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Victorian Civil and Adı

Paul v Goulburn Murray Rural Water Corporation [2009] VCAT 970 (22 May 2009)

Last Updated: 17 June 2009

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO.

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 Section 5; *Water Act* 1
preliminary objection by responsible authority to standing of objector/applica
application for review; whether applicant "a person whose interests are affect
decision".

APPLICANT	John Paul
RESPONSIBLE AUTHORITY	Goulburn Murray Rural Water Corporati
RESPONDENTS	Brendan & Gayle O'Keefe
SUBJECT LAND	Groundwater Licence – Crown Allotmer 149, 150, 151A, 151B & 151C BOORHAMAN VIC 3678
WHERE HELD	55 King Street, Melbourne
BEFORE	Mark Dwyer, Deputy President Ian Potts, Member
HEARING TYPE	Preliminary Hearing (Standing)
DATE OF HEARING	20 April 2009
DATE OF ORDER	22 May 2009

CITATION Paul v Goulburn Murray Rural Water Co
[2009] VCAT 970

ORDER

1. On the preliminary question raised by Goulburn-Murray Rural Water Corporation, the Tribunal rules that the applicant has standing to bring the application for review in this proceeding.
2. The proceeding is adjourned to an administrative mention before Member Potts on 10 June 2009. By that date, the parties must advise the Tribunal in writing:
   - whether any procedural orders are required for the filing and service of amended grounds, evidence or other material prior to a hearing;
   - the parties' estimate of the duration of the hearing; and
   - whether a directions hearing or further administrative mention is requested.

No attendance is necessary at the administrative mention.

Mark Dwyer
Deputy President

Ian Potts
Member

APPEARANCES:

For the Applicant	Mr Henry Jackson, solicitor, of DLA Phi
For the Responsible Authority	Dr R J Sadler of counsel, instructed by D Vary
For the Respondents	Mr James Lofting, solicitor, of Best Hoo

REASONS

1. The applicant John Paul has made application under s 64(1) of the *Water Act* 1989 to review the decision of Goulburn-Murray Rural Water Corporation (**GMW**) to grant a groundwater licence to the respondents Brendan and Gayle O'Keefe at Boorhaman (near Wangaratta).

2. GMW contends that Mr Paul has no standing to bring the application for review, on the basis that his interests are not affected by the decision. It seeks that the proceeding be struck out. The matter was listed for a preliminary hearing to determine this issue[1].
3. In our view, Mr Paul has standing to bring the application for review, and we must admit to some surprise that GMW has contested standing in the particular circumstances of this case. In particular, Mr Paul contends that:
    - he is the owner of nearby land (albeit some 3 kms from the O'Keefe land), with extensive river frontages and wetlands, and has the benefit of a diversion licence which allows him to take and use water from those waterways;
    - his land also benefits from a groundwater bore, and he uses both surface water and groundwater for irrigation, pastoral and agricultural activities. (GMW contests whether Mr Paul accesses the same aquifer, although the inter-connectedness between groundwater and surface water in the region is under investigation); and
    - a regional cap on the extraction of groundwater has recently been imposed.
4. GMW argues that, despite these factors, a general curiosity or concern by the applicant about environmental issues and water resources is insufficient to attract standing. It argues that Mr Paul must demonstrate that his interests (in the sense of an actual benefit accruing to him) are genuinely affected by the decision to grant a licence to Mr & Mrs O'Keefe.
5. GMW invited the Tribunal to use the application as an opportunity to identify the characteristics that entitle third party objectors to make an application to the Tribunal to challenge the issue of a groundwater licence[2]. We are mindful that the courts have held that whether a person's interests are affected by an administrative decision is generally a question of fact depending upon the

circumstances of a particular case, and there are no hard and fast rules[3]. We agree. We have therefore made general comments only to the extent we consider they are useful in deciding the issue in this proceeding.

6. Section 64(1) of the *Water Act* 1989 (**Water Act**) provides, in part, as follows:

64(1) A person whose interests are affected by the decision may apply to the Tribunal for review of a decision by the Minister –

...

(b) under s 55(1) to approve an application under s 51 or 52.

In this case, GMW was making a decision under s 55, as a delegate of the relevant Minister, to approve an application for a groundwater licence under s 51(1)(b) of the Water Act.

1. The key phrase in s 64(1) that gives rise to the preliminary question of standing in this case is that an applicant must be "a person whose interests are affected".
2. Importantly, Section 5 of the *Victorian Civil and Administrative Tribunal Act* 1998 (**VCAT Act**) provides as follows:

1. If an enabling enactment provides that a person whose interests are affected by a decision may apply to the Tribunal for review of the decision -

(a) "interests" means interests of any kind and is not limited to proprietary, economic or financial interests;

(b) the person may apply to the Tribunal whether the person's interests are directly or indirectly affected by the decision and whether or not any other person's interests are also affected by the decision.

1. It is not surprising that s 64(1) of the Water Act and s 5 of the VCAT Act use an identical phrase. The *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act* 1998 was passed to coincide with the commencement of the VCAT Act in 1998, and amended many enabling Acts conferring jurisdiction on this Tribunal to include this

phrase, including the Water Act. There is therefore a clear legislative intent that s 5 of the VCAT Act applies to applications for review under s 64(1) of the Water Act. It follows that the applicant's "interests" must be considered in the context of this definition in the VCAT Act.

2. We agree with the applicant that:
   - A liberal interpretation should be adopted of an applicant's interests and whether they are affected, having regard to the breadth of s 5 of the VCAT Act[4]. The standing requirement in s 5 is much more liberal than the "special interests" test of standing applying under the common law[5]. This broad interpretation is both consistent with the definition in s 5, but also with the broader objects of the VCAT Act "intended to render justice in a timely and cost efficient manner without undue legal formality"[6].
   - In considering whether a person's interests are affected by a decision, it is necessary to consider the context of the relevant enabling Act[7]. This requires consideration of the "subject, scope and purposes" of the legislation under which the decision in question was made, and the nature of the reviewable decision itself[8].
   - The Tribunal should be cautious in applying the meaning given to the expression in other legislation, or legislation where a slightly different expression is used (e.g. where the person "may" be affected, or where the person is "aggrieved" by the decision). Here, the context must be whether the applicant's interests *are* affected for the purposes of the Water Act and the specific reviewable decision under that Act.
3. Standing is not however unlimited. We agree with GMW that some meaning must be attached to the words "a person whose interests are affected" and that, despite the apparent breadth of s 5 of the VCAT Act, Parliament must

have intended that the rights of review did not accrue to "any person" having only a general interest. An interest must still be established greater than that of the general public[9]. The difficulty in any given case is the determination of the point beyond which the affectation of a person's interests by a decision should be regarded as too remote to support standing to make application for review[10].

4. In our opinion, the subject, scope and purposes of the Water Act support the view that a relatively broad (but not unlimited) approach to Mr Paul's standing can be adopted in this case. Within the Act, there are purposes including the following:

- to provide for integrated management of all elements of the terrestrial phase of the water cycle;
- to promote the orderly, equitable and efficient use of water resources;
- to make sure that water resources are conserved and properly managed for sustainable use for the benefit of present and future Victorians;
- to maximise community involvement in the making and implementation of arrangements relating to the use, conservation or management of water resources;
- to eliminate inconsistencies in the treatment of surface and groundwater resources and waterways;
- to provide better definition of private water entitlements and the entitlements of Authorities;
- to foster the provision of responsible and efficient water services suited to various needs and various consumers; and
- to provide recourse for persons affected by administrative decisions.

5. Whilst these purposes of the Water Act are very broad, we do not consider that they should be construed as creating unlimited standing to review decisions under the Act for anyone having a general interest, for example, in the sustainable use of water. The purposes of the Water Act

relating to community involvement, and providing recourse, must be considered in the context of how the further provisions of the Act provide mechanisms to achieve these purposes, including the context of the administrative decision being made under the Act.

6. It follows that the nature of the reviewable decision itself provides an additional consideration in the determination of whether a person's interests are affected. Here, the decision relates specifically to the issue of a groundwater licence to Mr & Mrs O'Keefe, and Mr Paul must demonstrate that his interests are affected by that specific decision.

7. It is our view that there are matters arising from the nature of the reviewable decision in this case that also support a relatively broad approach to Mr Paul's standing. For example, s 53 of the Water Act, the Minister (or GMW as delegate) must consider certain matters, including those set out in s 40(1)(b) to (m). These include:

- the existing and projected availability of water in the area.
- the existing and projected quality of water in the area.
- any adverse effect that the allocation or use of water under the entitlement is likely to have on existing authorised uses of water, or a waterway or an aquifer.
- the need to protect the environment, including the riverine and riparian environment.
- if appropriate, the proper management of the waterway and its surrounds or of the aquifer.
- the needs of other potential applicants.

Given these are proper matters for consideration in relation to the specific reviewable decision, they should also properly be taken into account in establishing the affected "interests" that might be relevant to an applicant's standing.

1. We consider that GMW has taken an unduly narrow approach to the context of a reviewable decision under the

Water Act. In particular:

- GMW contends that the Water Act gives no express right to third parties (unlike the *Planning and Environment Act* 1987). We disagree. The third party rights may not be spelt out as clearly as in the *Planning and Environment Act* 1987, and may not be as broad in ambit, but they are created for example by s 64 itself - giving persons whose interests are affected a right of review.
- GMW contends that the Water Act does not require notice (i.e. mandatory notice) of applications to be given (unlike the *Planning and Environment Act* 1987 or the *Environment Protection Act* 1970). However, whilst the giving of notice under s 49 is discretionary, and does not of itself create automatic rights of review, it at least creates a reasonable expectation that those receiving notice will be accorded an appropriate level of procedural fairness in the consideration of their submission or objection.
- GMW contends that the only relevant matter required to be taken into account, linked directly to a third party, is if an existing authorised user is likely to suffer an adverse effect. We disagree. The important considerations set out above include potential impacts on the aquifer and the needs of other potential applicants in the future who might seek to access the same resource.

2. We note that, in this case, a related application for a bore licence sought by Mr & Mrs O'Keefe was publicly advertised under s 49, but not the application for a groundwater licence. This is a somewhat curious practice adopted by GMW that was not satisfactorily explained to us, as it is the actual taking and use of water under the groundwater licence that would more likely affect the recipients of notice than the actual sinking of the bore itself. In any event, Mr Paul responded to the notice by objecting to the groundwater licence.

3. The applicant put his arguments in support of standing at a number of levels. Drawing together the threads of the submissions before us and our comments in these reasons, we make the following observations:

- We do not agree with Mr Paul's submission that his broader interests in water sustainability and environment protection, whilst no doubt genuine, create by themselves a sufficient basis for standing in this case. Whilst the purposes of the Water Act are broad, we do not agree with Mr Paul that they create virtually unlimited standing to anyone with a broad interest of this nature. Mr Paul's interests, at this level, are of a more general nature common to many members of the public. They do not necessarily have a sufficient nexus, by themselves, to the specific reviewable decision to grant a licence to Mr & Mrs O'Keefe. At most they provide a basis for arguing that the outcome of granting the licence is of general interest to those concerned about such issues, but not necessarily that any particular interest *is* affected for the purposes of the decision under the Water Act.
- We do not agree with Mr Paul that his objection or submission in response to the public advertising of the application (or a related application) automatically and by itself creates a sufficient basis for standing in this case. In reaching this view, we agree that the lodging of an objection may be a factor relevant to standing, particularly if in response to notice given specifically to those who may be affected, rather than comprising a general notice or advertisement circulated through a newspaper. The making of an objection or submission is not however conclusive in determining standing. The notice and submission provisions under the Water Act do not override the requirement that an applicant for review must still demonstrate, for the purpose of s 64, that he or she is "a person whose interests are affected".

- We do however agree with Mr Paul that his very specific circumstances give rise to standing in this case.

4. In relation to these specific circumstances, we have outlined them in these reasons. Mr Paul is the owner of nearby land, has the benefit of a diversion licence which allows him to take and use water from adjacent waterways, his land benefits from a groundwater bore, he uses both surface water and groundwater on his property, and he is a potential future user of groundwater and potentially subject to the regional cap on its extraction.
5. GMW contends that Mr Paul draws his groundwater from a shallow aquifer, whereas Mr & Mrs O'Keefe will draw their groundwater from a deep aquifer. As we have indicated, GMW therefore contests whether Mr Paul accesses the same aquifer, although it concedes that the inter-connectedness between groundwater and surface water in the region is under investigation. Mr Paul contends that there is an inter-connectedness between the aquifer, and between groundwater and surface water, and that his land essentially forms part of the same groundwater system. He may in the future, in any event, be a potential user of water from the deeper aquifer if there is a separation between these aquifers.
6. If it was clear and beyond debate that Mr Paul's land was separated geologically or hydrogeologically from the land of Mr & Mrs O'Keefe, such that they were clearly in different groundwater systems, then this may support an argument that Mr Paul's interests are not capable of being affected in the context of this reviewable decision, despite his relative proximity to the O'Keefe's land. That is not the case here. GMW referred to a technical assessment report from GHD consultants entitled '*Report for Bore Licence Application 2244348 (April 2008)*' to this general effect, but did not refer us to the report in any detail nor call its author. From our brief review of this report, it would seem to express a professional opinion on 'merits' issues relating to the grant of the bore licence rather than

conclusively resolving debate as to the surrounding hydrogeology in a manner that would deal a 'knock out blow' to Mr Paul's standing. Mr Paul's land appears to lie, in hydrogeological terms, within the same system as the O'Keefe's land. The matter appears to be one of legitimate debate as to the merits of the granting of the licence, and ultimately a matter for evidence at a hearing.

7. We do not agree with GMW that Mr Paul must 'prove' his standing by conclusively demonstrating this inter-connectedness at the preliminary hearing, in order to satisfy the test that his interests *are* affected. That would amount, in effect, to requiring the underlying merits of the proceeding to be finally decided in order to determine standing. There may be some cases where the issue of standing and the underlying merits are so inextricably interwoven that the matter needs to proceed to a full hearing to determine both at once. The objectives of the VCAT Act would support this outcome in those cases. However, in many cases, the issue of standing can be determined through a *prima facie* consideration of the decision under review, the particular circumstances of the applicant, and the grounds of review.

8. Some of the issues of standing and the underlying merits are interwoven in this case. However, we are satisfied on the facts of this case that Mr Paul's proximity to the O'Keefe land and his use and/or potential use of groundwater and surface water from within the same area and hydrogeological system, are sufficient in this case to give him standing to bring his application for review.

Mark Dwyer
Deputy President

Ian Potts
Member

[1] Although initially listed before a legal member only, GMW requested that the Tribunal be reconstituted to also include a member with hydro-geological experience. There was no objection to this course, and the Tribunal was able to

reconstitute on such a basis. However, to the extent our reasons address questions of law, they have been decided by the presiding legal member.[2] GMW written submissions at [9].[3] *Re McHatten & Collector of Customs* (1977) 18 ALR 154 at 158 per Brennan J, adopting an earlier US decision. *Re McHatten* was also applied in *Onesteel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc*. [2006] SASC 114 at [14]-[15] per Debelle J. An extract from this latter case was included in GMW's written submission at [31].[4] See, for example, *Brambles Australia Ltd v Power Marketing Pty Ltd* (1999) 16 VAR 143[5] The "special interests" test of standing has been adopted by the High Court in cases such as *Australian Conservation Foundation Inc. v Commonwealth* [1979] HCA 1; (1980) 146 CLR 493. See, however, the reference in Pizer – "Annotated VCAT Act" (Third Edition) at paragraph [1140] where the broader scope of s 5 of the VCAT Act is noted.[6] See, for example, *Kearney v Legal Services Board* [2006] VCAT 2303.[7] *Brambles Australia Ltd v Power Marketing Pty Ltd* (1999) 16 VAR 143.[8] See, for example, *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 174 and 184; and also *Australian Conservation Foundation Inc. v Environment Protection Appeal Board* [1983] VicRp 34; [1983] 1 VR 385 at 397, 400 and 404.[9] See, for example *Byron Environment Centre inc v Arakwal People* (1997) 78 FCR 1 at 9 and following per Black CJ.[10] *Onesteel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc*. [2006] SASC 114 at [14]- [15] per Debelle J