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In-House Memorandum

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Constructed wetlands – a snapshot of recent and important cases

Constructed wetlands are increasingly becoming core components of urban and peri-urban development and water treatment approvals. All too often legal issues associated with wetland design, development and maintenance are overlooked and can threaten or undermine the success of innovative developments.

The Victorian Civil and Administrative Tribunal (VCAT), and the Victorian Supreme Court, have recently considered the merits of planning decisions concerning constructed wetlands, especially in urban and regional residential developments, as well as related situations involving liability for damage.

These cases indicate that wetland construction and stormwater management are live issues before VCAT and that the courts continue to be responsive to how legal liability should operate in relation to damage or loss arising from water resources management.

Environmentally sensitive areas

Lake Park Holdings v East Gippsland SC [2014] VCAT 1449 concerned the subdivision of grazing land abutting the Gippsland Lakes Ramsar site.

VCAT found that good practice in wetland construction involved infrastructure that promoted environmental values (at [102]) and that where there is an intent to hand over wetland reserve management to Council or other authority, the authority should have a role in determining long-term plantings [at [120]]. It also observed that, where planning considerations for sea-level rise apply, they may affect wetland design, especially where a long-term planning response is required (at [124]-[140]).

Catchment Management Authority

Kennedy Plant Hire Pty Ltd v LaTrobe City Council [2015] VCAT 53 concerned residential subdivision adjacent to an environmental reserve and a waterway designated under the Victorian Water Act that affected drainage lines feeding into that reserve and waterway and their catchment. Council sought a 30m buffer along these drainage lines but VCAT was satisfied that a balance had been struck between ecological protection and residential development, with overall ecological improvement expected. VCAT found that the CMA had a duty to consider flood and stormwater management and, particularly, 'to consider and seek to improve the "environmental values and health of water ecosystems", biodiversity and ecological functions that depend on environmental conditions of waterways' (at [75]).

Constructed wetlands in the achievement of best stormwater design – land availability issues

Canterbury Hills Pty Ltd v Hume City Council [2015] VCAT 80 concerned drainage management in the Development Plan along with potential impacts on threatened species (Growling Grass Frog) habitat and impacts on water and environmental qualities in an existing wetland. In permitting residential subdivision where land constraints prevented best practice stormwater management through constructed wetlands, it

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held that ‘other stormwater treatment measures should be considered to achieve best practice targets’, and sufficient management (at [84]).

Legal liability

The construction of wetlands which interfere with, pollute or adversely affect another person’s land or water resources can enliven liability provisions in the Victorian Water Act. *Pumpa v Goulburn Murray Rural Water Corporation* [2010] VSC 169 considered the precise meaning of ‘flow’ of water onto another’s land and potential legal liability for damage arising. The case involved a dispute over the detrimental effect of salinity diversion works on farming land, in particular through adverse effects on groundwater. The case indicates that the concept of ‘flow of water’ onto another’s land will be understood widely and can include damage arising from the composition of the water, including groundwater, and not just its physical force.

Design of new wetlands

Greenham and Swan Hill Rural City Council [2005] VCAT 2674 concerned construction of a complex wetland system as part of stormwater management abutting the Murray River. Objectors expressed concern about the design, public health (particularly mosquito populations), access and other planning issues. VCAT found that the wetland design contributed to the ‘State Government’s aspiration to have healthy river systems by reducing water quality impacts from catchment runoff and stormwater generated within Swan Hill’ (at [50]).

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