

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP118/2017

### CATCHWORDS

WATER ACT– Section 157 and 6 of the *Water Act 1989*; *Catchment and Land Protection Act 1994*; *By-law 2014/01 Waterways Protection* - whether water authority has obligation to clear debris from river system; whether change in river course onto private property constitutes an unreasonable flow of water – whether failure by the water authority to clear debris from the river system caused the river course to change – whether s 157 of the *Water Act 1989* limited to a water authority’s ‘works’ – whether ‘works’ include a natural watercourse.

<b>APPLICANT</b>	Mark Baldwin
<b>RESPONDENT</b>	North East Catchment Management Authority
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member E. Riegler
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	1 March 2018
<b>DATE OF ORDER</b>	24 April 2018
<b>CITATION</b>	Baldwin v North East Catchment Management Authority (Building and Property) [2018] VCAT 608

### ORDERS

1. In answer to the questions raised by way of preliminary hearing the Tribunal finds and declares:
  - (a) The Respondent does not have an obligation to clear the Ovens River of natural debris where it abuts the Applicant’s property, so as to prevent the river from deviating from its original watercourse.
  - (b) The Applicant does not have a legal cause of action under sections 16 or 157 the *Water Act 1989* against the Respondent in respect of the matters, the subject of this proceeding.
2. **I direct the Principal Registrar to list the proceeding for a further directions hearing before Senior Member E Riegler at the**

**Tribunals earliest convenience, at which time further orders will be made as to the future conduct of the proceeding.**

3. The parties are at liberty to file minutes of consent orders, setting out what further orders should be made in the proceeding, having regard to the determination of the preliminary questions, which, if appropriate, may obviate the need for a further directions hearing.
4. Liberty to apply generally.
5. Cost reserved.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

For the Applicant                      Mr M Baldwin, in person.

For the Respondent                    Mr C Hart, solicitor.

## REASONS

### INTRODUCTION

1. The applicant is the owner of a rural property which borders the Ovens River in the locality of Smoko, which is approximately 300 km north-east of Melbourne and forms part of the Alpine Shire (**‘the Property’**). When the Applicant purchased the Property in 2010, the bank of the Ovens River was approximately 50 m from the eastern boundary of the Property, running its entire length.
2. In October 2010, parts of Victoria experienced a significant deluge, with sections of the Ovens River flooding and causing the township of Bright to be largely cut off by floodwaters. At that time, a section of the river channel adjacent to the Property became blocked with natural debris causing the flow of the river to be diverted around the obstruction and ultimately breaking out of the defined river channel and across the Property to its west. Over the course of the following week, the flow of the river eroded a section of the Property, creating a new river course, which now encroaches onto the Property.
3. The flow in the river receded significantly during the summer months however the river channel has now permanently moved approximately 50 m to the west of its original location. It now encroaches over a part of the Property. According to the Applicant, the situation is such that gradual erosion of the river bank (within the Property) is continuing, even with relatively low flows experienced during summer months.<sup>1</sup>
4. The Applicant contends that the erosion of the original river channel and its current encroachment onto the Property was caused by a failure on the part of the Respondent to remove Willow trees and other fallen debris from the river, especially where the river narrows adjacent to the Property. He submits that the failure to clear that debris and its resultant obstruction to the river channel, is the primary cause for the river channel altering its course onto the Property. He contends that this ‘failure to act’ constitutes an interference with what was previously a reasonable flow of water; namely, the original river channel, and as a result, has now caused damage to the Property.
5. The Respondent concedes that it is the water authority responsible for the management of the Ovens River adjacent to the Property and beyond. It also concedes that it is empowered under the *Water Act 1989* and the *Water Catchment and Protection Act 1994* to undertake maintenance and remedial work so as to ensure the sustainable use, conservation and rehabilitation of land and water resources within its designated area. Importantly, the Respondent concedes that it had the power to clear the

---

<sup>1</sup> *Engineering Assessment* report prepared by *Foresight Engineering Services* dated 11 April 2017, 2.

Ovens River adjacent to the Property, amongst many other functions and powers bestowed upon it. However, it contends that its functions extend to overseeing approximately 10,600 km of waterways and its resources must therefore be allocated appropriately. In the present case, the Respondent contends that, notwithstanding the powers conferred upon it, it was under no obligation to clear the Ovens River of debris and indeed, that task would have been impossible, given the length of the Ovens River, its accessibility and the limited resources of the Respondent. Therefore, notwithstanding the powers and functions conferred upon the Respondent, it contends that it was under no obligation to act by removing natural debris from the river system adjacent to the Property. It argues that the deviation of the river channel is a natural occurrence caused by an abnormal storm event. Accordingly, the Respondent submits that the Applicant's claim has no legal basis.

6. At the hearing on 1 March 2018, both parties requested that a preliminary hearing be conducted on that day to determine whether the Applicant had a legal basis to pursue his claim against the Respondent. It was agreed that the preliminary hearing would focus on the following questions:
  - (a) Does the Respondent have an obligation to clear the Ovens River in the vicinity of the Applicant's property of vegetation and debris so as to prevent the river channel from deviating from its original course?
  - (b) Does the Applicant have a cause of action against the Respondent under the *Water Act 1989* ('the Water Act')?
7. For the reasons that follow, I find that the answer to both questions is: *No.*

#### **DOES SECTION 157 OF THE WATER ACT 1989 APPLY?**

8. In written submissions filed by the Applicant, the Applicant couches his claim under s 157 of the Water Act. Mr Hart, the solicitor acting on behalf of the Respondent, submitted that s 157 of the Water Act does not apply to the present claim because that section is concerned with the flow of water from the *works* of a water authority, rather than water flowing naturally from a *waterway*, unaffected by any work undertaken by a water authority. Mr Hart submitted, correctly in my view, that there is no allegation that the Respondent carried out work, which caused the river to deviate. He argued that s 157 of the Water Act would therefore not apply because that provision is not enlivened if the loss or damage is caused by the flow of water from a *waterway*, absent any work having been undertaken by a water authority.
9. Section 157 of the Water Act states:

**157. Liability of Authorities arising out of flow of water**

- (1) If –
- (a) as a result of intentional or negligent conduct on the part of an Authority in the exercise of a function under Part 8, Division 2, 3 or 5 of Part 10, or Part 11 or any corresponding previous enactment, a flow of water occurs from its works onto any land; and
  - (b) the water causes –
    - (i) injury to any other person; or
    - (ii) damage to the property (whether real or personal) of any other person; or
    - (iii) any other person to suffer economic loss –the Authority is liable to pay damages to that other person in respect of that injury, damage or loss. [Underlining added]

10. Section 157 concerns the flow of water from an Authority's *works*. *Works* are defined in s 3 of the Water Act to include:

“works” includes –

- (a) reservoirs, dams, bores, channels, sewers, drains, pipes, conduits, fire plugs, machinery, equipment and apparatus, whether on, above or under land; and
- (b) works described in section 10, whether on, above or under land; and
- (c) fencing;

11. By contrast, a *waterway* is defined to mean:

“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 paragraph (a) or (b); 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 ...

12. In my opinion, the section of the Ovens River running along the eastern boundary of the Property cannot constitute the Respondent's *works*. In particular, there is no evidence to suggest that the relevant section of the Ovens River has been created, altered or modified by the Respondent; nor is there any evidence to suggest that it would fall within any of the infrastructure or facilities listed in the definition of *works* under s 3 of the Water Act. It is a natural watercourse that extends for many kilometres past the Property. Consequently, I find that the section of the Ovens River running along the eastern boundary of the Property is a *waterway*, within the meaning of that term as defined under s 3 of the Water Act.
13. Further, I find that s 157 is limited to the flow of water from an Authority's *works*, as opposed to the flow of water from a *waterway*.
14. In my view, had Parliament intended to include a flow of water from a *waterway* as also giving rise to liability in circumstances where an Authority has acted either intentionally or negligently, it would have included that term within the express words of s 157(1), which is not the case. The fact that *works* and *waterway* are individually defined to mean two different things is critical when considering the application and breadth of s 157. My view is reinforced when one considers that s 157 reverses the onus of proof and requires an Authority to disprove that it was not negligent. In particular, s 157(2) states, in part:
  - (2) If it is proved in a proceeding brought under sub-section (1) that water has flowed from the works of an Authority onto any land, it must be presumed that the flow occurred as a result of intentional or negligent conduct on the part of the Authority unless the Authority proves on the balance of probabilities that it did not so occur.
15. Further, other parts of s 157 repeatedly refer to an Authority's *works*. There is no mention of *waterways*. In my view, that supports the proposition that *waterways*, as opposed to works undertaken by a water authority, are not caught by s 157. For example, s 157 (3) (b) states:
  - (3) in determining whether or not a flow of water occurred as a result of negligent conduct on the part of an Authority, account must be taken of all the circumstances including any omission or failure, in the planning, design, construction, maintenance or operation of the *works*, to provide reasonable standards of capacity or efficiency or exercise reasonable care or skill having regard to the following matters –

- (i) the state of scientific knowledge and knowledge of local conditions and any relevant time;
  - (ii) the nature and situation of the *works*;
  - (iii) the service to be provided by the *works*;
  - (iv) the circumstances and cost of –
    - (A) the *works*; and
    - (B) the maintenance and operation of the *works*; and
    - (C) *works* which it would have been necessary to construct to avoid the occurrence of any relevant injury, damage or loss.
16. Subsection 3 above clearly contemplates some type of artificial infrastructure or asset created or maintained by an Authority. The provision, or at least a substantial part of the provision, would be rendered illogical if it also included a natural watercourse.
17. That being the case, I find that the Applicant's claim cannot be sustained on the basis that it is brought under s 157 of the Water Act. The claim is not one where the flow of water emanates from the Respondent's *works*. Here, the flow of water onto the Property emanates from a natural *waterway*, albeit that the Respondent is imbued with discretionary powers and functions to maintain and regulate that *waterway*.

#### **DOES SECTION 16 OF THE WATER ACT APPLY?**

18. Mr Hart submitted that as s 157 of the Water Act did not apply, the Applicant's only recourse was to recast his claim under s 16 of the Water Act. However, he contended that even if the claim was recast under s 16 of the Water Act, there still was no basis to find the Respondent liable for any of the loss or damage allegedly suffered by the Applicant.
19. The crux of Respondent's argument is that there was no positive duty imposed upon the Respondent to carry out any maintenance or clearing of debris from the river channel. It contends that the accumulation of vegetative debris is a natural occurrence over which it has no control. In that sense, the Respondent says that even if the accumulation of debris led to erosion of the riverbank and the ultimate deviation of the river channel onto the Property, it is not a phenomenon that was caused by any act or omission on the part of the Respondent.
20. Section 16 of the Water Act states, in part:

- (1) If –
- (a) there is a flow of water from the land of a person onto another land;
  - (b) that flow is not reasonable;
  - (c) the water causes –
    - (i) injury to another person; or
    - (ii) damage to the property (whether real or personal) of any other person; or
    - (iii) any other person to suffer economic loss –
 the person who caused the flow is liable to pay damages to the other person in respect of that injury, damage or loss.
- (2) If –
- (a) a person interferes with a reasonable flow of water onto any land or by negligent conduct interferes with the flow of water onto any land which is not reasonable; and
  - (b) as a result of that interference causes –
    - (i) injury to any other person; or
    - (ii) damage to the property (whether real or personal) of any other person; or
    - (iii) any other person to suffer economic loss –
 the person who interfered with the flow is liable to pay damages to that other person in respect of that injury, damage or loss.

21. In my view, the phrase *negligent conduct interfering with the flow of water onto any land* is wide enough to capture a scenario where a water authority, imbued with an obligation to maintain a waterway, has *unreasonably* failed to do so, with the consequence and its failure to act ultimately interferes with the natural flow of water. In other words, negligent conduct by a statutory authority may arise either by positive acts (misfeasance) or by an omission to act in circumstances where there was a duty to do so (nonfeasance). Consequently, the law has, with some trepidation, been prepared to impose liability for omissions causing economic loss where a statutory authority fails to give proper consideration to whether to exercise the power or not.<sup>2</sup>
22. The question then arises; namely, whether a water authority can be held liable for damages suffered by another person in circumstances where it

---

<sup>2</sup> *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 36 ALR 385; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.



has failed to maintain a natural river channel within its *waterway management district*.

23. In the present case, it is common ground that the Respondent is an Authority which has declared the relevant section of the Ovens River to be a *designated waterway* under s 188 of the Water Act. Section 189 of the Water Act sets out the functions of water authorities which have a *waterway management district*:

**189. Functions of Authorities**

An Authority that has a waterway management district has the following functions in relation to designated waterways or designated land or works within that district –

- (a) to identify and plan for State and local community needs relating to the use to the economic, social and environmental values of land and waterways;
- (b) to develop and to implement effectively schemes for the use, protection and enhancement of land and waterways;
- (c) to investigate, promote and research any matter related to its functions, powers and duties in relation to waterway management;
- (d) to educate the public about any aspect of waterway management.

24. Further functions are set out more broadly under Part 10 (Waterway Management) of the Water Act. Division 4 of Part 10 deals with Floodplain Management. For example, s 202 of the Water Act states, in part:

**202. Floodplain management functions**

An Authority has a following functions or such of those functions as are specified in the Order under s 201(1)(b) (ii), as the case requires –

...

- (d) to control developments that have occurred or that may be proposed for land adjoining waterways;
- (e) to develop and implement plans and to take any action necessary to minimise flooding and flood damage;
- (f) to provide advice about flooding and controls on development to local councils, the Secretary to the Department of Infrastructure and the community.

25. Additional functions of Catchment Management Authorities are found in Division 3 of the *Catchment and Land Protection Act 1994*. Section 1 of that Act states, in part:

**12 Functions powers and duties of Authorities**

- (1) Each Authority has the following functions in respect of the region for which it has been appointed –
- (a) to prepare a regional catchment strategy for the region and to coordinate and monitor its implementation;
  - (b) to prepare special area plans for areas in the region and to coordinate and monitor their implementation;
  - (c) to promote the cooperation of persons and bodies involved in the management of land and water resources in the region in preparing and implementing the strategy and special area plans;
- ...
- (i) to carry out any other functions conferred on the Authority by or under this Act or any other Act.
- (2) Each 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.

...

**19E Statements of obligations of Authorities**

- (1) The Minister may –
- (a) issue a statement of obligations to an Authority specifying obligations that the Authority has in performing its functions under this Act or exercising powers it has under this Act; or

...

26. Finally, Part 7 of the Water Act (General Powers) sets out, more generally, ancillary powers which a water authority has. In particular:

**123. Powers of Authorities**

- (1) 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.

...

**124. Particular powers of Authorities**

...

- (3) The powers of an Authority that has a waterway management district include any of the power set out in any Division of Part 10 that applies to that Authority.

...

- (5) An Authority is not obliged to perform any function conferred by this Act, unless this Act expressly provides otherwise. [underlining added]

27. Under s 19E of *Catchment and Land Protection Act 1994*, cited above, the Minister may issue a *Statement of Obligations* which may expand or clarify certain functions or obligations of a water authority. The most recent *Statement of Obligations* issued to the Respondent is dated 5 January 2018, a copy of which was produced during the course of the hearing. The relevant sections of that *Statement of Obligations* are:

**3 Purpose**

- 3.1 This Statement's purpose is to impose obligations on the Authority related to the performance of its functions under Part 10 of the Water Act and the exercise of its powers under the Water Act, performance standards, requirements for community consultation, and the management of the environmental water reserve.

...

**Part 4 Community Engagement**

**11 General**

- 11.3 The Authority must establish and maintain effective and transparent community engagement to:
- (a) Develop and implement the Regional Waterway Strategy, the Regional Floodplain Management Strategy, and drainage problems;

...

## **22 Floodplain Management**

22.1 The Authority shall develop, monitor, review and report on the regional floodplain management strategy and implementation plan for its region, in partnership with regional service deliverers, including cross-border interests.

22.2 The Authority must provide advice about flooding in controls on planning scheme amendments, and planning and building applications to local government in its capacity as a referral body in accordance with relevant legislation.

..

## **25 Responding to Natural Disasters, Incidents and Emergencies**

...

25.2 The Authority shall develop and implement funded waterway related restoration works programs after natural disasters such as bushfires or floods.

### **The Applicant's submissions**

28. The Applicant contends that the functions of the Respondent, as set out in the various provisions of the Water Act, *Catchment and Land Protection Act 1994*, and Statement of Obligations impose a positive duty on the Respondent to *reasonably* ensure that the waterways under its management do not flood private land. In the present case, the Applicant does not seek compensation for the initial flooding events but rather, seeks injunctive relief and compensation for the ongoing flow of water onto the Property, by reason of the Ovens River having changed its course. Put simply, the Applicant seeks an order compelling the Respondent to undertake remedial work to reinstate the Ovens River to follow its original watercourse and compensate the Applicant for any loss suffered as from the date when that work should have been done.
29. According to the Applicant the remedial work, the scope of which is set out in an expert report prepared by *Foresight Engineering Services* dated 11 April 2017, is approximately \$175,000. The Respondent contends that the cost is \$225,000. The difference between the two prices relates to what work will be undertaken by the Applicant on the Property at his own cost.
30. The Applicant contends that the Respondent has undertaken some work in the Ovens River upstream from the Property. He produced an extract of a webpage bulletin prepared by the Respondent which stated, in part:

## **Flood Recovery Update**

### **Winter – 2017**

#### **WORKS IN PROGRESS**

Works are underway in a number of the 56 sites approved for funding under the Natural Disaster Relief and Recovery Arrangements (NDRRA) Round 1 submission to protect essential public infrastructure. Works have commenced at the larger sites at most risk of significant damage and community impact if further flooding occurs.

The completion of a rock shoot on the Ovens River downstream of Pioneer Bridges in Markwood has rectified a major breach impacting on multiple public roads and river crossings and also affecting 16 landowners between Everton and Tarrawingee. The rock shoot has returned this section of the Ovens River to its pre-October 2016 flood course. The works involved removing logjams and debris in the construction of a sheet pile cut-off walls to fill the hole in bank. More than 3500 tons of rock were used to construct the rock chute and reinforce the rock wall...

31. It is not contended that this work caused (directly or indirectly) the diversion of the natural watercourse abutting the Property. However, the Applicant contends that the Respondent has created a precedent by undertaking such remedial work.
32. According to the Respondent, this work was done in order to protect public assets and utilities. It contends that no work was done solely to protect private property, although it concedes that some private landowners may have benefited from that work.
33. The Applicant contends that the relief funding provided under the Natural Disaster Relief and Recovery Arrangements should be utilised by the Respondent to reinstate the Ovens River to its pre-October 2016 flood course where it abuts the Property. He submits that the statutory obligations of the Respondent mandated that it be done.

#### **Is there a duty or obligation to carry out remedial work?**

34. In my view, none of the provisions of the Water Act, the *Catchment and Land Protection Act 1994* or the Statement of Obligations mandate that the Respondent must carry out remedial work to reinstate the Ovens River to its pre-October 2016 flood course along the eastern boundary of the Property. Although it is beyond doubt that the Respondent has the power to undertake that remedial work, the exercise of that power is at its discretion.
35. Consequently, I do not consider that the failure to exercise that discretion constitutes nonfeasance on the part of the Respondent, giving rise to any liability under s 16 of the Water Act. The situation may be different in

circumstances where the Respondent has undertaken some work to, or associated with, the Ovens River and where that work has caused the river to alter its water course.<sup>3</sup> However, there is no evidence of that. Here, the evidence, at best, points to the river having changed its course as a result of natural debris choking the water channel during a period of exceptionally high rainfall. This scenario is likely to have caused the river to find an alternate channel in which to dissipate upstream catchment flows. This is a natural phenomenon.

36. A similar scenario was before the House of Lords in *East Suffolk Rivers Catchment Board v Kent*.<sup>4</sup> In that case, the plaintiffs were occupiers of a dairy farm in Suffolk, England. Fifty acres of marshland formed part of the property adjacent to the river Devon. Between that marshland and the river was a wall which was necessary to prevent incoming tides from coming upon the land. The defendant was a water authority which was bestowed with powers and functions, similar to the powers and functions held by the Respondent. As a result of abnormal weather conditions, the wall was breached and the plaintiff's land inundated with floodwater. Although the defendant ultimately undertook remedial work, a question arose whether the water authority could be liable if it had chosen not to undertake remedial work, even though it clearly had the power to do so under the enabling legislation.

37. The court held that the provisions of the empowering Act did not oblige the Board to act:

It is admitted that the Land Drainage Act, 1930, did not impose a positive duty to undertake the repair of breaches in the walls on the banks of the main river on the applicant's appellants, but conferred on them power to undertake such repair, and to enter upon lands belonging to another for that purpose. It is clear to me that the appellants owed no duty to the respondents unless and until they actually entered on their land and commenced operations for repair of the breach.<sup>5</sup>

...

It is common ground that an Act of Parliament may either impose a duty upon a public or other body or may grant them powers to do an act without creating any obligation upon them to undertake the task. It is conceded that whereas in the former case a body upon whom a duty is imposed must fulfil it with due care and expedition -in the latter case there is no obligation upon the body to do anything at all. If they choose for any reason which commends itself to them to leave the task unperformed no remedy can be obtained nor can any action

---

<sup>3</sup> In which case, s 157 of the Water Act may apply.

<sup>4</sup> [1941] AC 74.

<sup>5</sup> Ibid, 94 per Lord Thankerton.

be taken against them unless a right to do so is given by the Act which grants the power.<sup>6</sup>

38. In my view, the situation in *East Suffolk Rivers Catchment Board* is analogous with the present case. According to the Applicant the Respondent was aware that fallen trees and other natural debris had created an obstacle impeding the natural flow of the watercourse. In those circumstances, I accept that it was reasonably foreseeable that the collection of natural debris, and the subsequent choking of the river system, may result in the river altering its course.
39. That being the case, it was clearly open for the Respondent to allocate resources to clear the river system at that point. Indeed, the Applicant said that he had even offered to use his own excavator to clear the river of debris but was told that this was not permitted.
40. Nevertheless and notwithstanding that the Respondent might justifiably be criticised for not allocating funds to clear the Ovens River of debris where it abuts the Property, its decision to act remained largely discretionary.
41. Consequently, I find that the Respondent did not cause the flow of water onto the Applicant's land; nor did it interfere with a reasonable flow of water causing damage to the Applicant's property. Therefore, the cause of action, insofar as it is couched pursuant to s 16 of the *Water Act* is without legal or factual foundation.

## **Conclusion**

42. Consequently, I find that the Respondent did not have an obligation to clear the Ovens River in the vicinity of the Property of vegetation or debris so as to prevent the river channel from moving or deviating from its original course. Further, I find that the Applicant does not have a cause of action against the Respondent under either s16 or s 157 of the *Water Act*.

## **SENIOR MEMBER E. RIEGLER**

---

<sup>6</sup> Opcit, 103, per Lord Porter.