a VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| Planning and Environment list | vcat reference No. P11719/2021 |
| CATCHWORDS | |
| Application for review under section 83 of the Water Act 1989 of a Direction issued by Southern Rural Water (a delegate of the Minister) under section 80 of the Water Act 1989. Stay of the Direction sought by applicant under section 50(3) of the Victorian Civil and Administrative Tribunal Act 1998. Direction relates to the operation of and for works on a dam. Stay to the operation of parts of Direction granted. | |

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| **Joint Applicant** | Charles Angelo Santospirito & Josephine Rita Santospirito |

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| **Decision Maker** | Southern Rural Water |

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| SUBJECT LAND | 1075 Horseshoe Bend Road,  TORQUAY VIC 3228 |
| dates of hearing | 12 & 22 November 2021 |
| DATE OF ORDER | 26 November 2021 |
| citation | Santospirito v Southern Rural Water [2021] VCAT 1432 |

# Order

### Original directions by South Rural Water stayed – in part

1. Pursuant to section 50(3) of the *Victorian Civil and Administrative Tribunal Act 1998*, and subject to these orders or further order, the operation of directions 6.1, 6.2, 6.7 and 6.8 issued by Southern Rural Water on 21 October 2021, is stayed pending final determination of this proceeding.
2. Pursuant to section 50(5) of the *Victorian Civil and Administrative Tribunal Act 1998*, and subject to further order the stay order in Order 1 (above) will be lifted if the water level in Pintail Dam on the land at 1075 Horseshoe Bend Road, Torquay exceeds RL 12 metres AHD as referenced against the datum on the site plan in the report of Australian Geotechnical Testing, numbered AGTE17463, December 2017 (AGT Report).

### Schedule for the proceeding

1. This application is scheduled for a practice day hearing and a hearing as detailed below.

All hearings will be at **55 King Street, Melbourne**.

If there is any change to these details, the Tribunal will notify you by a further order.

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| **Practice Day Hearing:** | |
| Date | |  | | --- | | 20 January 2022 | |
| Start time | For details of the start time, please refer to the Tribunal’s website ([www.vcat.vic.gov.au/todays-hearings](http://www.vcat.vic.gov.au/todays-hearings)) after 4:30pm on the day before the hearing |
| Duration | 1 hour |
| Conduct | Online Platform |

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| **Hearing:** | |
| Date and time | |  | | --- | | 15, 16, 17 & 18 March 2022  10.00 am – 4.30 pm | |
| Conduct | Online Platform |

Further advice about the hearing procedures will be provided to the parties prior to the relevant hearing

### What must the decision maker do?

1. By **14 December 2021** the decision maker must give the information required by the Tribunal’s Practice Notice **PNPE2 – Information from Decision Makers** (**PNPE2**)to the Tribunal, unless this material has already been given in another related proceeding. The copy for the Tribunal must be sent to [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au).
2. The decision maker must give a copy of the completed table of PNPE2 to the applicant. The attachments do not need to be given to the applicant.

### Practice Day Hearing

1. The purposes of this practice day hearing are:

* To consider and give directions about hearing application P11719/2021 in conjunction with the application P11797/2021 for review of the refusal to issue a works licence.
* To consider the Statements of Contentions filed by the parties in order to identify and clarify the real issues in dispute in the proceeding.
* To consider any other appropriate orders about the future conduct of the proceeding. This may include the calling of expert or lay evidence, conduct of expert conclaves and production of minutes, preparation of a Tribunal Book and pre-filing of submissions.

1. Parties must attend the practice day hearing with the following information:

* Details of any other applications at the Tribunal that are related to this application.
* All evidence and documentation relating to the specific purpose of the practice day hearing (where relevant).

1. If a party is seeking specific orders or directions at the practice day hearing, a draft Microsoft Word copy of the orders or directions must be lodged electronically with the Tribunal and provided to the other parties. The copy for the Tribunal must be sent to [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au). This must be completed **five business days prior** to the date of the practice day hearing.

### Statement of Contentions required from all parties

1. By **13 January 2022** all parties must give the Tribunal and the other party/s a Statement of Contentions setting out:

* An outline of the primary contentions of fact or law relied upon by that party to support its contended position in the proceeding, and a summary of the basis for those contentions. The outline should be sufficient to enable all relevant issues in the proceeding to be identified.
* The name of any witness retained in the matter as at the date of the Statement of Contentions and a brief summary of the evidence that would be adduced by that witness at a hearing.

1. The Statement of Contentions should not exceed six pages. The copy for the Tribunal must be sent to [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au).

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| Teresa Bisucci  **Deputy President** |  | Ian Potts  **Senior Member** |

# Appearances

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| For the Applicant | Phil Cadman, of counsel, instructed by Roy Morris & Co Lawyers.  He called David Santospirito to give sworn oral evidence about the farm and irrigation operations. |
| For the Decision Maker | Andrew Sherman, lawyer, Russell Kennedy |

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# Reasons

## Background

1. On 5 November 2021, Charles Angelo Santospirito and Josephine Rita Santospirito (**applicants**) lodged an application seeking review of the following decisions by the delegate of the Minister for Water:

* the refusal of a works licence to repair, reduce capacity and construct a spillway to an existing dam under section 69 of the *Water Act 1989* (***Water Act***) (**works licence application**); and
* the issue of a Directions under section 80 of the *Water Act* (**directions application**).

1. We are told that the delegate of the Minister for Water for decisions under sections 67, 69 and 80 of the *Water Act* is Southern Rural Water (**SRW**). Although raised in its application, the applicant no longer disputes this delegation or that SRW is the relevant decision maker in these applications.[[1]](#footnote-2)
2. The decisions of SRW relate to a dam known as ‘Pintail Dam’ located at 1075 Horseshoe Bend Road, Torquay (**land**).
3. The application was listed for a preliminary hearing to consider:

* whether a stay of the Direction made under section 80 of the *Water Act 1989* dated 21 October 2021 should be granted;
* whether two separate review applications should be made with the Tribunal for the two decisions made about the dam on the subject land, (i.e. an application to review a decision to refuse a licence for works and an application to review a decision to issue a Direction); and
* to give directions about the future conduct of the proceeding(s).

1. At the preliminary hearing on 12 November 2021, we were not satisfied that we had sufficient material before us to properly consider the stay of the operation of the direction issued by SRW.
2. The parties agreed that it was appropriate that we have sufficient material before us and consequently we adjourned the preliminary hearing to allow the applicant an opportunity to provide additional material to us.
3. Having considered the material before us, we have decided to grant a stay of the operation of part of the Direction by SRW issued 21 October 2021. Our reasons follow.

## Relevant context

1. The land is located to the north of a residential estate and golf club. We are told that the dam has existed for approximately 40 years without any incident or impact to neighbouring properties until October 2020. In October 2020 the residential properties to the south and south west experienced inundation that was later discovered to be due to water emanating from an uncapped pipe located in the wall of Pintail Dam. This pipe had been previously used to provide water to the adjacent Sands Golf Club via a desalination plant operated by the golf club. We are told by SRW that the water was taken from the dam under a commercial arrangement between Barwon Region Water Corporation and the applicants. When this arrangement ceased, Barwon Water subsequently bought and removed the plant.
2. The flooding event in October 2020 caused serious concerns for the nearby residents as they were evacuated from their properties until it was deemed safe to return. Consequent to this event in October 2020, SRW served various Directions under section 80 of the *Water Act*. Those Directions sought to control the operation of the dam, by way of limiting its operating level to Relative Level (**RL**) of 12.5 metres as measured against a known datum, an inspection and maintenance regime and a call to apply for a works licence under section 67 of the *Water Act* to make safe its operation.
3. The applicants duly made an application under section 67 of the *Water Act* for works to Pintail Dam. The works application was referred to an Independent Panel (**panel**) who recommended the refusal of the works licence. The reasons for the refusal in part, relate to the lack of information provided to the panel for assessment of the works application. As a result, the panel was unable to conclude with sufficient confidence the safe operating water level for the dam.
4. The panel recommended that Pintail Dam should operate at RL9.5 metres so that there would be no pressure on the dam wall and the water level would be below surrounding natural ground levels so that there would be no risk to the surrounding residential properties.
5. On 21 October 2021, SRW issued the Direction requiring *inter alia* the reduction of the water level in Pintail Dam to RL9.5 metres.

## Relevant legislative framework

1. Section 50 of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**) provides (as relevant):

**50 Effect of original decision pending review**

(1) Subject to subsection (2), the commencement of a proceeding for review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision.

…

(3) The Tribunal may make an order staying the operation of a decision that is the subject of a proceeding for review.

(4) The Tribunal may make an order under subsection (3)—

(a) on application by any party or on its own initiative;

(b) whether or not it has given any person whose interests may be affected by the order an opportunity to be heard.

(5) In making an order under subsection (3), the Tribunal—

(a) may require any undertaking as to costs or damages that it considers appropriate; and

(b) may make provision for the lifting of the order if specified conditions are met.

(6) The Tribunal may assess any costs or damages referred to in subsection (5)(a).

(7) The Tribunal's power to make an order under subsection (3) is exercisable by the presiding member.

1. The Tribunal has considered section 50 of the VCAT Act in various decisions over time. The following general principles are applicable to the application for a stay before us:[[2]](#footnote-3)

(a) The power to grant a stay is discretionary to be exercised after full consideration of the circumstances and facts of each particular case.

(b) The dominant principle is whether or not the failure to grant a stay would render the application for review before the Tribunal nugatory.

(c) Whether or not there is a serious question to be tried on review is a matter of some importance.

(d) Whether or not it is in the community interest to grant a stay is properly to be taken into account. This involves the balancing of private interests against the public interest.

(e) It is relevant for the Tribunal to take into account the period of time which will elapse before the hearing of the application for review.

1. Further, in *Hazelwood Power v Department of Primary Industries[[3]](#footnote-4)* (***Hazelwood***) Dwyer DP considered whether s stay should be granted subject to conditions or upon the giving of an undertaking as to costs or damages.
2. Essentially the matters for our consideration are:

Will the failure to grant a stay render the application for review nugatory?

Is there is a serious issue to be tried?

Is it in the community interest to grant a stay?

What period of time will elapse before the hearing of the application for review?

General discretion

## Parties’ submissions

### Will the failure to grant a stay render the application for review nugatory?

1. The applicant submits that the refusal to grant a stay of the operation of the Direction by SRW will render the application for review nugatory for the following reasons.
2. Pintail Dam supports the operation of a flower farm on the land with a total area for flower production of 303 hectares (ha) with 222 ha requiring irrigation from water stored in Pintail Dam. The ‘critical’ dates for the flower farm operations encompasses late spring, summer and autumn months when water from Pintail Dam is used for irrigation. If the water level in Pintail Dam is too low for proper irrigation of the flower farm, there will be ‘a material adverse impact on the business and most likely make the business unviable’.[[4]](#footnote-5)
3. At the resumed preliminary hearing, we heard *viva voce* evidence from David Santospirito, the farm manager. Mr Santospirito’s evidence can be summarised as follows:
4. Water is ordered from Barwon Waterby email on a demand basis.[[5]](#footnote-6) The frequency depends on weather conditions and the growth stages that the flowers are in. He highlights that seedling, larger plants and bulbs require different watering regimes.
5. In general, if he does not receive any response from Barwon Water and if the water is not delivered on the same day or the following day he will call to follow up on the order.
6. Supply will be disrupted if Barwon Water is undertaking maintenance, which he may only get two days notice of, and which may last for up to five days.
7. He does not rely on information regarding the water volume flowing into or out of Pintail Dam to make his order. Rather he relies upon visual inspection and observation of the water level using a gauge in the dam and his experience on how much water he needs for the particular plants he is growing.
8. He has operated the flower farm with Pintail Dam at RL12 metres for the last twelve months. However, the summer of 2020-2021 was not a ‘hot’ summer with consecutive hot days (i.e. 300C to 400C) that required high levels of irrigation.
9. The water is not only used to irrigate the flower crops but also to suppress dust on the land.
10. He provides water to a Turf Farm from time to time, generally in the summer months. This water is not drawn from the dam but diverted at a valve/pump station adjacent to the dam.
11. His concern with the reduction of the water level in Pintail Dam to RL9.5 metres is twofold:
    * + - 1. if there is hot, windy, dry weather for a week this can require three days of continuous irrigation in response but his experience is that the draw on the water in the dam can reduce the water level by 2 metres over two days; and
          2. at lower water levels (at around RL 10m) there are inefficiencies with the operation of the extraction pumps and the foot valve has clogged at this lower level.
12. As we understand the combined *viva voce* evidence of Mr Santospirito and the letter of Mr Tomkinson[[6]](#footnote-7), the water inflow rate of 8 Megalitres/day (**Ml/day**) from Barwon Water does not match the irrigation demand of up to 40Ml/day. Accordingly, there is a need to hold several days of supply (up to three days over summer) to address the possible hot and dry conditions or supply interruptions.
13. Given these reasons for the flexibility in managing irrigation water demand and hence secure water supply volumes, it is submitted that the water level of RL 9.5 metres in the Direction would put the viability of the flower growing operations at risk. If it were to fail, given the peak demands periods for flowers that are supported by the irrigation, there would be no need to pursue a review of the works licence decision.
14. SRW does not dispute that if the operation of the Direction of SRW is not stayed, the application for review will be rendered nugatory.

### Is there is a serious issue to be tried?

1. The parties agree that there is a serious question to be tried. At least in part that serious question is:

Whether Pintail Dam is safe for its operations and if so, what water level should be approved.

1. The findings of the panel raise the following issues that will require determination by the Tribunal:[[7]](#footnote-8)

How the ANCOLD Guidelines on Risk Assessment and As Low as Reasonably Practicable analyses should be applied to the dam, and what conclusions may be produced from their application.

What additional controls and features may be necessary or preferable together with the applied for works, such as filter protection, to secure the approval of the works under section 69(1) of the Act.

### Is it in the community interest to grant a stay?

1. The applicants submit that there is greater prejudice to them if the stay of the Directions by SRW is refused because it may make the flower business unviable. Further, they submit that in the 40 year operation of Pintail Dam there has only been one incident to public safety. The cause of the incident has been rectified and thus the risk to public safety is minimal. They note that Pintail Dam is now under the close scrutiny of the authority.
2. Mr Santospirito’s sworn evidence is that he is required to undertaken daily inspections under another existing Direction.
3. Conversely, SRW submits that the application for stay should be refused because the applicants have failed to provide:

* specific details of which direction should be stayed and the basis for the stay that is the application lacks the requisite particulars required for such applications; and
* we do not have any detailed evidence supporting the claim made by the applicants regarding requisite water levels in Pintail Dam to support the flower operations. It is said that the evidence of Mr Santospirito lacked the requisite details and specifics to allow us to conclude the level of water necessary in Pintail Dam to allow the flower farm to operate until the application for review is heard and determined.

### What period of time will elapse before the hearing of the application for review?

1. The applicants did not specifically address this issue and SRW originally submitted that the hearing would not be for many months and that is relevant to our consideration of the application for a stay.

### General discretion

1. The applicants say that in balancing all the relevant factors including only one incident in the 40 years of operation, an application for a stay of the operation of the Direction should be granted.
2. SRW raises concern that damages are not appropriate and thus cannot be considered because ‘if there was a failure of the dam wall any form of undertaking or commitment in relation to damages in favour of SRW or the Minister will not meet the risk in respect of property damage or even (at the extreme) loss of life’.[[8]](#footnote-9)

## Tribunal determination and orders

1. Having considered the facts, circumstances, submissions and evidence in this proceeding we will grant a stay of the operation of parts 6.1, 6.2, 6.7 and 6.8 of the Direction of SRW because:
2. The application for review will be rendered nugatory in part, if the works required to the be undertaken under directions 6.1, 6.2 and 6.8 are in fact undertaken. This is because works are required to part of the dam wall including spillway works at RL 9.5 metres and drainage works that would direct flow away from neighbouring properties. These works will alter Pintail Dam significantly and would be unnecessary as would the works plan under part 6.7 of the Direction if the applicants are successful in their application for review.
3. Further and importantly, the reduction in the water level to RL 9.5 metres may cause serious impact to the farming operations because insufficient water would be available during any extreme weather conditions in the summer period. Whilst we accept SRW criticism of the applicant’s case and its failure to establish a precise water level for the farm operation, we are also cognisant of the farm manager’s evidence that he relies upon visual inspection of water level in Pintail Dam. Further, the farm has operated for the last 12 months with RL 12 metres in Pintail Dam without incident. We also record that we find Mr Santospirito’s evidence credible and honest.
4. There is no dispute amongst the parties that there is a serious question to be tried and that the production of documents and evidence will assist in the resolution of the application for review.
5. There have been no further incidents from Pintail Dam since October 2020 and importantly, the source of that incident is acknowledged and well understood. The argument regarding the risk to the public seems to arise from other possible pipe work that has not identified in the dam embankment. The applicants say that even if there were other pipes, the inlet levels to date have all passed through the bank above 12m AHD such that there are unlikely to be pipes laid at the natural level of surrounding ground. Mr Santospirito’s answers to our questions about the pipework and operations of the dam indicate as such although we note that further testing and assessment of this evidence maybe required in the final hearing. We do not have any evidence of slumping or other geotechnical distortion of the banks or indications of any imminent failure of the dam. A strict regime for monitoring of the dam’s conditions (particularly the embankment) and water levels required by the Direction is not challenged nor is the reporting regime to SRW. Thus, we do not consider that the community interest outweighs the private interest by allowing a level of water in the dam that on the evidence before us is of minimal risk to public safety but will support the ongoing operation of the flower farm.
6. The applications for review will be listed for hearing in March 2022 and as such the time that will elapse for determination is not unreasonable.
7. Our order therefore stays those parts of the Direction as they relate to the operating water level but maintains the limit of the source of the inflow to the Barwon water supply controlled by the applicants and maintains the dam inspection and reporting regime.

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| Teresa Bisucci  **Deputy President** |  | Ian Potts  **Senior Member** |

1. For completeness we note the direction of 21 October 2021 refers to the delegation of authority from the Minister. Southern Rural Water submissions of 12 November 2021 set out the delegation of authority about licence applications. [↑](#footnote-ref-2)
2. *Bell and Eager* *v Liquor Licensing Victoria and Swapnil* [2000] VCAT 214 at; *Duncan v Nurses Board of Victoria* [2006] VCAT 4 at [9]; *Hazelwood Power v Department of Primary Industries* [2011] VCAT 719 at [13]. [↑](#footnote-ref-3)
3. [2011] VCAT 719. [↑](#footnote-ref-4)
4. See applicant’s submissions dated 10 November 2021 at [8]. [↑](#footnote-ref-5)
5. The water being treated wastewater from the Blackrock Treatment Plant. [↑](#footnote-ref-6)
6. See Exhibit RM2 of Affidavit of Roy Morris sworn 19 November 2021. [↑](#footnote-ref-7)
7. See applicant’s submissions 10 November 2021 at [12]. [↑](#footnote-ref-8)
8. See SRW submissions dated 10 November 2021 at [3.22]. [↑](#footnote-ref-9)