SECTION 11

RIPARIAN AND WATER RIGHTS

Compiled by S.C. Saunders

INTRODUCTORY NOTE TO THE 1994 UPDATE

The wide ranging Water Act 1989 No. 80/1989 which came into operation with the exception of the last two sections, 328 and 329, on 1 September 1991, has amended and clarified much previous legislation relating to water.

Section 11.13 has been added in this update to summarize the new Water Act and should be read in conjunction with the 1989 edition of the Handbook text, which has been retained in its entirety to provide continuity and an understanding of previous practices.

Compiled by A.E. Timcke


11.13 THE WATER ACT 1989

11.13.1 Introduction

The *Water Act* 1989 (No. 80/1989) with the exception of sections 328 and 329 commenced operation on 1 September 1991.

The Act repealed more than 45 pieces of legislation that had evolved over the years for the use and operation of water in Victoria.

The Act has many aims but the overriding purpose is to resolve the various piecemeal approaches to water use and regulation and make one clearly written and easily understood Act. The Act covers all areas of concern to water administrators and water users.

This sub-Section does not re-state the detailed history of the development of water legislation in Victoria which is recorded in the earlier parts of this Section prepared in 1989. The reader should refer to the 1989 edition to learn of the background and sequential development of water in Victoria.

The *Water Act* 1989 is within itself a complete document for water and it resolves many of the 'grey' areas which existed previously. This section on the Act has been expanded to summarise most of the Act (except finance). The Act is extensive, comprising 329 sections laid out in Parts, Divisions (of Parts), with the sections sequentially numbered.

11.13.2 Common Law

The early social customs for sharing water evolved as a necessary way to establish rights and responsibilities in the relation of one neighbour with another.

In England these customs became laws applied by courts to resolve disputes. This judge-made law is known as common law.

English common law allowed owners whose land abutted a stream to take water for stock and domestic purposes. In addition such owners could take water for other purposes subject to the overriding duty to let the stream flow on. This "riparian doctrine" denied other landowners access to the water in the stream.

Ground water was subject to other common law rules. An overlying landowner could take any amount of water from under his land without regard to his neighbours wells.

Another set of common law rules sought to solve drainage disputes between upstream and downstream landowners.

Common law rules therefore were used to resolve private and personal disputes. There was no formal role for government concerning the apportionment of rights.
11.13.3 Statute Law

With the development of larger towns and combined with the industrial revolution, the demand for water became a public matter. The need to store and conserve large amounts of water for urban, industrial and irrigation uses cut across the simple rules of common law. Private rights had to be qualified. In Australia, it became accepted that government was required to fund the capital and manpower to institute major water projects.

Legislation became the method by which common law rights were qualified to allow a greater role for government in water management.

In Victoria the landmark law enactment was the Irrigation Act 1886. This Act, inter alia, was intended to abolish the common law riparian right and give the Crown the right to control all rivers.

11.13.4 Water Act 1989

Prior to the Water Act 1989 most of Victoria's water law came into being to solve particular problems without regard to the systematic way in which water resources should be managed. As a result the legislation did not give clear directions to courts to ensure that the solution of disputes between individuals was consistent with wider community interests. The 1989 Act emphasises the need for resource based legislation.

The Act has built on basic principles which were clearly identified by Alfred Deakin in his Royal Commission which led to the Irrigation Act 1886. Those principles are:-

(a) water is a community resource;
(b) the right to access water should be unambiguously defined;
(c) that the state has power to ensure that water resources are equitably distributed, properly protected and that individual entitlements are protected;
(d) government and government agencies must be subject to review and questioning where communities or individuals are disadvantaged.

The Water Act 1989 has followed Deakin's principles and has introduced some new measures to benefit users and communities. In particular the Act has redefined:

11.13.5 Rights

These are contained in Part 2, Division 1, sections 7-13, which clearly define and simplify the rights to use water, and state the rights of the Crown, statutory authorities and private individuals.

Section 7 - Crown has control of all water in a waterway and all groundwater.
Section 8 - The right for individuals to take water free of charge to which the individual has defined access.
Section 9 - Empowers Authorities to take water in nominated amounts.
Section 10 - An Authority or other persons' rights to construct and operate works.
Section 11 - Very important. This section has the facility to restrict the riparian rights to water to only One lot of a subdivision of a parcel of land which previously enjoyed the right.
Section 12 - Authorisation from an appropriate authority is required for any substantial change to land use which may affect the drainage regime.
Section 13 - The right of the Minister to qualify any rights to water in the interests of the area or system.
11.13.6 Liabilities
These are contained in Part 2, Division 2, sections 14-21 and Clearly define the liabilities and responsibilities of government and individuals.

Section 14 - Ensures that polluting, constructing, maintaining, operating or interfering can be redressed for such actions before or after the commencement of this section.

Section 15 - Civil liability applies to the unauthorised taking, or use of water or unauthorised works. Damages may be awarded to injured parties.

Section 16 - Various definitions of liability arising from flow of water over other lands and a statement of responsible parties.

Section 17 - Defines some special cases where liability is not the basis for proceedings.

Section 18 - Ensures the liability at common law of an owner of a dam from which water escapes and causes damage.

Section 19 - Deals with the jurisdiction of the Administrative Appeals Tribunal for claims for damages and with the constitution of the Tribunal.

Section 20 - Matters to be taken into account to determine if flow is "reasonable".

Section 21 - Some restrictions and considerations in relationship to stream flow for public works.

11.13.7 Groundwater

Until the Water Act 1989 there was an unhappy and complex division of functions between the former Department of Mines and the former State Rivers & Water Supply Commission and of course the successor bodies to both those bodies.

Under the Water Act 1989 the Crown has the right to the use, flow and control of all groundwater. See Part 2, Division 1, section 7.

The powers of the Minister are sweeping and are generally defined in Part 3, Division 2, sections 23-26, and Division 3, sections 27-32.

The broad details are:-

Part 3, Division 2 - Water Resources Assessment Programme.

Section 23 - The Minister may do anything considered necessary for water assessment programmes including approval for entry onto land, keeping records and directing authorities.

Section 24 - Details the requirements for drilling and entering on land.

Section 25 - Supply to the Minister as directed.

Section 26 - Requires that a report on the water resources programme must be in the annual reports of the Department of Minerals & Energy and the Rural Water Corporation.

Part 3, Division 3 - Groundwater Supply Protection Areas

Section 27 - The conditions and purpose for which the Minister may declare an area as a ground-water supply protection area.

Section 28 - Variations to groundwater protection supply areas.

Section 29 & 30 - Requirement for the Minister to appoint a consultative committee. The membership of such a consultative committee is nominated and the requirement for the formulation of a management plan.
Section 31 - Details procedure for amendment or revocation of a management plan.

Section 32 - Management plan must be available for inspection.

11.13.8 Water Storages

Part 3, Division 4, section 33 gives the Minister the power to qualify all or any of the rights to take water from an area or supply system. The requirements to so qualify such takings are listed.

11.13.9 Allocation of Water

Under the provisions of Part 4, Division 1, sections 34-48, and Division 1, sections 49-64, the allocation of bulk water entitlements must be applied for either under the provisions of the Act or an Act which is now repealed and is continued under this Act.

Sections 36-48 detail the procedure and authorities required to register and take up entitlement to bulk water. The sections are quite specific and thereby resolve any problems which were inherent in the former and repealed Acts.

Sections 49-64 deal with the steps required to establish, alter, amend or revoke licences for bulk water. It should be noted that an application for a licence for bulk water may refer to the Murray River, groundwater or any Rural Water Corporation works. The Minister has wide powers in these sections.

11.13.10 Works

Part 5 of the Water Act 1989 has six divisions and all are devoted to the orderly regulation and to control licences to construct and operate works.

Part 5 deals with works as follows:

Division 1

Sections 65-66. Requirement to advertise details of an application to construct or alter works, renewal of licence, transfer a licence or dispose of any matter through a bore. The Minister has the power to require such applications to be submitted as he sees fit and to a panel of persons to which he wishes the application to be referred.

Division 2

Sections 67-75. Details quite precisely the procedure required to ensure the issue of a licence as detailed in Division 1. This Division has many checks and balances but generally relies on the Minister to approve of, amend or refuse any such applications. Provision is made for the clear definition of offences.

Division 3

Sections 76-77. Set out the procedure to dispose of any matter underground by means of a bore. Requires application to and approval of the Minister.

Division 4

Sections 78-82. Set out the requirements and procedures for the Minister to give directions.

Division 5

Section 83. Sets out the avenues available to a person for a review of a decision made by the Minister.
Division 6

Section 84. Shows the details of penalties for offences under the Act.

11.13.11 Authorities

Part 6 sets out the structure and responsibilities of various water authorities.

Division 1 Sections 85-95 Authorities in general
Division 2 Sections 96-106 Authorities & Districts
Division 3 Section 107 Environmental Areas
Division 4 Sections 108-110 Committees
Division 5 Sections 111-113 General
Division 6 Sections 114-115 The Rural Water Commission
Division 7 Sections 116-122 Other Particular Authorities

11.13.12 General Powers

Part 7, sections 123-161.

This part of the Act has many sections but the whole thrust of the part is summarized in Section 123 (i) - an authority has power to do all things that are necessary or convenient to be done for or in connection with, or as incidental to the performance of its functions, including any function delegated to it.

The succeeding sections give details of the application and responsibilities of that authority. Sections 133 and 134 qualify the right of an authority or authorised person to enter onto any level.

11.13.13 Water Supply

Part 8, sections 162-171

This part defines in general terms the functions of water authorities which administer or are responsible for a water district. Section 167 is another authority for authorised person to enter any land for the purposes of water supply protection, subject to the provisions of section 133.

11.13.14 Sewerage

Part 9, sections 172-184 General duties and responsibilities concerning the functions of sewerage and other authorities.

11.13.15 Waterway Management

Part 10

This sweeping and comprehensive part is designed to, and probably will, make the management of all waterways and flood prone land simple and effective. Waterway management is defined as the management of waterways, drainage or floodplains. The part is in seven divisions.

Division 1 Preliminary

Sections 185-186 Application of part and functions of authorities.
Division 2  Waterway Management
Sections 187-197 Covers closing of access in certain circumstances, prohibits interference of works and strict control over discharge into any waterway.

Division 3  Regional Drainage
Sections 198-200 Certain authorities by definition or direction must carry out the functions for regional drainage.

Division 4  Floodplain Management
Sections 201-212 This important division allows for nominated authorities to investigate floodplains, set flood levels/ declare areas to be flood prone and thereby control all structures and buildings within the floodplain.

Division 5  Water Management Schemes
Sections 213-217 These five sections allow the Minister to require a community based committee to be appointed to carry out an investigation in relationship to water management. Such committees are required to submit a water management scheme and publish details in nominated newspapers and the Government Gazette. The Minister may by publication declare (by Order in Council) the scheme to be an approved scheme. The declaration allows the nominated authority to control reasonable flow or waterway obstruction activities.

Division 6  Drainage Courses
Section 218 Whilst only one section the procedure for declaring a drainage course and the penalties for non-conforming to the directions of the nominated authority is detailed. The Minister may declare any designated water course to be a drainage course.

Division 7  By-Laws
Section 219 Bestows the right of authorities to make by-laws for the effective operation of waterway management.

11.13.16 Irrigation
Part 11, sections 220-232
This part applies to any authority which has an irrigation district. The part until recently (1994) was directed mainly at the Rural Water Corporation (successor body to the State Rivers & Water Supply Commission) together with some other minor irrigation trusts. From 1 July 1994, the various regions of the Corporation became autonomous and the provisions of the part refer to the former regions as authorities.

Detailed definitions and procedures are provided for the powers and duties of authorities, district bulk entitlements, transfer of water rights temporary and permanent, tenders by irrigators for new allocations, the keeping of an irrigation register, subdivision of water rights and the use of Crown land for water supply works.

The part clearly states the requirements of authorities, the rights and obligations of irrigators and the opportunity of costs.

The part brings together in one Act many by-laws. Acts and Regulations which had become clumsy and nearly unworkable in former amendments and regulations.
11.13.17 Access Over Lands

Part 12, sections 233-248 refers to and is designed to facilitate the access over lands. The sections stress that agreement between one landowner seeking access and the owner over whose land the access is required must be the first approach. If agreement cannot be reached there is provision for the requesting owner to apply to the Minister to make an appointment of an authority or Melbourne Water to decide the issue. Included in this process is the right to appeal to the Administrative Appeals Tribunal for a review of any decision of the authority or Melbourne Water.

Any agreement finally settled must include provision for compensation (if appropriate) and must be registered under the Transfer of Land Act 1958 or a memorial lodged for land not under the Transfer of Land Act. Time limits apply to the registrations.

The parties involved must agree to the maintenance of works, and the restoration of roads and other facilities to the condition which existed before the works were installed.

Provision is also made for access over public land including land owned by the Public Transport Corporation.

The Act details the requirements to set up community drainage schemes. Land subject to a community drainage scheme must be registered over land under the operation of the Transfer of Land Act 1958 or by the lodgement of a memorial for land not under the operation of the Transfer of Land Act.

The powers of the Rural Water Corporation, its successor bodies, community committees and municipal councils are broadly defined.

11.13.18 Finance and Accountability

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This part directs all the procedures for finance of water authorities.

11.13.19 Enforcement

Part 14, sections 288-305. In these, the Act sets out the broad definitions of offences and the avenues open to various authorities to protect works and enforce by-laws and regulations.

11.13.20 General

Part 15, sections 306-327 include:

- Listing the delegations available to the Minister together with other powers of the Minister.
- Details of a Drillers' Licensing Board together with powers relating to licence issuing, and revoking or suspending a driller's licence.
- The Governor in Council may make regulations for specified purposes.

This part also introduced a new Part XII - Bed and Banks of Certain Watercourses - into the Land Act 1958. This Part XII adds sections 384-386 to the Land Act and these relate to various definitions. Crown property in bed and banks of certain watercourses, and access etc. to bed and banks of certain
watercourses. These sections should be read in conjunction with Section 7.11.3 of the *Survey Practice Handbook - Part 2*, 1992 update.

**11.13.21 Schedules**

There are 14 schedules to the Act all of which facilitate the operations and understanding of the Act. The schedules in the main refer to the various authorities and their structure. Schedule 13 lists all the Acts which were repealed to allow the proclaiming of the Act.