Water Planning and Management

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Foley's List
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Introduction

- **What is a waterway?**
- **What is the impact of the *Water Act 1989* (Vic) on planning decisions?**
- **How does climate change impact waterways and flood overlays for planning purposes?**

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Intersection between the Water Act and Planning Provisions

- **Why is the Water Act relevant to planning?**
  - Planning Schemes, cl 73 : meaning of terms
    - A term used in this planning scheme has its ordinary meaning unless that term is defined:
      - In this planning scheme; or
      - 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.
  - The ***Interpretation of Legislation Act 1984*** **(Vic)** provides frequently used definitions: ***land*** includes “buildings and other structures permanently affixed to land, land covered with water…” and ***waterway*** “means a waterway as defined in section 3(1) of the *Water Act 1989*” .

Why does it matter? Take aways

Why does it matter if a body of water, a drain or a thin blue line on the map is a **waterway**?

- Greater protection under the Planning Scheme
  - Eg clauses 2, 11, 12, 13, 14, 16, 19, 32, 35
- Protection under the Water Act 1989 (Vic) (**Water Act**)
  - The definition of ***waterway*** is pivotal to the Water Act and in its operation in other acts.
  - The Crown has the right to the use, flow, and control of all water in a waterway and all groundwater (s 7(1)).
  - The definition of waterway is intertwined with all rights to water; private rights (s 8), traditional owner rights (s 8A), Authorities rights (s 9) and works rights (s 10).
  - All rights to water, licences and works approvals affecting the use, flow, or control of water are subject to the environmental water reserve (s 7(4)) which is to be maintained to preserve the environmental values and health of water ecosystems, including biodiversity, ecological functioning, quality of water, and other uses that depend on environmental condition (s 4B).

Take aways

- Complex question
- Always a mixed question of fact and law
- Take care how you apply the Waterway Determination Guidelines
- Get good evidence from a water engineer, hydrologist and/or geomorphologist

Topic 1: What is a waterway

- ***Development Victoria v Knox CC* [2023] VCAT 1094**
  - Question of Law: whether Lake Knox /dam was a *waterway for the purposes of the Knox Planning Scheme*
- ***ESG Lysterfield Pty Ltd v Yarra Ranges SC* [2026] VCAT 480**
  - Whether the drainage was a waterway for the purposes of the Yarra Ranges Planning Scheme

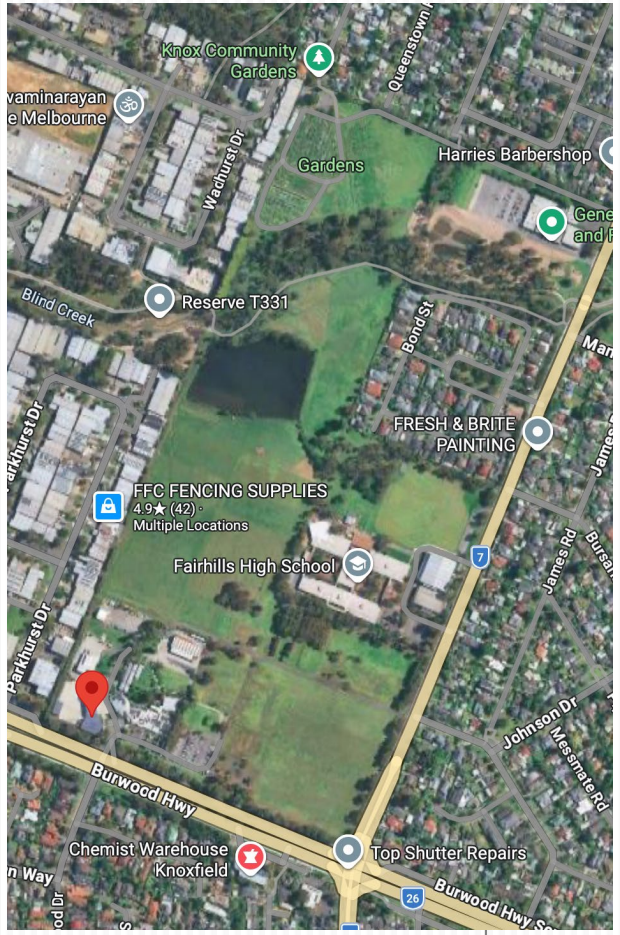
Development Victoria v Knox CC [2023] VCAT 1094

Site: 607-621 Burwood Highway; 19.2ha site

Proposal: to decommission/ remove waterbody, subdivide land (residential), create a water treatment system & wetlands

Contested aspect of the proposal: removal of the waterbody to clear space for housing and stormwater / wetlands requirement.

Concern of the residents and the Knox Environment Society (**KES**): destruction of the deep-water lake would destroy critical habitat for the ***endangered Blue-billed duck***



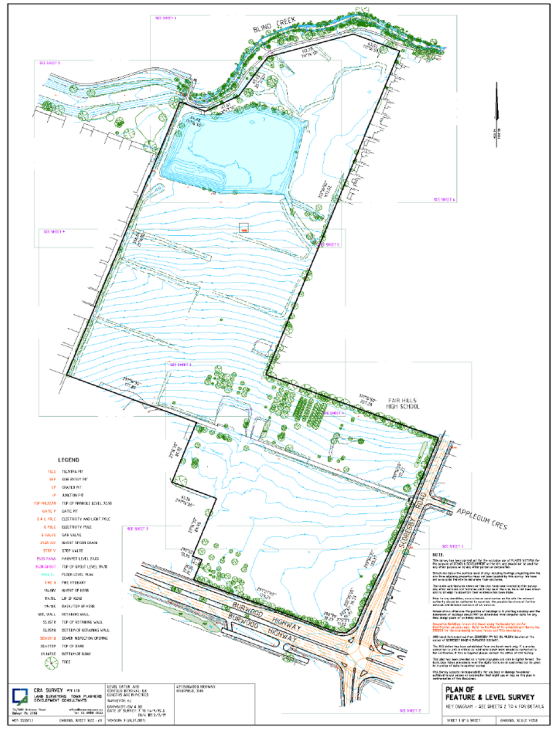
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THE FACTS

- "man-made" water body/dam; built for agricultural water supply (in 1940s) Reasons (**R**)[18], [24]
- 1.5m-2m average depth, 4m in SW corner R[21]
- became habitat for range of flora and fauna incl endangered blue-billed duck (esp eel grass, also endangered) R[25]

14 The feature and level survey plan show the existing water features on the subject land.



5 Planning Property Report, Tribunal Book 1, page 270.

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Development Victoria v Knox CC [2023] VCAT 1094

FACTS contd:

- water inflow from *45ha catchment* area via inlet drains to SW, outflow into Blind Creek R[15], [19], [22]
- The existing flood extent map for the 1% Annual Exceedance Probability ('AEP') event, appears to indicate that the northern inlet drainage line conveys overland flood flows from the gully to the waterbody. R[16]

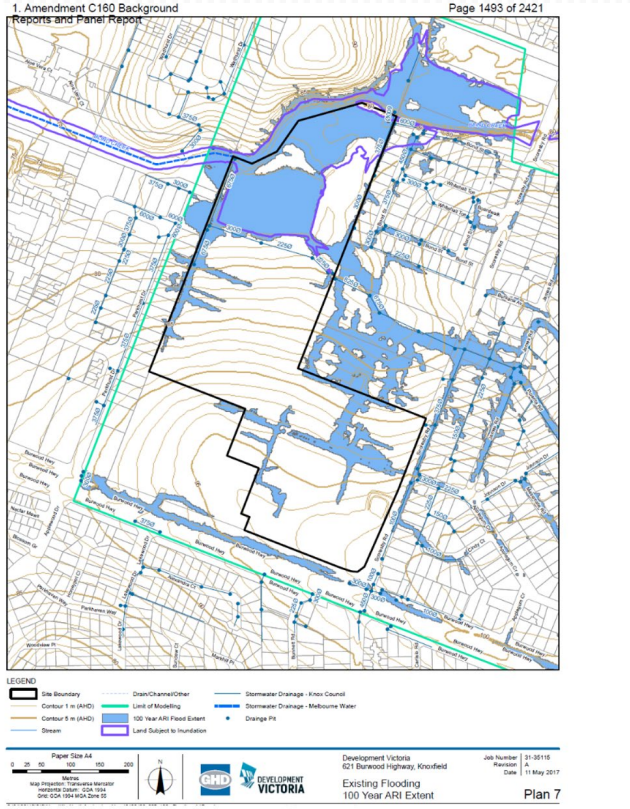


Figure 4 Existing flood extent for the 1% AEP event and existing stormwater drainage pits and pipes, with subject land outlined in black[9]

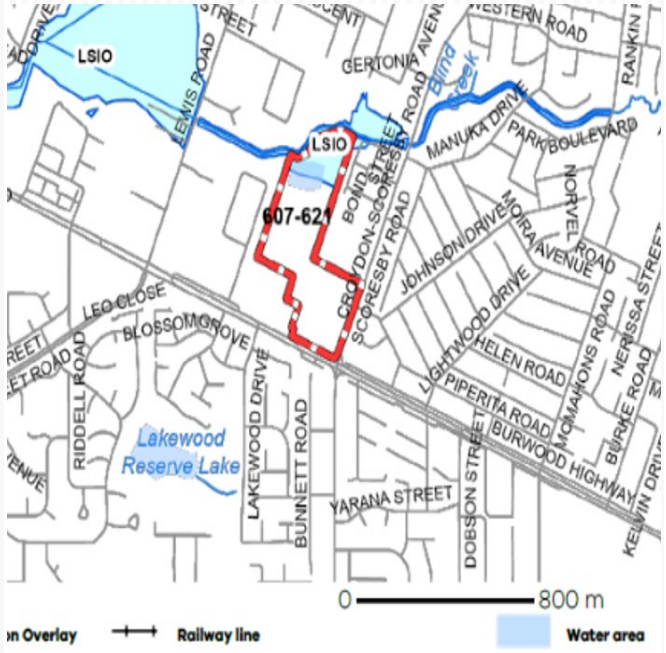
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Planning Scheme:

- northern half of waterbody/dam covered by Environment Significance Overlay – Sch 2 & Land Subject to Inundation Overlay → to be developed into water treatment system and wetlands R[26]

- southern half of waterbody/dam to be subdivided → residential use R[26]



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Development Victoria v Knox CC [2023] VCAT 1094

THE LAW

- **Statutory interpretation:** ordinary principles applied R[33]-[44].
- **Knox Planning Scheme** Cl 73 : meaning of terms

  A term used in this planning scheme has its ordinary meaning unless that term is defined:

  In this planning scheme; or

  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.
- **PE Act / Scheme:** "waterway" **not** defined but used in cls 12.03-1S, 14.02-1S, 37.02, 42.01, 44.04 & 62.02-1 R[47]

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Development Victoria v Knox CC [2023] VCAT 1094

- **<u>Why did it matter?</u>**
- **Removing the lake / dam would have been much harder**
- **Clause 12.03-1S** Water Bodies and Wetlands policy addresses *waterway* systems including river and riparian corridors, waterways, lakes, wetlands and billabongs. *Policy guidelines – "locating development [and earthworks] a minimum of 30 metres from the banks of waterway systems" (now 50 metres)*
- **Clause 14.02-1S** Catchment Planning & Management Policy included a strategy to retain natural corridors with vegetated buffer zones at least 30m on each side of a *waterway*
- **Clause 42.01-2** ESO2 included a statement of environmental significance which included considerations of indigenous vegetation along *waterways*
- **Clause 37.02-2** sch 2 – Comprehensive Development Zone – development "must not adversely affect the floodplain, the *waterway* conditions, water quality or stream ecosystem of Blind Creek
- **Clause 44.04** LSIO – included a purpose statement to ensure development maintained or improved… *waterway protection and floodplain health*

Development Victoria v Knox CC [2023] VCAT 1094

THE LAW

- *Interpretation of Legislation Act 1984* (Vic)

  38 Definitions

  In all Acts and subordinate instruments, unless the contrary intention appears—

  … ***waterway*** means a waterway as defined in section 3(1) of the **Water Act 1989**;

- **No contrary intention therefore** definition in the *Water Act* applies: R[58]
- Eg contrary intention – see Mahoney JA in *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104 at 108; *RACQ Insurance Ltd v Wilkins* [2009] QSC 365 at [18] (Pearce & Geddes (8th ed) at[6.68])
- **Water Act:** s 3(1): ***waterway*** means—
  - (a) a river, creek, stream or watercourse; or
  - (b)a natural channel in which water regularly flows, whether or not the flow is continuous; or
  - (c) a channel formed wholly or partly by the alteration or relocation of a waterway as described in (a) or (b); or

Development Victoria v Knox CC [2023] VCAT 1094

- Meaning of ***waterway*** (contd):
- (d) a lake, lagoon, swamp or marsh, being—
- (i) a natural collection of water (other than water collected and contained in a private dam or a natural depression on private land) into or through or out of which a current that forms the whole or part of the flow of a river, creek, stream or watercourse passes, whether or not the flow is continuous; or
- (ii) a collection of water (other than water collected and contained in a private dam or a natural depression on private land) that the Governor in Council declares under section 4(1) to be a lake, lagoon, swamp or marsh; or
- (e) land on which, as a result of works constructed on a waterway as described in paragraph (a), (b) or (c), water collects regularly, whether or not the collection is continuous; or
- (f) land which is regularly covered by water from a waterway as described in paragraph (a), (b), (c), (d) or (e) but does not include any artificial channel or work which diverts water away from such a waterway; or
- (g) if any land described in paragraph (f) forms part of a slope rising from the waterway to a definite lip, the land up to that lip;

Development Victoria v Knox CC [2023] VCAT 1094

MATTERS TAKEN INTO CONSIDERATION

- **Waterway Identification Guidelines 2022** – “consistent application of the definition of waterway” R[62]; ”guidance”; R[63], [65]; “useful, however, they are not determinative. We have relied upon our own observations as an expert Tribunal.” R[67]
- **Healthy Waterways Strategy**
- **Melbourne Urban Stormwater Institutional Arrangements Review** - the “MUSIA Review whose purpose was to “review the 60ha catchment boundary convention, established by the MBW in 1927 [71]
- **Australian Rainfall and Runoff** (**ARR**)(a national guideline document, data and software suite that can be used for the estimation of design flood characteristics in Australia) [74]

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- **APPLIED**
- If the waterbody is a *waterway under the Water Act*, it is also a waterway under the Planning Scheme: R[75]
  - **PE Act** includes no definition of "waterway", and s 38 of the ILA defines the term by reference the Water Act,
  - **The Planning Scheme does not** indicate a contrary intention
- Therefore, the question was whether (a), (b), (d), (e) or (f) of the definition applied such that the waterbody was a *waterway* [82]
- ***Whether (a)*** a river, creek, stream or watercourse; or
- **No** see R[107]-[128]. Applied the Guidelines – needs *channel, bed and banks and regular flow of water and source of water must be from a spring, soak or water percolating from the soil.*
- ***"springs and soaks"; "regular"*** *under the Guidelines.* R[109]-[110]

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APPLIED

- ***Whether (b)*** a natural channel in which water regularly flows, whether or not the flow is continuous; or
- **No** see R[129]-[135].
  - Not *natural channel*
  - Applied the Guidelines for meaning of *regularly*. Catchment was less than 60ha therefore the regularity of flow requirement in the Guidelines not met
  - *Cf* text "regularly"

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APPLIED

- ***Whether (d)*** a lake, lagoon, swamp or marsh, being—
  - (i) a natural collection of water (other than water collected and contained in a private dam or a natural depression on private land) into or through or out of which a current that forms the whole or part of the flow of a river, creek, stream or watercourse passes, whether or not the flow is continuous; or
  - (ii) …
- **No** R[142]-[171]
- **Issues:** *whether a natural collection of water; whether a current …passes,* whether or not the flow is continuous

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Development Victoria v Knox CC [2023] VCAT 1094

APPLIED

- (d)(i)… contd
- **No** R[142]-[171]
- **Issues:** *whether a natural collection of water; whether a current …passes*
- Different arguments: Council / KES (yes) v Development Victoria (no)
- Application of the Guidelines – "regularity of flow" cf text – "current… passes whether or not the flow is continuous". Are the words in the Guidelines consistent with the text of the Water Act?

Development Victoria v Knox CC [2023] VCAT 1094

APPLIED

- ***Whether (e)*** land on which, as a result of works constructed on a waterway as described in paragraph (a), (b) or (c), water collects regularly, whether or not the collection is continuous; or
- **No** R[172]-[183]
- Guidelines re (e): R[183]. If works are constructed *on a waterway* and water collects regularly (eg a dam), then the additional land on which water collects is also a waterway
- Consider words of the Guidelines cf actual text of the Act - are they consistent?

Development Victoria v Knox CC [2023] VCAT 1094

APPLIED

- ***Whether (f)*** land which is *regularly covered by water* from a waterway as described in paragraph (a), (b), (c), (d) or (e) but does not include any artificial channel or work which diverts water away from such a waterway; or
- **No** R[184]-[219]
- **"regular"** – dictionary definition adopted (**not** the test from the Guidelines) [186]
- T said flooding events did not recur at fixed times; and 20% AEP event is not a short interval. Also, there was an absence of data about flood. Coverage here by water from Blind Creek in a 20% AEP event was **not** considered to be "regularly covered by water from a waterway" R[215].

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TAKE AWAYS

- ***Complex definition*** *– 8 ways to be a* ***waterway***
- ***Need excellent evidence about:*** *water flow, banks, channels, drains, catchment area*
- ***Take care when applying the Guidelines to the definition in the Water Act: "regularly flows" (b), a "current", whether or not the flow is continuous (d)(i), and "regularly covered" (f)***
- Don't forget the words of the text; consider *Alcan* (HC)

ESG Lysterfield Pty Ltd v Yarra Ranges SC [2026] VCAT 480

ESG Facts

THE FACTS

- **465 Lysterfield Road, Lysterfield** – 40.9 ha in the Green Wedge Zone
- **Proposal:** 400,000 m^3 of clean fill over about 15 ha, across three years
- fill placed within a catchment draining to Monbulk Creek, near an environmentally sensitive waterway supporting the last remaining platypus population in the Dandenong Creek Catchment
- **LSIO** applies to the flood plains of Monbulk Creek and to the drainage line running through the valley from south to north

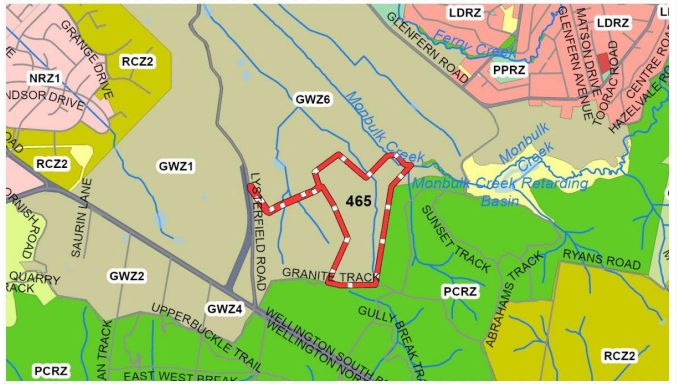


Figure 1 – The land (shown in red outline) and its surrounding area as seen in the Scheme

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ESG Lysterfield Pty Ltd v Yarra Ranges SC [2026] VCAT 480

ESG Facts (contd)

THE DRAINAGE LINE

- drainage line on the land, with a total catchment area of approximately 25 hectares
- **the Planning Property Report** denotes a 'water course' – but not all blue lines on these maps are waterways; in some cases they represent drainage lines
- **also an 'unnamed watercourse'** on the Vicmap Hydro – Watercourse Line layer (DECCA, 2025)
- **does not appear** in the dataset developed by Walsh et al (2022) for designated headwater streams in the Port Phillip and Westernport Region

ESG Lysterfield Pty Ltd v Yarra Ranges SC [2026] VCAT 480

Questions before VCAT

QUESTIONS BEFORE THE TRIBUNAL

- Is all or part of the drainage line on the land a 'waterway' for the purposes of the Yarra Ranges Planning Scheme?
- Is the tributary on the subject land a **swamp or marsh**, being a natural collection of water (other than water collected and contained in a private dam or a natural depression on private land) into or through or out of which a current that forms the whole or part of the flow of a river, creek, stream or watercourse passes, whether or not the flow is continuous?

Relevant also to the CHMP question

- Is all or part of the drainage line a waterway as defined in reg 5 of the *Aboriginal Heritage Regulations 2018*?
- If yes, is all or part of the waterway – or land within 200 metres of it – an area of cultural heritage sensitivity under reg 26(2)?

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Why important

WHY IT MATTERED

- The Tribunal had to decide whether the drainage line is a 'waterway' under the Water Act because the Scheme's waterway policy applies **differently** depending on the answer.
- References to 'waterway' in the Scheme relevant to this matter: **cll 12.03-1S, 13.03, 14.02-1S, 14.02-1L, 14.02-2S, 19.03-3S, 35.04-6, 42.01, 44.04 and 44.04-08**

ESG Lysterfield Pty Ltd v Yarra Ranges SC [2026] VCAT 480

Consequences of being a waterway?

IF IT WERE A WATERWAY

- the works include the **filling of a waterway**, causing physical changes to it
- contrary to the purposes of the **LSIO** – they do not protect the waterway or improve waterway health, and could be located outside the LSIO and away from a waterway
- inconsistent with the **GWZ** response to 'environmental issues' – filling a waterway does not protect and enhance the biodiversity of the area
- inconsistent with the **cl 12.03-1S** objective to protect waterways

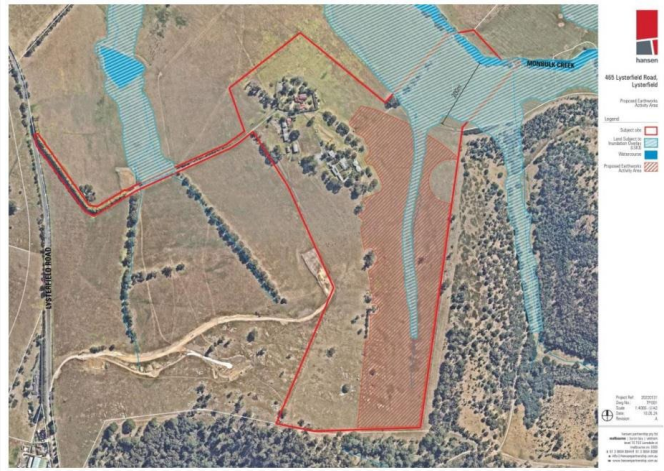


Figure 3 – The land (red outline), subject site (red hatching) and LSIO (blue hatching)

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Process of reasoning

PROCESS OF REASONING

- Determine whether the drainage line is a 'waterway' as defined under **s 3(1) of the Water Act** – and therefore whether it is a 'waterway' for the purposes of the Scheme.
- Council, Melbourne Water and the applicant agreed that the approach taken in *Development Victoria v Knox CC* provides a summary of the legislative framework for the determination of a 'waterway' under a planning scheme.

ESG Lysterfield Pty Ltd v Yarra Ranges SC [2026] VCAT 480

Matters taken into consideration

MATTERS TAKEN INTO CONSIDERATION

- **Waterway Identification Guidelines 2022** – "useful, however, they are not determinative. We have relied upon our own observations as an expert Tribunal."
- **Healthy Waterways Strategy**
- **Yarra Ranges Localised Planning Statement (2017)** – adopted 27 June 2017; a policy document of cl 11.05-2
- **Civil construction, building and demolition guide** (EPA Publication 1834.1, 2023) – erosion, sediment and dust control, including vehicle movements
- **Flood Management Plan 2016** – roles, responsibilities and actions for flood management in Yarra Ranges; drainage generally split between Melbourne Water (catchments over 60 ha) and the council

ESG Lysterfield Pty Ltd v Yarra Ranges SC [2026] VCAT 480

Matters considered

MATTERS CONSIDERED

- the definition and presence of **hyporheic flows** on the land
- **regularity of flows**
- **current**
- **defined bed and banks**
- **a natural channel** in which water regularly flows, whether or not the flow is continuous
- **a lake, lagoon, swamp or marsh**

ESG Lysterfield Pty Ltd v Yarra Ranges SC [2026] VCAT 480

The outcome

THE OUTCOME

- The drainage line is **not** a ‘waterway’ under s 3(1) of the Water Act, and so not a ‘waterway’ for the purposes of the Scheme.
- Reach C had no defined bed and banks. Any bed and banks in Reaches A and B may have been formed by artificial flows – two leaking stock troughs and a septic system outfall.
- The catchment is under 60 ha, so the regularity of flow requirement in the Guidelines is not met.
- **But the applicant still lost.** No permit granted; the council’s decision affirmed. The use produces no net community benefit and is not orderly planning, and the works were not developed to an acceptable level.

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ESG Lysterfield Pty Ltd v Yarra Ranges SC [2026] VCAT 480

Importance of evidence

IMPORTANCE OF EVIDENCE

- Council submitted the drainage line was a waterway – and called **no expert evidence** on drainage or waterways.
- Melbourne Water called Arrowsmith (water engineer), Mason (water engineer) and Sandercock (geomorphologist). The applicant called Swan (hydraulic engineer), Hall (hydrogeologist) and Leake (soil scientist).
- The experts split on **hyporheic flow**. The Tribunal declined to resolve it: the flows observed were likely artificial, and the catchment was under 60 ha either way.
- What decided it was the ground – walking the drainage line, the cross-sections, the catchment area, and the source of the water.

Waterway Management under the Water Act 1989 (Vic)

- Part 10 of the Water Act deals with waterway management.
- Applies to Melbourne Water and catchment management authorities (**CMAs**) with a waterway management district.
- Includes the execution of functions, duties and powers by Melbourne Water and CMAs relating to ***water management*** defined as the management of waterways, drainage, or floodplains (s 185(2).
- Part 10 Division 4 of the Water Act specifically deals with floodplain management.

Climate change and water management: Water Act 1989 (Vic) and Water Act 2007 (Cth)

- The Water Act provides that the Minister may investigate the effect of climatic conditions on the occurrence and quality of water in undertaking the Water Resources Assessment Program (s 23(e)).
- Relevant policy considerations include the Long-term water resource assessment for Southern Victoria (2020) and the Long-term water resource assessment for Northern Victoria (commenced 2025) : https://www.water.vic.gov.au/__data/assets/pdf_file/0019/664210/long-term-water-resource-assessment-for-southern-victoria.pdf https://www.water.vic.gov.au/our-programs/long-term-water-resource-assessments-and-strategies
- Keep in mind crossover between state water resources management and the *Water Act 2007* (Cth) for Basin water resources.
- Recent landmark HCA case on groundwater and traditional owner water rights *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* [2026] HCA 23 where the NT Minister's decision to grant a 30 year groundwater extraction licence was set aside.

Climate change and water management: land use and planning

- The *Climate Change and Energy Legislation Amendment (Renewable Energy and Storage Targets) Act 2024* (Vic) amended the *Planning and Environment Act 1987* (Vic) inserting new s 4(da) which states:

> ***"to provide for explicit consideration of the policies and obligations of the State relating to climate change, including but not limited to greenhouse gas emissions reduction targets and the need to increase resilience to climate change, when decisions are made about the use and development of land"***

- Victoria's Climate Science Report 2024 prepared under part 6 of the *Climate Action Act* 2017 (Vic) provides the best available scientific evidence on climate for Victoria:

https://www.climatechange.vic.gov.au/victorias-climate-science

Climate change and floodplain management: planning policy

- Following the 2022 Victorian floods, flood risk has become a key focus for policy implementation.
- Relevantly, climate change risks (including in relation to floods) should be identified having regard to the best available data (refer to Victoria's Climate Science Report 2024) and climate change science, and strategic land use planning should be integrated with emergency management decision-making.
- The Victorian Floodplain Management Strategy (2016) is being reviewed and updated by 2028 and includes 9 regional floodplain strategies, flood studies and priority flood mitigation projects.

Case Study: Warrnambool Merri River Catchment Flood Modelling

- Warrnambool City Council proposed to adopt new flood modelling of the Merri River catchment in South Warrnambool which would result in amendments to the planning scheme.
- Flood controls including Urban Floodway Zone and Floodway Overlays would be likely to apply to areas identified as high hazard flood risk and the Land Subject to Inundation Overlay would be imposed on areas identified as low hazard flood risk during a 1% AEP flood event.
- It was the subject of considerable community opposition and criticised by claims that the proposed 1% AEP level in the relevant flood study was not based on the best available scientific research.
- Council voted not to adopt the flood study and the planning amendments did not go ahead.

Recent legislative changes for flood prone areas

- **24 June 2026**: The *Building Legislation and Treasury Legislation (Tax Relief) Amendment Act* 2026 inserted new s 188B into the *Building Act* 1993.
- Part 10 Division 4 of the which deals with floodplain management was amended to include the new defined term "***designated flood-prone area***" (s 3(1) of the Water Act).
- the Minister can determine a "designated flood-prone area", reported as land with a 1% or higher chance of flooding in any year.
- Practically speaking, this means that there are changed Ministerial powers to declare flood prone areas for the purposes of flood management and development control.
- Applications for building permits now consider flood risk and impose flood risk management conditions on building permits.
- Section 32 statements for the sale of land must advise if the land is in a designated flood-prone area and provide relevant insurance cover details for the purposes of statutory insurance.

Building Legislation and Treasury Legislation (Tax Relief) Amendment Act 2026: Explanatory Memorandum

The Bill amends the **Building Act 1993** and makes related amendments to the **Water Act 1989** to enable the Minister for Housing and Building to determine land as being in a designated flood-prone area because the land has a 1% or higher risk of flooding in any twelve-month period. The Minister's determination is to be based on advice about flooding and controls on development that the floodplain management Authorities under Part 10 of the **Water Act 1989** will be required to give to that Minister and to the Minister administering the **Planning and Environment Act 1987**. The purpose of conferring this new power on the Minister for Housing and Building is to ensure flood risk is considered by the relevant council and by the relevant building surveyor when determining an application for a building permit and imposing flood risk management conditions on the permit.

Related amendments to the **Sale of Land Act 1963** in the Bill also require that a section 32 statement for a sale of land under that Act must advise if the land is in a designated flood-prone area and must include particulars of any applicable insurance cover under the statutory insurance scheme (branded as the "First-resort Home Warranty Scheme"). These amendments are intended to ensure that potential purchasers are informed of these aspects of the land.

[Questions?]

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