Fix the broken notice and appeal provisions of the *Water Act*

The problem

For many years, planning permits issued under the *Planning & Environment Act* have been subject to a robust process of public notification and appeal to the Victorian Civil and Administrative Tribunal. Third parties have meaningful rights to know when a proposal might affect them and to participate in the approval process. Few people would not at some time have received an informative letter from their local Council in the mail, or seen a sign up in front of a property, letting the public know that a permit application has been made and telling them where they can get more information and how to make an objection.

In contrast, the public notice and appeal process for an application for a licence to take and use water under the *Water Act* is grossly inadequate, and leaves the public in the dark and shut out from the process. Decisions are made, licenses are issued and appeal time limits run out before people who might be affected are even aware of what's happening.

Water is an increasingly scarce and contested shared natural resource, and when one person is given permission to take large amounts of it that can have serious impacts on others, like farmers, whose livelihoods depend on having reliable access to water.

One of the purposes of the *Water Act*, set out in section 1, is 'to maximise community involvement' in decisions relating to the use of water resources. The faulty public notice and appeal provisions are clearly failing to achieve that purpose.

These serious problems with the notice and appeal provisions of *Water Act* are not new or unknown. They were specifically pointed out by VCAT almost nine years ago, in the decision of *Conroy v Goulburn Murray Water* [2009] VCAT 2108, where the Tribunal said:

> The following problems with procedures in the *Water Act 1989* are identified:
>
> - There is no obligation under the Act to give notice of an application for a works licence or a licence to take and use water. Giving notice of an application is at the discretion of the water authority.
> - A person whose interests are affected by a decision has a right of review to the Tribunal, but if third persons do not know about the application, they may be denied an opportunity to exercise that right.
> - There is no obligation imposed on the water authority to give notice of its decision to anyone, yet rights of review must be exercised within 28 days after the day on which the decision was made.
> - If there is no obligation to give notice of a decision, a person's right of review may be compromised by a failure to give notice in time for a person to exercise their right, which is what has occurred in this case.
> - Rights of review are given to a person whose interests are affected. Rights of review are not limited to licence applicants or objectors.
>
> In light of the growing interest by people in the grant of new licences and the construction of new bores given the pressures on water resources, it is evident there is a disconnect between the processes for requiring notice to be given of licence applications, giving notice of decisions, and rights of review, which should be addressed by amendment of the legislation.

> In the meantime, water authorities are encouraged to adopt good practice procedures to ensure that applications are advertised consistently and as a matter of course, and that notice of decisions is given to applicants and objectors alike at the same time and immediately a decision is made in order to enable any party to exercise their rights of review under the Act within time.

Despite this, neither of the things the Tribunal identified back in 2009 as needing to be done have been done. The *Water Act* has not been amended to fix the problems, and in the meantime water authorities continue to make decisions without providing any or adequate notification to people who may be affected.

The solution

- Amend section 49(2) of the *Water Act* so as to impose on water licence applications the same kind of meaningful public notification requirements that already exist for planning permit applications under section 52 of the *Planning & Environment Act* – including:
    - the placement of a sign on the land
    - publication in local newspapers
    - personal notice to any person whose interests may be affected by the grant of the licence.
- Amend section 49(1) of the Water Act so as to apply the public notification requirements to an amendment application by a licence holder under section 59A.
- Amend section 49(3) of the *Water Act* so as to require the public notification to invite submissions on the application to be made.
- Amend sections 55, 58 and 62 of the *Water Act* so as to provide that the Minister (or delegate water authority) cannot make a decision to grant, amend (under section 59A(1)) or approve the transfer (under section 62(3)) of a water licence until the public notification period has ended (in the same manner as section 59 of the *Planning & Environment Act).*
- Insert a new section 55A of the *Water Act* so as to:
    - require the Minister (or delegate water authority) to give notice of a decision to approve a water licence to all persons who objected to it (in the same manner as section 64 of the *Planning & Environment Act)*
    - provide that a water licence must not be issued until the time for any application for review of the decision to VCAT has ended, or any application for review has been determined (in the same manner as section 64(3) of the *Planning & Environment Act).*
- Amend sections 58, 59A and 62 of the *Water Act*, so as to also apply the requirements of the new section 55A to:
    - a decision to renew a water licence under section 58(1)
    - a decision to amend a water licence on the application of a licence holder under section 59A(1)
    - a decision to approve the transfer of a water licence under section 62(3).

- Insert a new Division 3A of Part 4 of the *Water Act* so as to provide a process by which, on the motion of the Minister or application by an affected third party, the Tribunal may revoke or amend a water licence (in the same manner as Division 3 of Part 4 of the *Planning & Environment Act)* in circumstances where there has been:
    - a material misstatement or concealment of fact in relation to the application for the licence (or its renewal, amendment or transfer)
    - any substantial failure to comply with its conditions
    - any material mistake in relation to its grant (or renewal, amendment or transfer)
    - any material change of circumstances which has occurred since its grant
    - any failure to give notice in accordance with the Act.

Make the *Water Act* prioritise the use of water as a productive resource, not just a commodity to be mined and sold off

The problem

Entitlements to take and use water under the *Water Act* are linked to land. Land is where water is used, and the licensing system is based on identifying and sharing the total amount of water that is available between various users and the environment within each particular water catchment area.

For that reason, if a landowner wants to transfer the water licence that is linked to their land to someone else, they must make an application under section 62 and establish that taking the licence away from their land and transferring it to some other land will be consistent with the fair management of that water sharing scheme for the catchment.

But there is no similar process or consideration where someone keeps the water licence and just extracts and sells on all of the water they can extract under the licence, taking it away from the catchment and leaving the land unused.

The purpose of the *Water Act* is to manage the use of water as a productive resource. That doesn't require an all out ban on water mining in all cases, but it does mean that people who need water for productive use should not have to compete directly for access with those who just want to mine enormous quantities of it and sell it off directly as a commodity.

The solution

- Insert a new section 51BA of the *Water Act* so as to:
    - Define 'primary extractive purpose' for the purposes of section 51BA as the taking and use of water for the purpose of on-selling or trading it directly as water, including sale or trade after filtering, processing or bottling.
    - Require an application for a water licence under section 51 to include a specific request for permission to use water for a primary extractive purpose.
    - Require such an application to include more comprehensive information on potential impacts, including a comprehensive hydrogeological assessment.

- Prohibit the use of any water licence for a primary extractive purpose except where such permission has been requested under section 51BA, granted and endorsed on the water licence.
- Provide that permission to use water for a primary extractive purpose:
  - can only be granted if the Minister (or delegate water authority) is satisfied that the use of water under the entitlement will have no material adverse effect on existing authorised uses of water, on the needs of other potential applicants, or on the environment
  - cannot be granted in a water supply protection area or in an area in which water entitlements are capped or subject to rationing and restrictions.

Regulate water mining under the *Planning & Environment Act*, like other kinds of natural resource extraction

The problem

A person who proposes to carry out natural resource extraction will almost always require two separate permissions – permission under specific legislation such as, for example, the *Mineral Resources (Sustainable. Development) Act*, and also a planning permit under the *Planning & Environment Act*.

The planning permit process is important because it provides the opportunity for a decision to be made taking into account the combination of the whole wide range of planning factors that go into determining whether a proposal to extract natural resources is suitable in its particular place and context.

This can include the strategic priorities for areas of land with certain zoning – such as whether the land is especially well suited to agriculture – and can even draw in wider issues such as the enormous waste and environmental harm of single use plastic water bottles. It allows all of the relevant factors – such as the impact on the environment, the availability of water for others, the amenity impacts from heavy tankers transporting the water in and out – to be considered and weighed up together and at the same time, in a balanced and integrated decision for the proposal as a whole.

Every Victorian planning scheme contains specific requirements, in clauses 52.08 and 52.09, for dealing with proposals for the exploration and extraction of various natural resources – such as mining for minerals, for stone or for petroleum.

The only thing missing is mining for water.

The Supreme Court has determined that mining for water does not require a planning permit at all as the law currently stands – because when someone has a water licence, the operation of the *Planning & Environment Act* is displaced by the previously unknown effect of an obscure section of the *Water Act*.

Ironically, the guidelines for quarries in clause 52.09 of every planning scheme specifically require planning decisions to consider the effect of quarrying on groundwater and its impact on other water uses. So if someone proposes to extract groundwater in order to quarry for the stone below it then they might be refused a permit on the basis of groundwater impacts, but if they propose to just extract as much water as they can to sell off directly then they do not even need a planning permit.

There is no reason why this loophole for water mining should remain. Again, this does not require water mining to be banned in all cases, but it should at the very least require a planning permit just like other kinds of natural resource extraction.

The solution

- Either:
    - repeal sections 8(6) and 10(2) of the *Water Act*, which provide an effective (and unwarranted) immunity to holders of a water licence from the ordinary requirements of other legislation such as the *Planning & Environment Act*; or
    - insert a new subsection 47(3) of the *Planning & Environment Act*, to specify that a requirement that a permit be obtained for a use or development of land is expressly intended to limit, to the extent necessary, any right conferred by sections 8 and 10 of the *Water Act*.
- Amend clause 74 of all planning schemes to insert a new land use term 'Water extraction', included in the group 'Earth and energy resources industry' and defined as 'land used for the extraction of water for the purpose of on-selling or trading it directly as water, including sale or trade after filtering, processing or bottling'.
- Insert a new clause 52 'particular provision' in all planning schemes to set out policy, requirements and decision guidelines for permit applications for water extraction. These should include a requirement for a robust hydrogeological assessment to establish potential effects on the environment and on other land uses in the area, and a clear policy preference for the refusal of applications which are likely to impact upon surrounding productive land uses.