with *E Peppler* for the respondent.

Cur adv vult.

OSBORN JA
SANTAMARIA JA
ASHLEY JA

Introduction

1 The applicant, Stanley Rural Community Inc (**the objector**), is a non-profit incorporated association concerned with 'fostering and enhancing the town of Stanley's cultural, economic, social and environmental interests and providing the town with a single representative voice'. The objector seeks leave to appeal the decision of McDonald J upon an appeal on questions of law from the Planning Division of the Victorian Civil and Administrative Tribunal (**the Tribunal**).

2 Whilst the objector is undoubtedly motivated by concerns with respect to the underlying merits of the planning dispute between the parties, it is important to emphasise that such an appeal is not a merits review. The application to this Court is fundamentally concerned with issues of statutory construction.

3 The Tribunal determined to grant a planning permit to the respondent,

Stanley Pastoral Pty Ltd (**the permit applicant**), for a 'utility installation' as defined under the Indigo Planning Scheme (**the planning scheme**) utilising groundwater extracted from a bore on land owned by the respondent.

4 In so doing, it held that the objector could not object to the impact of groundwater extraction upon the groundwater resource because of provisions of the *Water Act 1989* (Vic) (**the Water Act**).

5 The primary judge reached the same conclusion albeit by way of different reasons.

6 The objector contends that the primary judge was wrong to conclude that relevant provisions of the Water Act create rights to take and use groundwater which cannot be the subject of objection or control pursuant to a planning scheme.

7 For the reasons which follow, we are of the opinion that the primary judge was fundamentally correct in his conclusion and leave to appeal should be refused.

Background circumstances

8 The permit applicant is the owner of 16 hectares of land located in Cue Springs Road, Stanley, in north eastern Victoria. It purchased the land in 2013 with the benefit of a 'Take and Use Licence' issued by Goulburn Murray Water (**GMW**), as water authority, pursuant to ss 51 and 55 of the Water Act to divert and use 50 megalitres of surface water for irrigation purposes from an adjacent stream (**the s 51 take and use licence**). The land had historically been used for the purposes of an orchard.

9 After purchasing the land, the permit applicant sought and obtained substitute take and use licences from GMW in October 2013 which in effect split the volume of the previous entitlement into a licence to take 19 megalitres from groundwater and 31 megalitres from surface water.

10 The new groundwater take and use licence permitted use of the water for the purpose of 'Industrial or commercial use — as well as domestic and stock use'.

11 In addition, GMW also granted in 2013 a 'Licence to Operate Works' pursuant to ss 67 and 69 of the Water Act to use an existing bore on the land for the purpose of extracting groundwater (**the s 67 works licence**). The s 67 works licence also permitted the bore to be operated for the purpose of providing water for 'Industrial or commercial use — as well as domestic and stock use'.

12 The permit applicant proposes to extract the groundwater via the bore, filter it, store it in tanks and on-sell it in bulk using water tankers in order to supply a water bottling plant.

13 In order to implement the proposal the permit applicant required a planning permit for the non-agricultural use of the land (which is contained in a Farming Zone) and for certain infrastructure works, comprising two storage tanks and filtration equipment, housed in a colorbond shed adjacent to the bore, and on-site road works necessary to accommodate the movement of trucks which will transport the water to the bottling plant.

14 The bulk of the land (some 15 hectares) will remain in agricultural use. It is intended that in the first instance this will be constituted by cattle grazing.

15 The objector objected to the grant of a planning permit primarily upon grounds which went to the potential impact of the proposal upon the groundwater resource. Other objections went to secondary impacts including the effect of the proposed truck traffic upon the safety and amenity of the local road network.

16 A threshold question which arose before the Tribunal was the question whether the use of groundwater pursuant to the s 51 take and use licence was itself susceptible to objection pursuant to the relevant provisions of the *Planning and Environment Act 1987* (Vic) (**the PE Act**). The Tribunal concluded that a planning permit was not required to extract groundwater. Its reasoning was as follows:

> The matters that can be provided for in a planning scheme are set out in s 6 *Planning and Environment Act 1987*. The powers conferred by s 6 can compendiously be described as a power to regulate or prohibit the use and development of land. This is a very broad power, and on the face of it would enable a planning scheme to impose controls over the extraction of groundwater.
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> Approval of a land use under a planning scheme would in the normal course embrace all activities associated with or ancillary to that use. Thus, in the absence of specific provisions planning approval for a hotel would not require additional planning permission for a liquor licence. Approval for a recreational club (place of assembly) would not require additional planning permission for gaming machines. A domestic tennis court would not need planning permission to install lights. However, in each of these instances (and indeed many others) the planning scheme has specific provision which requires planning permission for an activity, or a component, that would otherwise be embraced by the land use approval. These specific provisions are to be found in clause 52 of the planning scheme.
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> Specific provisions are to be found in relation to:
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> - satellite dishes (cl 52.04);
> - heliports (cl 52.15);
> - post boxes (cl 52.16);
> - telecommunication facilities (cl 52.19);
> - private tennis courts (cl 52.21);
> - liquor licences (cl 52.27);
> - electronic gaming machines (cl 52.28);
> - wind energy facilities (cl 52.32).

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> The extraction of groundwater is a similar activity which although amenable to planning control by inclusion in the planning scheme of a specific provision requiring a permit for such extraction, the planning authorities have chosen not to be subject to such control. This is consistent with the clear Government intention that matters relating to groundwater should be dealt with under the *Water Act 1989*.
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> What is subject to planning control is the installation of the infrastructure for the collection, treatment, transmission, storage and distribution of water. The means by which the water is acquired or brought on to the land is not subject to specific control, and indeed in this case had already been approved by the relevant authority before the planning permit was sought.
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> The 'covering the field' test derived from cases involving inconsistent State and Commonwealth legislation is of little assistance in this case. The question here is whether powers which are capable of being used to control the extraction of groundwater available to different authorities under the *Water Act 1989* and the *Planning and Environment Act 1987* have in fact been used.
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> In summary, the *Water Act* sets out a code for the use and control of groundwater, including procedures and protocols for obtaining licences to extract groundwater which include the opportunity for third party participation. The *Planning and Environment Act 1987* empowers planning schemes to introduce a control over the extraction of groundwater but the planning authorities have chosen not to do so. This analysis leads the Tribunal to the conclusion that a planning permit is not required to extract groundwater.[1]

17 McDonald J identified the central issue before him as turning on the question of the extent to which rights conferred pursuant to a licence under the Water Act may be qualified by the PE Act and planning schemes authorised by that Act.

18 His Honour resolved that question by reference to the terms of s 8 of the Water Act which grants rights to use water taken in specified ways, limited only to the extent to which an intention to limit such rights is expressly provided for in certain specified forms of statutory control. His Honour concluded that no such limitation arose in the present case.

19 His Honour held that the effect of ss 8(4) and (6) of the Water Act is that the rights conferred upon the holder of the licence granted under the Water Act will only be qualified by a planning scheme which contains provisions which explicitly limit the rights arising under the Water Act.[2] In this sense, his Honour reasoned to the same ultimate effect as the Tribunal:[3]

> The effect of ss 8(4) and (6) of the *Water Act* is that the rights conferred upon the holder of a licence granted under that Act will only be qualified by a planning scheme which contains provisions which explicitly limit the rights arising under the *Water Act*. The permit requirements under the [*Planning and Environment Act*]

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1 *Stanley Pastoral Pty Ltd v Indigo SC* [2015] VCAT 1822 [38]–[44] (Senior Member H McM Wright QC, Member G E Sharpley).

2 *Stanley Rural Community Inc v Stanley Pastoral Pty Ltd* [2016] VSC 764 [43] (**Reasons**).

3 Ibid (citations in original).

> and [Indigo Planning Scheme] are subject to, and subordinate to, ss 8(4) and (6).[4] Consequently, absent explicit words limiting the rights conferred upon a licence holder, the provisions of the [Indigo Planning Scheme] which would otherwise require a permit for the bulk extraction of water must be deemed not to apply in circumstances where a licence for extraction of water has been granted.[5]

20 It followed that although a planning permit was required for the use of the land for the collection, filtration, storage and distribution of the water, the right of the permit applicant to extract and use the groundwater as such could not be the subject of planning objection.

21 It also followed that his Honour's conclusion was 'fatal' to the appeal proceeding before him, in that each of the proposed grounds of appeal were premised upon the proposition that the Tribunal was entitled to consider whether the proposed extraction of groundwater as such was an appropriate planning outcome.

22 The objector now seeks leave to appeal on the basis that the primary judge erred with respect to the following question of law:

> Does a requirement to obtain a planning permit under s 47 of the *Planning and Environment Act 1987* to use land for a purpose that involves the extraction of groundwater relevantly limit a right conferred by s 8(4)(a) of the *Water Act 1989*, and is the requirement to obtain such a permit therefore 'deemed' inoperative by effects of s 8(6) of the *Water Act 1989*, in circumstances where the extraction of groundwater is subject to a licence that has been issued under s 51 of the *Water Act 1989*?

23 For the reasons which follow, in our view neither the PE Act, nor the planning scheme made under it, limit the relevant right under s 8(4) of the Water Act. In order to demonstrate why, it will be necessary first to describe the relevant provisions of the Water Act; and secondly, to identify the relevant provisions of the PE Act and the planning scheme, before turning to the grounds of appeal addressing the question set out above.

24 For completeness, however, we record that in addition to its primary conclusion with respect to the Water Act, the Tribunal also concluded that if it was incorrect and a planning permit was required to extract groundwater then it would nevertheless have granted a planning permit as:

(a) the Tribunal considered it must assume that the impact of the extraction upon the groundwater resources, was 'already set in place', by reason of the licence to take and use 19 megalitres of groundwater; and

(b) in the exercise of its discretion and in the circumstances of the case, it would not venture into an area which was governed by another authority with specialist expertise set up by legislation for that ex-

4 See *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 276.
5 See *Goodwin v Phillips* (1908) 7 CLR 1, 14.

press purpose, and that it would not 'entertain re-agitation' of issues determined by GMW as the water authority.

25 The Tribunal also observed that it was 'comforted' by the conditions of the permit applicant's water licences and that it would impose a permit condition, invited by the permit applicant, requiring the holder of the planning permit to comply with any written directions of GMW to cease or reduce pumping. Such condition would invoke the sanctions and enforcement provisions of the PE Act in the event of a breach of parallel conditions of the water licences. The Tribunal noted that the applicant's expert hydrological witness, Dr Dahlhaus, had 'stated that a condition to this effect would to a large extent allay his concerns'.

26 Dr Dahlhaus had given evidence that the aquifer containing the groundwater which it was proposed to extract was directly connected to the stream from which water had previously been diverted for irrigation purposes. Nevertheless, it would not be subject to the same rostering or restrictions as applied to diversions from streams and hence posed a greater potential demand on the water resource.

> An important aspect of the Stanley Pastoral groundwater licence is in relation to whether the annual 19 ML entitlement of groundwater withdrawal will be subject to rostering (ie restrictions on taking water during summer months imposed by Goulburn Murray Water). As stated in Section 9.1 of the Upper Ovens River WSPA Water Management Plan, because of the significant impact of water extraction on the Ovens River and tributaries, a roster and restriction regime has been in place for many years to ensure equitable share of available water during summer. Restrictions can be severe, and in 2006/07 surface water users had restricted access for 16 weeks and were banned from water extraction for up to 9 weeks (GMW 2012, Section 7.2, page 17).
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> According to the documentation submitted to Council by Stanley Pastoral, the Groundwater Entitlement — BEE071611 — and the associated Licence to Operate Works — WLE 058275 — have conditions appended that indicate that the water must be taken in accordance with the rosters set out in the management plan (Condition 8). However in the Upper Ovens River WSPA Water Management Plan it clearly states that '*Groundwater users in Management Zone 2 will not be subject to the water sharing regime because the impact that groundwater extraction has in that zone on stream flows is considered to be negligible.*' (GMW 2012, Section 12.1.8, page 36).
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> Thus it appears the 19 ML groundwater licence is not subject to rostering or restrictions. Although there is no increased entitlement, the proposed Stanley Pastoral development now has 19 ML that was formally rostered, but now is not. In fact, the Licence to Operate Works allows Stanley Pastoral to pump a permissible 0.50 ML per day for 38 days at the height of summer during low stream flow periods. This will almost certainly result in a reduction in the irrigation water available for agriculture, since there is clear connection between the groundwater and surface water in the Cue Springs area. The reduction will be particularly felt by the downstream surface water users in dry years.[6]

6 Emphasis in original.

27 Proposed grounds 2 to 6 of the appeal relate to the Tribunal's subsidiary conclusions with respect to groundwater extraction. They seek to establish proposed grounds of appeal that were argued before McDonald J, but which his Honour did not find it necessary to determine. Because we have reached the view that his Honour's primary conclusion with respect to the permit applicant's rights to extract and use groundwater should be upheld, we are also of the view that it is unnecessary to decide these grounds.

28 The permit applicant also seeks leave to cross-appeal from the orders of McDonald J on one ground, namely, that the costs orders made by his Honour were manifestly unreasonable. Argument on the cross-appeal has been deferred pending resolution of the primary appeal, the outcome of which is potentially determinative of the cross-appeal.

Principles of interpretation

29 The outcome of this appeal ultimately turns upon the interpretation of the Water Act and the PE Act. The relevant provisions fall to be understood by reference to their text, context and purpose.[7] The central issue in this case involves the question of whether the Water Act contains provisions to which the PE Act provisions are subordinate. Before turning to these provisions, it is useful to repeat the following statement of principles by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
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> Furthermore, a court construing a statutory provision must strive to give meaning

7 See, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39].

to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'.[8]

The Water Act

30 The first purpose of the Water Act, as set out in s 1 of the Act, is:

(a) to re-state, with amendments, the law relating to water in Victoria;[9]

31 In so doing, it is intended:

(g) to provide better definition of private water entitlements and the entitlements of Authorities;

...

(m) to continue in existence and to protect all public and private rights to water existing before the commencement of the relevant provisions of this Act.[10]

32 Other purposes of the Act inform the provisions which govern the granting of licences to take and use water. They relevantly include conservation objectives[11] and the need to provide for the orderly, equitable and efficient use of water resources.[12]

33 The purposes also make clear that it is intended to provide for community participation in the making of arrangements relating to water resource management and to provide recourse for persons affected by administrative decisions made under the Act.[13]

34 Part 2 of the Water Act deals generally with rights and liabilities in respect of the use of water. Division 1 of pt 2 deals specifically with rights. It commences with provisions which provide the fundamental framework for rights to use water in Victoria. Sections 7(1)–(3) vest the underlying right to the use, flow and control of all water in waterways and all groundwater in the Crown.

7 Continuation of the Crown's rights to water

(1) The Crown has the right to the use, flow and control of all water in a waterway and all groundwater.

(2) Subject to subsection (3), the right of the Crown to the use, flow and control of all water referred to in subsection (1) is not diminished by the fact that—

(a) by or under this or any other Act rights to water are conferred on other persons; or

(b) under this Act the Minister may issue licences for the taking or use of

8 (1998) 194 CLR 355, 381–2 [69]–[71] (citations omitted).
9 Water Act s 1(a).
10 Ibid ss 1(g), 1(m).
11 Ibid ss 1(b), 1(d) and 1(k).
12 Ibid s 1(c).
13 Ibid ss 1(e), 1(i).

water; or

(c) under this or any other Act approval may be given for works or activities that affect the use, flow or control of water.

(3) The Crown must not exercise a right conferred by subsection (1) so as to limit a right to water conferred on any other person by section 8(1)(b), (c) or (d) or section 8(4)(c).[14]

35 Sections 8(1)–(6) provide for a series of private rights to use water.

8 Continuation of private rights to water

(1) A person has the right to take water, free of charge, for that person's domestic and stock use from a waterway or bore to which that person has access—

(a) by a public road or public reserve; or

(b) because that person occupies the land on which the water flows or occurs; or

(c) in the case of a waterway, because that person occupies land adjacent to it and the bed and banks of the waterway have remained the property of the Crown by virtue of section 385 of the *Land Act 1958* or any corresponding previous enactment; or

(d) subject to section 33C, in the case of a bore, because that person occupies it.

(2) If required to do so by the regulations, a person taking water under subsection (1) must give the Minister, in accordance with the regulations, written notice of the amount taken.

(3) A person has the right to use water taken by that person from a waterway under subsection (1)(a), if the water is being used at the place at which it is taken.

(3A) A person has the right to use water taken by that person from a waterway under subsection (1)(b), (c) or (d).

(3B) A person has the right to use water taken by that person from a bore under subsection (1).

(3C) A person has the right to use, while it is within the waterway or bore, water which that person has the right to take under subsection (1).

(4) A person has the right to use—

(a) water taken or received by that person in accordance with a licence or other authority issued to that person under this Act or any corresponding previous enactment; or

(b) water lawfully taken or received by that person from the works of an Authority or of any other person; or

(c) rainwater or other water that occurs or flows (otherwise than in a waterway or bore) on land occupied by that person or, with the permission of the other person, on land occupied by another person.

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14 The Act contains an explanatory endnote to s 7(1) which states: 'Section 8 confers water rights on persons other than the Crown, including the right to use rainwater that falls on land occupied by them. Section 10(1)(b) confers the right to construct works to store rainwater.'

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(5) Water referred to in subsection (4)(c) may be used for any purpose and on any land.

(5A) Subsections (4)(c) and (5) do not apply to the use, other than domestic and stock use, of water from a spring or soak or water from a private dam (to the extent that it is not rainwater supplied to the dam from the roof of a building).

(6) A right conferred by this section is limited only to the extent to which an intention to limit it is expressly (and not merely impliedly) provided in—

(a) this Act, any regulations or by-laws under this Act, or any permission, authority or agreement made under this Act; or

(b) any other Act or in any permission or authority granted under any other Act; or

(c) the conditions of a licence issued under this Act; or

(d) the prescriptions contained in an approved management plan drawn up under Division 3 of Part 3 for a water supply protection area.[15]

36 Some preliminary observations may be made about these provisions.

- The right to take water is a right to take water which is otherwise subject to the control of the Crown under s 7.
- In each case specified in s 8 the right to take water merges into the right to use such water.
- The apparent purpose of each of the provisions relating to the taking of water is to define the source of the water which is the subject of a right to use.
- The structure of the section generally distinguishes between use for domestic and stock purposes and use for other purposes.
- In the case of the right to take water free of charge for domestic or stock use from a bore to which the permit applicant has access because it occupies it, the right to take merges into the rights to use created by ss 8(3B) and (3C).
- In the case of water taken by the permit applicant pursuant to a licence issued under the Act, the right to take merges into a right to use pursuant to s 8(4).
- The critical provision is s 8(6) which provides that such rights are limited only to the extent to which an intention is expressly provided for in a limited category of statutory instruments.
- Section 8(6) governs all rights created under s 8 including rights to take and use water for domestic and stock use which are of fundamental significance to land use in many areas of the country. It is

[15] Emphasis added.

unsurprising that such rights are entrenched by s 8(6).

37 Section 8(6) is in the nature of an interpretation of legislation provision. Unless other legislation or statutory instrument of the type specified provides an intention to expressly (and not merely impliedly) limit the rights granted by s 8, it will not do so.

38 McDonald J considered the sense in which the word 'expressly' is used in s 8(6):

> Where the word 'expressly' is used in a statute, it can be construed in two alternate ways. First, it may serve 'to emphasize the generality of the main provision by making clear that no case is outside that provision unless that is the necessary result of the operation of another enactment according to the intention it manifests'. When used in this way:
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> > it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language however broad the language may be which covers it so long as the applicability arises directly from the language used and not by inference therefrom.
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> Second, 'expressly' may be used as an antonym of 'impliedly'. When used in this way it has a broader operation, requiring an explicit reference to the relevant subject matter. An example of this broader approach is provided by *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)*, where the High Court considered the meaning of s 17(2) of the *Supreme Court Act 1986*. That section provides that 'unless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge'. The plurality stated:
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> > Section 17(2) contemplates 'express' provision otherwise. There are legislative provisions in which 'expressly' is not used as an antonym of 'impliedly' but 'merely serves to emphasise the generality of [one] provision by making clear that no case is outside that provision unless that is the necessary result of the operation of another enactment according to the intention it manifests'. It may greatly be doubted, however, that 'expressly' should be understood as being used in s 17(2) in this way. Section 17(2) is a provision which confers jurisdiction upon a court and it is, on that account alone, to be given no narrow construction. Rather, it is to be construed with all the amplitude that the ordinary meaning of its words admits. It follows that the conclusion that there is express provision to the contrary will seldom, if ever, be available in the absence of explicit words excluding the jurisdiction of the Court of Appeal to hear an appeal from any determination of the Trial Division when constituted by a judge.
>
> The reasoning in *Roy Morgan Research* is apposite in the present case. The terms of s 8(6) of the Water Act put beyond doubt that 'expressly' is used as an antonym of 'impliedly'. Consequently, absent explicit words in the P & E Act and/or the IPS qualifying the rights conferred by the take and use licence, SPPL did not require a permit to extract the water the subject of that licence.[16]

39 No ground of appeal was directed to this reasoning and in our view it is plainly correct. The words in parenthesis '(and not merely impliedly)' make

[16] Reasons [33]–[35] (citations omitted).

this clear.

40 In turn, for a series of reasons to which we shall shortly come, the judge at first instance was correct to conclude that the provisions of the planning scheme do not govern the extraction of groundwater by the permit applicant.

41 Before turning to those reasons, it is necessary to say something further about ss 51 and 55 of the Water Act pursuant to which the permit applicant applied for and obtained the relevant take and use licence creating the right to use water which the judge concluded was critical.

42 Sections 51 and 55 are found in pt 4 of the Water Act which deals generally with the allocation of water. Division 2 of that part provides for licences. Section 51 enables a person to apply to the Minister for the issue of a licence to take and use groundwater.[17]

43 The Minister may require the applicant to give notice of the application[18] and appoint an independent panel to consider submissions made with respect to the application.[19]

44 The application must be referred to relevant public authorities.[20]

45 In considering the application the Minister must consider the report of any panel[21] and advice or comments received from a relevant public authority.[22] The Minister must further consider the needs of other potential applicants[23] and a series of environmental concerns relating to the aquifer set out in s 40(1). The Minister may further consider any matter he or she considers fit to have regard to.[24]

46 He or she must also consider relevant matters arising under the *Groundwater Act 1969* (Vic).[25]

47 The Minister may either refuse an application for a s 51 take and use licence or approve it and issue a licence under s 55, and may impose conditions with respect to a series of detailed matters including conservation considerations.[26]

48 A person whose interests are affected by the Minister's decision may review that decision before the Tribunal.[27] On review the Tribunal must in addition

17 GMW acted as the Minister's delegate pursuant to s 306 of the Water Act.
18 Water Act s 49.
19 Ibid s 50.
20 Ibid s 51B.
21 Ibid s 53(1)(a).
22 Ibid s 53(1)(ab).
23 Ibid s 53(1)(b).
24 Ibid s 53(1)(e).
25 Ibid s 53(2).
26 Ibid s 56.
27 Ibid s 64.

to other matters take into account planning considerations and, in particular, the provisions of a relevant planning scheme.[28]

49 The fullness of this scheme of provisions incidentally supports the view in the present context that amplitude should be given to the express terms of s 8(6). It is also no doubt why the Tribunal referred to the provisions of the Water Act as creating a code. Although in strictness, the very terms of s 8(6) indicate that the 'code' may not be comprehensive and as the specific reference to the *Groundwater Act 1969* noted above indicates, other legislation may be relevant.

50 It may also be noted that a licence granted under s 55 is not subject to a provision of the Water Act which might be regarded as relevantly falling within the terms of s 8(6)(a) by providing expressly for an intention to limit a right conferred under s 8.[29]

The Planning and Environment Act

51 The purposes of the PE Act[30] and the objectives of planning in Victoria[31] are very broad. The latter include:

> to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;[32]

52 Section 6(2) of the PE Act enables a planning scheme, amongst other things, to regulate or prohibit the use or development of any land. It is this power which provides the basis for the provisions upon which the objector relies and, in particular, for the controls contained in the 'Table of uses' within the Farming Zone control of the planning scheme.

53 Having regard to the nature and purpose of the power to make planning schemes,[33] the power to regulate or prohibit the use of land is in terms a broad one which read on its own might be regarded as implicitly enabling the regulation of the extraction of groundwater under a planning scheme. Nonetheless the power does not expressly demonstrate an intention to limit the rights conferred under s 8 of the Water Act.

54 It follows from s 8(6) of the Water Act that a planning scheme cannot limit rights to use water which are created under s 8.

55 As the permit applicant submits, the PE Act itself could theoretically expressly provide that its provisions and/or the provisions of any planning scheme made under it, were intended to limit and regulate any rights created under the Water Act. It does not. In turn, a planning scheme cannot go

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28 Ibid s 305B.
29 For example, Water Act ss 70, 77.
30 PE Act s 1.
31 Ibid s 4.
32 Ibid s 4(1)(b).
33 *South Australia v Tanner* (1989) 166 CLR 161, 164–5 (Wilson, Brennan, Toohey and Gaudron JJ).

beyond the field of operation which the legislation marks out for it.[34]

56 For reasons we shall expand below, it may also be doubted that a planning scheme meets the description found in s 8(6)(b) of 'any permission or authority granted under any other Act'. The fundamental point is however that even if these words are read sufficiently broadly to embrace a planning scheme, it could not have an effect upon rights to use groundwater which the PE Act does not expressly authorise.

57 It follows that the Tribunal was in error to conclude that the planning scheme might have made express provision to limit water rights. But it was correct to conclude that the planning controls do not have the effect of limiting the rights created under s 8.

The nature of the planning scheme controls

58 Although it is ultimately the provisions of the Water Act and the PE Act which we find to be determinative of this case, it is contextually useful to examine how the planning scheme regulates the proposed land use.

59 The planning scheme adopts the standard format provided for in pt 1A of the PE Act by way of the Victoria Planning Provisions. The planning scheme first states State and Local Planning Policy. It then regulates land use and development pursuant to zone controls. It next provides for overlay controls which further regulate development within specified areas by reference to particular planning considerations. It further regulates specific aspects of land use by particular provisions which deal with matters of incidental sensitivity. It lastly sets out a series of general definitions and other provisions facilitating the operation of the scheme.

60 In the present case there is no dispute that the proposed land use requires a permit pursuant to the Farming Zone control of the planning scheme.[35]

61 A permit is also required under these provisions to develop the building and works proposed as an incident of the use.

62 In addition, the proposal requires a development permit (but not a use permit) pursuant to the provisions of an Environmental Significance Overlay.[36]

63 For completeness, it may be noted that (as the Tribunal observed) there are no particular use provisions purporting to regulate the extraction of groundwater independently of the zone controls. A number of these provisions, such as native vegetation controls, operate within the Farming Zone.

64 As the permit applicant submits, a different statutory regime might have led to the inclusion of provisions relating to the extraction of groundwater

34 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 187–8 (Gibbs CJ) and the cases there cited.

35 Clause 35.17.

36 Clause 42.01–2.

under cl 52.08 of the planning scheme, which relates to 'Earth and Energy and Resources Industry' extraction.[37] But the planning scheme does not attempt to do so.

65 The application of the zone provisions turns upon the real and substantial purpose of land uses. The zone controls operate by specifying 'Section 1 Uses' which are as of right; 'Section 2 Uses' which require a permit; and 'Section 3 Uses' which are prohibited.[38] It is necessary to characterise the purpose of a use in order to apply the controls.

66 Thus under the provisions of the planning scheme agriculture is an as of right 'Section 1 Use' within the relevant zone. If the water obtained pursuant to the existing licenses were used for agricultural purposes no planning permit would be required irrespective of the provisions of the Water Act.

67 On the other hand the planning scheme list of 'Section 2 Uses' for which a permit is required relevantly includes 'Utility installation (other than Minor utility installation and Telecommunications facility' and a residual category of innominate use titled 'Any other use not in Section 1 or 3' in the 'Table of uses' contained in the Farming Zone control.

68 The permit applicant contends that the proposed use is properly characterised as a 'utility installation' as defined. The objector contends that the proposed use is an innominate use, namely 'groundwater extraction'.

69 The definition of 'utility installation' is found in cl 74 of the planning scheme which commences as follows:

> The following table lists terms which may be used in this planning scheme in relation to the use of land. This list is not exhaustive. However, a term describing a use or activity in relation to land which is not listed in the table must not be characterised as a separate use of land if the term is obviously or commonly included within one or more of the terms listed in the table.
>
> ***Meaning of terms***
>
> A term listed in the first column, under the heading 'Land Use Term', has the meaning set out beside that term in the second column under the heading 'Definition'.
>
> ***No definition of listed term indicates ordinary meaning***
>
> A term listed in the first column, under the heading 'Land Use Term', which does not have a meaning set out beside that term in the second column, under the heading 'Definition', has its ordinary meaning.

70 Earlier cl 71 provides:

> ***Meaning of words***
>
> A term used in this planning scheme has its ordinary meaning unless that term is defined:

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37 Among other things, this governs mineral extraction, stone extraction, geothermal energy extraction and petroleum extraction.

38 Clause 31.

- In this planning scheme.
- In the *Planning and Environment Act 1987* or the *Interpretation of Legislation Act 1984*, in which case the term has the meaning given to it in those Acts unless it is defined differently in this scheme.

71 The definition of the land use term 'utility installation' is relevantly:

> Land used:
>
> ...
>
> (c) to collect, treat, transmit, store or distribute water;
>
> ...
>
> It includes any associated flow measurement device or a structure to gauge waterway flow.

72 It can be seen that the proposed use will fall within the literal terms of the definition of 'utility installation' in that it involves the collection, treatment (by filtration), storage and distribution of water.

73 Moreover the definition comprises a series of concepts which are themselves quite general and are described by ordinary English words.

74 In such a case, the responsible authority and in turn the Tribunal must consider whether the facts of the proposal for land use before it fall within the ordinary meaning of the words of the definition of the 'Land use term'.

75 The Tribunal will not commit an error of law unless the characterisation at which it arrives was not reasonably open to it.[39]

76 In the present case the Tribunal found that it was satisfied that the proposal accurately answers the definition of 'utility installation'.

77 The primary judge concluded as follows:

> I have no hesitation in concluding that [the permit applicant]'s proposal for the bulk extraction for 19 megalitres of water was the real and substantial purpose of its use of the land. The extraction of the water was the primary use of land. The construction of storage and transfer facilities were ancillary to this primary purpose. Absent ss 8(4) and (6) of the Water Act, [the permit applicant] would have been required to obtain a permit for the bulk extraction of the water. First, the pumping of groundwater via a bore into storage tanks is a use of land to collect water. It therefore falls within the definition of utility installation in cl 74 of [the planning scheme] and is a matter prescribed by s 2 of cl 35.07–1 as requiring a permit. Alternatively, if the collection of water by pumping groundwater into tanks via a bore is not a utility installation, it would nevertheless be 'any other use' not otherwise provided for in s 1 or 3 of cl 35.07–1.[40]

78 The objector submits that the judge was correct to characterise the bulk

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39 *Hope v Bathurst City Council* (1980) 144 CLR 1; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; *S v Crimes Compensation Tribunal* [1998] 1 VR 83; *Franceschini v Melbourne & Metropolitan Board of Works* (1980) 57 LGERA 284; *City of Springvale v Heda Nominees Pty Ltd* (1982) 57 LGRA 298; *City of St Kilda v Perplat Investments Pty Ltd* (1990) 4 AATR 358.

40 Reasons [40].

extraction of groundwater as the real and substantial purpose of the use of the land but was incorrect to conclude that the proposal falls within the definition of 'utility installation'.

79 The characterisation of relatively novel land uses may involve difficult questions of fact and degree. In *Cascone v City of Whittlesea*,[41] Ashley J canvassed the leading authorities[42] and summarised the following principles.

(1) In characterising the proposed use of premises it is always necessary to ascertain the purpose of the proposed use.

(2) Whilst intended use of premises, in the sense of activities, processes or transactions to be undertaken, will be useful in casting light upon the purpose of the proposed use, it is wrong to determine the relevant purpose simply by identifying activities, processes or transactions and then fitting them to some one or more uses as defined in a scheme.

(3) It is wrong to approach the ascertainment of purpose of proposed use on the footing that it must fit within one (or more) of the uses defined in a scheme; at least that is so where there is provision for innominate uses in the scheme.

(4) The ascertainment of purpose of a proposed use may yield the result that the purpose revealed very largely falls within a defined use. The extent to which it does not may be so trifling that it should be ignored. In that event the purpose as revealed should be taken to fall within the defined use.

(5) The ascertainment of purpose of a proposed use may yield the result that more than one separate and distinct purpose is revealed. In that event the question initially arises whether one is dominant. The further question that may arise is whether the lesser purpose or purposes are ancillary to the dominant purpose. If the answer to both questions is 'Yes', and the dominant purpose is available as of right or is permitted, the lesser purpose or purposes are legitimised. Then, in planning terms, there is but one purpose. But if the answer to the first question is 'No', each revealed purpose must be available as of right or permitted, else there will be a breach of the scheme. The mere fact that one purpose is authorised will not prevent other revealed purposes from being prohibited.

(6) In resolving the problems of characterisation raised in the preceding paragraphs (1) to (5) the preferable view, in my opinion, is that the adjectival phrase 'real and substantial' qualifying 'use' will always be nominally present. But it is unlikely to be of practical importance in many cases. It will always serve to emphasise that there is a distinction between 'purpose of use' and 'use' in the sense of activities, processes or transactions. It should not be used to cloud the potential for more than one purpose being revealed. It should not be thought to provide a basis for treating a combination of activities, processes or transactions as necessarily attracting the appellation of 'innominate use'. It is likely to be of practical importance in cases falling within

41 (1993) 11 AATR 175.

42 *Humphries v Latrobe Valley Caravans Pty Ltd* (1976) 63 LGRA 434; *Franchesini v Melbourne and Metropolitan Board of Works* (1980) 57 LGRA 284; *City of Springvale v Heda Nominees Pty Ltd* (1982) 57 LGRA 298; *Davey v Brightlite Nominees Pty Ltd* [1984] VR 957; *City of Nunawading v Harrington* [1985] VR 641; *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305; *St Kilda City Council v Perplat Investments Pty Ltd* (1990) 72 LGRA 378; *Clare v Jeff's Bulk Appliances Pty Ltd* [1981] VR 758.

> paragraphs (4) and (5) above. The alternative conclusion to be drawn from the authorities, which may well produce very little difference in a practical way to the determination of cases, is that the 'real and substantial' purpose of use test will be applicable in factual situations having the perceived potential to fall within paragraph (4) or (5) above.[43]

80 In the present case we are not persuaded that the Tribunal erred in its characterisation of the proposed land use. In our view, it was open to conclude that the proposal falls within the broad definition of 'utility installation'.

81 The objector submits that the Tribunal has committed the error of seeking to fit what is in truth an innominate use into the statutory definition of 'utility installation'.

82 The structure of the planning scheme required the Tribunal to consider whether the use fell within the defined land use terms listed in Sections 1, 2 and 3 of the 'Table of uses' within the Farming Zone control. The application of the 'Table of uses' required a judgment to be made in the first instance as to whether the proposed land use fell within one of the specified uses. In particular, the provision in Section 2 that a permit was required for 'Any other use not in Section 1 or 3', could only be applied by considering the uses specified in Sections 1, 2 and 3. Accordingly, it was necessary for the Tribunal to consider whether the proposed use fell within the definition of 'utility installation' before characterising it in some other way.

83 The collection of groundwater for the purpose of bottling water or on-sale in bulk has been regarded by the Tribunal as falling within the definition of 'utility installation' since the decision in *Learmonth Springs Pty Ltd v Yarra Ranges Shire Council*.[44] That decision concerned a permit for a spring water bottling plant utilising groundwater extracted pursuant to a licence under the Water Act. The Tribunal expressly considered the principles stated in *Cascone*.[45] It further considered whether the notion of 'utility installation' impliedly required that the installation be used as a public installation.

> Although the use of the term 'utility' can infer that this is a public installation to be used as a public service such as for gas or electricity, the term 'utility' also has the meaning of something useful, having the capacity to satisfy a human want, the ability of a thing to satisfy the needs or gratify the desires of a majority, a useful thing. There is nothing within the definition in the planning scheme that indicates it should be strictly referred to only in terms of a public service. What is proposed is the collection treatment, storing and distributing of spring groundwater for sale to the public, a utility installation.[46]

84 This understanding of the definition provisions has been consistently adopted by the Tribunal over the 15 years since that decision.[47]

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43 *Cascone v City of Whittlesea* (1993) 11 AATR 175, 190.
44 [2002] VCAT 1043.
45 Ibid [28].
46 Ibid [29].
47 *Sunkoshi Pty Ltd v Yarra Ranges SC* [2006] VCAT 2627; *Bennet v Macedon Ranges* [2007] VCAT

85 As such, the use proposed has become a use 'commonly included within one or more of the terms listed in the table' within the meaning of cl 74 of the planning scheme. Consistently with this understanding, GMW, as water authority, also accepted that the proper characterisation of the proposed use was 'utility installation'.

86 Further, if it were not the intention of the standard form definition as contained in all planning schemes within Victoria that 'utility installation' continue to be understood in this way, then the Minister has had ample opportunity to clarify the definition by way of amendment of the Victoria Planning Provisions.[48]

87 These considerations fortify us in the view that the Tribunal did not err in its characterisation of the proposed land use. But ultimately the objector has simply failed to persuade us that as a matter of fact the proposal could not reasonably be regarded as falling within the ordinary meaning of the terms contained in the definition.

88 Moreover, because there is no dispute that the proposed use is a permissible use, the question whether it should be characterised as 'utility installation' or as an innominate use was not critical to the Tribunal's decision.

89 Further, whether the use be characterised as 'utility installation' or as an innominate use, the planning scheme makes no express provision in the relevant sense with respect to rights to use water granted pursuant to s 8(4) of the Water Act.

90 Reference was made in argument on behalf of the objector to authority concerned with the construction of a will.[49] But nothing in that case provides authority for regarding a general residual control over innominate land use as demonstrating an express intention to limit rights to use water.

The grounds of appeal concerning s 8(6) of the Water Act

91 Proposed ground 1 of the appeal challenges the decision of McDonald J concerning the effects of s 8(6) of the Water Act on a series of discrete bases. We will deal with each in turn. But we should make clear at the outset that we accept that ground 1 attacks the central basis upon which his Honour upheld the decision of the Tribunal.

1136; *Big Wet Natural Springs Pty Ltd v Hepburn Shire Council* [2011] VCAT 2293; *Myrtleford Springs Pty Ltd v Alpine SC* [2011] VCAT 1267.

48 See PE Act s 4B.

49 *In re Parker-Jervis; Salt v Locker* [1898] 2 Ch 643, 653–4.

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Proposed ground 1(a) of appeal: The relevant right conferred by s 8(4)(a) of the Water Act is not a right to take (extract) water in accordance with a licence issued under s 51; it extends only to a subsequent right to use water once it has been lawfully taken or received in accordance with such a licence

92 The objector did not take this point before the primary judge. Accordingly, his Honour's reasons did not deal with it. Nevertheless, because it goes to a jurisdictional issue, the objector should not be precluded from raising the point at this late juncture.

93 It may be accepted that the initial provisions of s 8 utilise both the concepts of taking and using water.

94 In each case however the subsection grants a right to use water which is taken in a specified manner.

95 When the section is read as a whole (as we have already observed) the right to take merges into a right to use.

96 In consequence, at the very same point in time that water is taken from the use of the Crown it commences in fact to be used by the person who has the right to do so.

97 The purpose of the provisions relating to taking water is not to provide a separate substantive right to take water independent of its use, but to define the sources of water which attract rights to use.

98 Consistently with this view, s 51 provides for 'take and use' licences not 'take *or* use' licences.

99 Section 8(4) is the only instance of the provisions made for water rights under s 8 in which the grant of a right to use is not preceded by a grant under s 8 of the right to take.

100 This is because in the case of s 8(4)(a) the source of the water will be defined by the licence or authority required by the subsection as a precondition to the right to use.

101 In the case of s 8(4)(b), the source of the water is defined by reference to legal rights derived from third parties.

102 In the case of s 8(4)(c), the source of the water is defined by reference to sources upon land occupied by the user or in respect of use authorised by the occupier. It relates only to rainwater or other water which occurs or flows otherwise than in a waterway or bore.

103 In our view, the right conferred by s 8(4)(a) to use water 'taken or received ... in accordance with a licence ... under this Act', is one upon which the permit applicant can rely in respect of water taken and used under the s 51 take and use licence, by virtue of s 8(6) as 'limited only to the extent to which

an intention to limit is expressly (and not merely impliedly) provided in ...' statutory instruments of the various types specified.

104 The contrary view would disconnect the power to grant a s 51 take and use licence to both take and use groundwater from a substantive right to both take and use water. Section 8(4) would be understood as giving a right to use but not to take water.

105 Sections 51 and 55 should not themselves be construed as enabling the grant of a licence which independently results in a right to take and use. First, they are not contained in div 1 of pt 2 of the Act which states rights to water but in pt 4 which deals with the allocation of water. Secondly, they do not purport to grant rights either in language analogous to that found in div 1 of pt 2 or in express terms at all. Such language is necessary to qualify the rights of the Crown provided for in s 7. Thirdly, if they (and other licence provisions under the Act) are construed as independently resulting in the grant of rights to take and use water, then the right granted under s 8(4)(a) would be superfluous insofar as it relates to licences issued under the Act.

106 It cannot be that the sections in combination are intended to give a right to use but no actual right to take the water in the first instance. As the permit applicant submits, this would be an absurd outcome. The better view is that the s 51 take and use licence specifies and defines the source from which water may be taken for the purpose of and incidentally to use in accordance with s 8(4)(a). The licence states the content of the right granted by s 8(4)(a) including the source and quantity of the water which is the subject of the right. Accordingly, proposed ground 1(a) should be rejected.

107 The permit applicant also submits in the alternative that the licence it holds to operate a bore, entitles it to take water and that right is entrenched by s 10.[50] We do not accept that this is so. Sections 67 and 69 are within pt 5 of the Water Act, which deals with works. The s 67 works licence applied for under s 67 and granted under s 69 is an authority to operate specific works.[51]

108 Although the Act cannot be construed by reference to the licences, it may be noted that the s 51 take and use licence notes the s 67 works licence as a 'related works licence' and gives its number WLE058275.

109 Section 67(1) relevantly provides as follows:

> (1) An Authority or any other person may apply to the Minister for the issue of a licence to construct, alter, operate, remove or decommission—
>
> (a) any works on a waterway (including the River Murray), including works to deviate (temporarily or permanently) a waterway; or
>
> (b) a bore.

---

50 Section 10 is extracted at [110] below.

51 'Works' are defined by s 3 to include: '(a) reservoirs, dams, bores, channels, sewers, drains, pipes, conduits, fire plugs, machinery, equipment and apparatus, whether on, above or under land. It has been granted in aid of the s 51 take and use licence'.

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110 Section 10 is likewise concerned with rights to construct or operate works:

> (1) An Authority or any other person may, in accordance with this Act, construct or operate works for, or which may result in—
>
> (a) the drainage of any land; or
>
> (b) the collection, storage, taking, use or distribution of any water; or
>
> (c) the obstruction or deflection of the flow of any water.
>
> (2) The right conferred by subsection (1) is limited only to the extent to which an intention to limit it is expressly (and not merely impliedly) provided in—
>
> (a) this Act; or
>
> (b) any other Act; or
>
> (c) the provisions of a licence issued, or entitlement granted, under this or any other Act.

111 The bore may be operated to take and use groundwater for stock and domestic use under ss 8(1) and 8(3B). It may be operated to take and use groundwater for commercial or industrial use pursuant to the s 51 take and use licence under s 8(4). Nonetheless, for the reasons we have explained, the permit applicant is entitled to rely on ss 8(4)(a) and (6) without recourse to s 10.

Proposed ground 1(b): The permission actually conferred by the licence issued to the permit applicant under s 51 of the Water Act is explicitly limited in scope so as not to remove the need to apply for any authorisation or permission necessary under the Planning and Environment Act with respect to any activity authorised by the licence.

112 The permit applicant relies upon the right created under s 8(4) to use water taken in accordance with a licence issued under the Water Act, but the objector submits that the scope of the licence logically limits the effect of s 8(6).

113 In answer, the permit applicant submits that s 8(6) itself provides for such limitation but no limitation arises under that provision in the present case.

114 Section 8(6)(c) of the Water Act specifically envisages that a right conferred by s 8 may be limited to the extent to which an intention to limit is expressly provided in 'the conditions of a licence issued under this Act'.

115 Sections 56(1)(a) and (c) make specific provision for the imposition of conditions upon take and use licences including: 'any other conditions that the Minister thinks fit and specifies in the licence'.[52]

116 In the present case the s 51 take and use licence contained the following preliminary statement in italics differing from the script adopted in the body of the licence:

> The information in this copy of record is as recorded at the time of printing. Current information should be obtained by a search of the register. The State of

[52] Water Act s 56(1)(c).

> Victoria does not warrant the accuracy or completeness of this information and accepts no responsibility for any subsequent release, publication or reproduction of this information.
>
> This licence does not remove the need to apply for any authorisation or permission necessary under any other Act of Parliament with respect to anything authorised by the take and use licence.
>
> Water used under this entitlement is not fit for any use that may involve human consumption, directly or indirectly, without first being properly treated.
>
> The Authority does not guarantee, by the granting of the licence, that the licensee will obtain any specific quantity or quality of water. The Authority is not liable for any loss or damage suffered by the licensee as a result of the quantity of water being insufficient or the quality of the water being unsuitable for use by the licensee at any particular time or for any particular purpose.

117 The objector relies on the second paragraph of this statement.

118 The preliminary note reflects the terms of ss 70[53] and 77[54] of the Water Act which qualified the grant of rights under certain other licences with respect to the operation of works (s 67) and disposal of matter underground by way of a bore (s 76).

119 These types of licences are not caught by the terms of ss 8(4) and (6), although s 67 works licences have the benefit of s 10(2).

120 The first two paragraphs of the preliminary statement on the s 51 take and use licence are in identical terms to those of the preliminary statement on the s 67 works licence. It may be that administrative practice with respect to s 67 works licences (based upon s 70) has been applied to the form adopted for s 51 take and use licences. Whether this is so or not, the form of words taken from s 70 falls to be interpreted in an entirely different context in the present case.

121 After the preliminary statement, the s 51 take and use licence then states:

> This take and use licence entitles its holders to take and use water as set out under the licence description, subject to the conditions that are specified.

122 The licence then sets out the content of the licence under separate headings with respect to the licence holder, licence contact details, licence description, licence volume details, extraction point details, land on which the water is to be used, related instruments, and application history.

123 The licence then under the heading 'conditions' states:

> This take and use licence is subject to the following conditions:

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53 Section 70 provides: 'The issue of a licence under section 67 does not remove the need to apply for any authorisation or permission necessary under any other Act with respect to anything authorised by the licence.'

54 Section 77 provides: 'The approval of an application under section 76 in respect of a disposal does not remove the need to apply for any authorisation or permission necessary under any other Act with respect to the disposal.'

...

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124 Twenty detailed conditions follow relating to method of taking, take location, take volume and rate, temporary transfers to the licence holder, water allocations, take period, rosters and restrictions, metering the water taken and used, use of water, managing drainage disposal, and fees and charges.

125 In our view, it is plain that the preliminary statement upon which the objector seeks to rely is not a condition of the s 51 take and use licence within the meaning of s 8(6)(c). When the licence is read as a whole, the preliminary statement is not part of the substantive licence at all. It is not set out in the licence subsequent to the grant of authority as a condition of that grant. It is not described as a condition and it is not located with the other conditions so described within the licence. Rather, it is simply an introductory statement like that which precedes it to the effect that 'current information should be obtained by a search of the register'. Indeed, at one point counsel for the objector conceded in argument that he did not rely on this paragraph of the licence as 'a condition per se'.

126 Moreover, even if the preliminary statement were regarded as a condition, it would be necessary to consider whether it was 'necessary' under the PE Act to apply for permission under that Act for something authorised under the licence. In turn, the answer to this question is governed by s 6(2) of the PE Act which, as we have said, does not evidence any express intention to limit the rights granted under the Water Act.

127 The better view is that the preliminary statement simply directs the reader to the possibility of express limitation upon water rights created in accordance with s 8(6). It does not create such limitation itself.

128 For completeness we should add that insofar as the general words of the proposed ground of appeal might be understood as directed to s 8(6)(a) of the Water Act, the same problems arise. First, we do not read the introductory words relied upon as comprising part of the 'permission' or 'authority' granted by the licence. Again, at one point counsel put the argument by stating:

> It is part of the licence. It is not part of the permission.

129 But if the second paragraph of the preliminary statement is not part of the permission or authority, then it does not fall within the terms of s 8(6)(a).

130 Secondly, as we have said, the preliminary statement does not express an intention to limit the relevant right to use water save by reference to what is 'necessary under any other Act'. The PE Act does not expressly demonstrate an intention that it is necessary to obtain permission under it to extract groundwater.

131 It follows that proposed ground 1(b) must fail. The preliminary statement does not limit the rights granted under the s 51 take and use licence in the

manner contended for.

Proposed ground 1(c): As a matter of law, a requirement to obtain a planning permit for a land use purpose does not limit any right conferred by a licence issued under s 51 of the Water Act because the planning permit requirement does not operate upon the legal right actually conferred by a water licence

132 The objector's submission in respect of proposed ground 1(c) is that the planning permit requirements imposed under the planning scheme do not 'limit' the rights conferred by s 8(4). The essential steps in the objector's submission are set out in particulars of proposed ground 1(c):

i. A land use planning permit regulates the use of land, independently of the particular activities that may be involved in that land use.

ii. A licence issued under s 51 of the Water Act authorises a particular activity without conferring any additional right to use land for a particular purpose.

iii. Section 8(6) concerns the direct limitation of the specific legal right conferred by s 8(4)(a); it does not render inoperative any and all extraneous or incidental legal impediments, howsoever arising, to a person's ability to effectively exploit such a right in the pursuit of any and all desired purposes.

133 The objector is correct to distinguish between a right to use water under the Water Act and a right to use land for a particular purpose under the PE Act.

134 Moreover, the right to control the extraction of groundwater for which the objector contends is put forward as an incidental consequence of a broader right to control land use. In turn, the objector submits that s 8(6) is concerned only with direct limitation of the right to use water and not indirect limitation by way of control of land use.

135 The fundamental difficulty facing the objector is however that by reason of s 8(6) of the Water Act any limitation upon the right to use land for a particular purpose under the PE Act cannot incidentally or impliedly limit the right to use water as such under the Water Act. This is because the PE Act does not expressly (and not merely impliedly) provide any intention to limit the rights conferred by s 8 of the Water Act. As s 8(6) makes clear, an implication that might otherwise be said to lie in general words will not be sufficient. The general provision for the regulation and prohibition of land use under the PE Act does not expressly qualify the use rights granted by the Water Act.

136 The objector cannot raise a planning objection to the use of groundwater as such in accordance with the Water Act. Conversely, of course, the use of the land for the purpose of a 'utility installation' (as defined) is regulated by the planning scheme and an application for a permit for that land use is open to objection under the provisions of the PE Act.

137 The objector's written case states in part:

> Parliament cannot have intended in enacting s 8(6), to grant every person with

> a water licence an immunity from every single law, howsoever arising, whether civil or criminal — to literally render every such law inoperative — to the extent that the law would inhibit a licence holders practical ability to use that licence whenever, wherever, in whatever manner and from whatever purpose they desire to.[55] Such an interpretation would lead to endless absurd outcomes, and is contrary to the terms of s 8(6) which refer only to the limitation of a legal right itself, not to limitations inherent to the context and manner in which someone may wish to exercise the right on any given occasion.[56]

138 The view we take of s 8(6) does not give rise to the absurdity which is postulated. The permit applicant will still require a planning permit for the proposed land use. But it will not require a planning permit for the incidental extraction of groundwater.

139 Proposed ground 1(c) must also fail.

Proposed ground 1(d): In the alternative, to the extent required by s 8(6) of the Water Act, the express requirement to obtain a planning permit to use land for a specified purpose (including a purpose specified as 'Any other use not in Section 1 or 3' of the table of uses in cl 35.0–1 of the planning scheme) does expressly (and not merely impliedly) limit any right conferred by s 8(4)(a) to the extent that such a right is exercised in using land for a purpose for which there is an express requirement to obtain a planning permit

140 As we have already sought to explain, the PE Act itself does not demonstrate an express intention to limit rights to use water granted under the s 8 of the Water Act.

141 It follows that the planning scheme made under the PE Act could not do so.[57]

142 Nor does the planning scheme readily meet the description contained in s 8(6)(b) of 'any permission or authority granted under any other Act'. Presumably deliberately s 8(6)(a) refers to 'this Act, any regulations or bylaws under this Act, or any permission, authority or agreement under this Act'. The following subsection relating to any other Act omits reference to 'any regulations or bylaws' under any other Act. This phrase would be apt to describe a planning scheme, but conversely a planning scheme is itself neither a 'permission' or an 'authority'.[58]

143 Further for the reasons we have explained, when discussing the planning scheme above, we are not persuaded that the Tribunal was incorrect to characterise the proposed use as an 'utility installation'. If this is so, the innominate use provision upon which this proposed ground is premised is

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55 See *Director of Public Prosecutions v Downer EDI Works Pty Ltd* (2015) 47 VR 688, 719 [121]–[123].

56 Citation in original.

57 *R v Toohey; Ex parte Northern Land Council* [1981] 151 CLR 170, 187–8 (Gibbs CJ) and the cases there cited.

58 Water Act, ss 10(b), (c).

irrelevant.

144 Moreover and in any event, the innominate use provision upon which the objector seeks to rely makes no express reference to rights to use water and its implied scope could not be sufficient to meet the requirements of s 8(6) that an intention to limit water rights be expressly (and not merely impliedly) provided for.

145 'Extraction of groundwater' is not a use defined in the planning scheme, nor is it an activity that is either expressly referred to or expressly controlled by any provision of the planning scheme.

146 Proposed ground 1(d) thus fails at a series of consecutive levels.

Conclusion

147 For the above reasons, the proposed grounds of appeal directed to the primary judge's substantive conclusion must fail and leave to appeal should be refused.

Orders accordingly.

Solicitors for the applicant: *HWL Ebsworth Lawyers.*

Solicitors for the respondent: *Best Hooper.*

E LEVINE
BARRISTER-AT-LAW

[The Court of Appeal subsequently allowed a cross-appeal by the respondent in respect of costs: [2018] VSCA 104.]