T E R R A   P U B L I C A
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This edition of Terra Publica looks at aspects of some of our recent consultancy work – relating to urban public land, the seabed, and rivers.

Public Land-Led Urban Renewal

Sure, the township of Lara isn't Geelong, and it certainly isn't metropolitan Melbourne, but maybe it has something to tell its bigger neighbours about urban renewal.

Lara faces many of the planning challenges which are so familiar elsewhere – a central precinct struggling to service an expanding population, heavy truck traffic on a poorly configured road network, and a railway station that is simultaneously a honey-pot for commuters and a barrier cutting the town in two. Smack in the middle is Austin Park, a Crown land reserve criss-crossed by dysfunctional road reserves.

Developing a second commercial precinct on the fringe of Lara would just fragment commercial activity and allow the present centre to run down, without doing anything to solve its problems. Instead, Council planners have chosen the bold course of revitalising the existing precinct – by reconfiguring the public land.

The Lara Structure Plan proposes the discontinuation of some old road reserves and the proclamation of others, the relocation of a bowling club and a skate park, the revocation of some parts of Austin Park and the re-reservation of new parts. At the end of the day, the reconfiguration will result in a 1.9 hectare expansion of the commercial precinct, with a new supermarket, library, town square, and rationalised car parking. The new-look Austin Park will be more accessible and more pedestrian-friendly.

Of course, the land isn't Council's to just chop up as it sees fit. It's Crown land, to be dealt with only with government consent– which was granted in March 2006 when the plan was given in-principle approval by then Planning Minister Rob Hulls. Being Crown land, there will also need to be an Indigenous Land Use Agreement with the Aboriginal community.

www.geelongaustralia.com.au/Services_In_Geelong/Planning/Strategic_Planning/

City of Greater Geelong now changes role, from strategic planner to project manager. The broad-brush concept plans must be converted into council resolutions, contract documents and Orders-in-Council published in the Government Gazette.

Many of the Melbourne 2030 showpieces (Dandenong, Footscray, Box Hill, Bendigo…) are centred around railway land, dysfunctional road reserves, run-down recreational facilities, abandoned market sites and so forth. But, as they've demonstrated at Lara, you don't have to be on the Transit City A-list to reap the benefits of some innovative thinking about urban public land. ■

Scuba-Law

Defence Minister Brendan Nelson has promised an extra $7 million for the sinking of ex-HMAS *Canberra* off Barwon Heads, accusing the State Government of delaying the project. Victorian Tourism Minister Tim Holding says the Federal Government is playing politics, and is just rectifying its own funding shortfall.

Leaving politics to the politicians, it falls to rest of us to work through the technical detail: who owns the sea bed? What laws govern it? What options are there for management of the wreck as a diving attraction? The range of possibilities turns out to be remarkably broad.

A band of ocean seabed 3 nautical miles wide is deemed to be within Victoria by virtue of two 1980 Commonwealth Acts. Other Commonwealth statutes relevant to the site include the Native Title Act, which reminds us that Native title may exist, even out at sea.

The Environment Protection and Biodiversity Conservation (EPBC) Act may also apply, even though the 'Commonwealth Marine Area' as defined by that Act commences at the three nautical mile line, and does not include waters within States. If the EPBC Act applies, it will more likely be due to some impact on nationally-listed threatened species or ecological communities.

Off Barwon Heads the seabed is 'default status' Crown land, having never been alienated or reserved – although it is open to the State government to lease it, to reserve it either under the National Parks Act or the Crown Land (Reserves) Act, or even to sell it off as freehold. At present, the site is not within any municipality, and does not come under any Planning Scheme – although, again, the State government has the option of bringing it within municipal boundaries, or bringing it under a planning scheme, or both.

Continued…

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Scuba-Law … continued

The site is already 'Coastal Crown Land' for the purposes of the Coastal Management Act – although this status could be removed, if it was seen as in impediment, by a simple Order in Council.

The Marine Act could be used to appoint a 'waterway manager' with power over boating and navigation; the Fisheries Act could be used to make the area a fisheries reserve with an enforceable management plan protecting fish; the Wildlife Act could be used to protect seabirds and mammals (including dolphins, which the Act curiously defines as being 'whales').

Other Acts deal with shipwrecks, but are not immediately applicable to this case. The State Heritage Act applies only to historic shipwrecks, defined to be those more than 75 years old, and provides for shipwrecks in ocean waters (whether within the 3-mile limit or not) to be administered under the Commonwealth Heritage Shipwrecks Act. This latter Act provides for regulated exclusion zones, but is also limited to wrecks more than 75 years old, although the Commonwealth Minister may extend it to later wrecks.

Eventually, it's hoped that many thousands of divers will enjoy swimming through specially-cut ports in the wreck's superstructure. Unknown to them, they'll also be swimming through a maze of commonwealth and state law. ■

Right: HMAS Brisbane is scuttled off the Gold Coast, August 2005.

Page 1: HMAS Perth is scuttled off Albany, WA, Nov 2001.

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LAND LAW FOR COASTAL AUTHORITIES

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WATERWAYS
A Cadastral Taxonomy

Geographers, ecologists and hydrologists may classify rivers in terms of their geomorphology, biological characteristics, or flow regimes. For legal purposes, however, waterways often need to be described in terms of their relation to the cadastre.*

The Murray

In this taxonomy the Murray stands apart. It defines the state border, which lies at the top of the bank on the southern side of the river. A strip of dry land on the southern side, between the water's edge and the top of bank, is thus in New South Wales.

In places where there is more than one channel, the relevant channel is the one which carried the greater flow in 1850, being the year in which Victoria was separated from New South Wales.

The three-chain Crown reserve established along the southern frontage was created in 1881, when the state border was believed to be the water's edge at ordinary winter flow. As a result, the present width of the reserve is three chains, minus the width of the strip between water's edge and top-of-bank**.

Headwaters

The headwaters of many major rivers lie entirely within Crown land – often State Forest or National Park. In the former case the riparian land may have dual status, being simultaneously State Forest and Crown Reserve; in the latter, the Crown Reserve will have been revoked by the legislation creating the National Park. In both cases, the riparian land is regarded and managed as part of the Forest or Park of which it forms a part.

Waterways as Property Separators

Many of the State's major waterways are cadastral separators. Here we find a strip of Crown land, containing the watercourse and its frontages, separating the freehold land on either side**. It is this class of waterway where Crown water frontage grazing licences are most likely to be found.

'1905' Boundary Waterways

Certain waterways form freehold property boundaries. On title the boundary is defined as the centreline of the watercourse, apparently leaving no Crown land. These titles must, however, be read in conjunction with the Water Act 1905, which decreed that the bed and banks of such waterways did not pass with the grant of freehold, but remained as Crown land. In these cases the waterway itself is now Crown land, but there is no Crown frontage.

Continued…

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Waterways within Properties

A further class of waterway includes those streams, often relatively minor or non-perennial, which lie entirely within freehold property boundaries. These were unaffected by the 1905 expropriation.

Designated Waterways

The *Water Act* 1989 relates to both 'waterways' and 'designated waterways.' Under section 188 a Waterway Authority (other than Melbourne Water) may declare a waterway to be a designated waterway. Under section 188A all waterways in Melbourne Water's waterway management district are designated waterways (without having to be so declared), other than waterways within the Port of Melbourne and the lower reaches of certain rivers near the Port.

The '1881' Rivers

Much riparian Crown land is reserved, and although this may occur at any time, the most notable reservation was that of 1881, when land forming the bed, banks and frontages to some 280 rivers and lakes was reserved. The reservation applied only to land which was still Crown land at the time, so the reserve is interrupted by parcels of freehold land which had been sold off before that date.

Named Rivers

The *Aboriginal Heritage Regulations* 2007 employ a novel method of identifying all streams other than the most minor – by reference to streams with a registered name. In these regulations -

> ***waterway*** means—
> (a) a river, creek, stream or watercourse the name of which is registered under the **Geographic Place Names Act 1998**; or
> (b) a natural channel the name of which is registered under the **Geographic Place Names Act 1998** in which water regularly flows, whether or not the flow is continuous.

Navigable Rivers

In the past, navigability was an important taxonomic characteristic. Navigable rivers were granted special recognition in early land law, and are still regarded as 'public highways' by the common law. The lower Yarra, Maribyrnong, Patterson River etc are also given special status under ports-related legislation.

Heritage Rivers

The *Heritage Rivers Act* 1992 designates 18 specified rivers, or parts of them, as Heritage Rivers.

For each river, a schedule specifies a bandwidth (typically 100, 200, or 300 metres wide) of riparian land to which the provisions of the Act applies. For public land within these zones, restrictions apply to uses and works such as water diversions and timber harvesting. ■

* The *cadastre*: the body of data defining the legal status and ownership of land.

** Warning: further complications if the river has moved !

Professional development

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Thurs 8 November — Warrnambool
Tues 13 November — Melbourne
Tues 27 November — Bendigo
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VEGETATION AND THE LAW

Thurs 13 December — Melbourne

Presenter: Brendan Sydes, Principal Solicitor, The Environment Defenders Office

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Enquiries and Registrations

To book into one of our courses, or arrange a course at your offices, please contact -

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Inquiries and Registrations

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What's the difference between a *Government* Road and a *State* Road?

Question asked by a municipal Director of Infrastructure

They say the Inuit (Eskimo) people have a hundred words for 'snow.' Our vocabulary is just as complex when it comes to roads: there are so many variations, permutations and nuances that a single word will just not suffice. One day we'll draw up a road lexicon which, who knows, may well have a hundred entries.

But back to the question. 'Government Road' refers to a type of land status: whether there is a physical roadway on it, and who manages it, is immaterial. It is Crown land dedicated as a road, usually by a 19th Century surveyor, and recognised as a road by the Land Act 1958. At one end of the spectrum Government roads include Bourke Street in central Melbourne; at the other end they include bands of bush or pasture indistinguishable from the landscape through which they run.

A 'State Road' is a creature of the Road Management Act, which uses the term as a collective descriptor for many (but not all) roads on Crown land. It includes Arterial Roads and roads administered under the Crown Land (Reserves) Act 1978, the Forests Act 1958, the National Parks Act 1975 and the Alpine Resorts (Management) Act 1997. In all these cases, the reference must be to a physical roadway rather than to the land's legal status – because the land status is Crown Reserve, State Forest, National Park or Alpine Resort as the case may be.

The definition of State Road also ropes in roads under the Land Act 1958, but most of these are Government Roads, and therefore Municipal Roads, while others are Unused Roads and therefore outside the scope of the Road Management Act altogether.

Do the Inuit have a word for too much snow? ■

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LAND LAW FOR MANAGERS OF ROADS, STREETS AND LANES

Tuesday 4 December

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