TERRA PUBLICA
VOL 8 NO 1 JANUARY 2008

In the first edition of Terra Publica for 2008 we delve yet again into various areas of public land law, including the Retail Leases Act, the Aboriginal Heritage Act, the numerous Acts governing riparian land, and that bottomless pit of curiosities, the Road Management Act.

WHEN PUSH COMES TO SHOVE

As taxpayers, we approve when a state agency acts to divest itself of costs. As ratepayers, we support our local council when it complains about government cost-shifting. As road users, we don't care whose coffers the money comes from: we just want the potholes filled.

For most roads there is no argument about management responsibility: it's either VicRoads or the relevant council. For Arterial Roads, demarcation issues have been sorted through pretty comprehensively, and the resultant protocols are set out in the *Code of Practice – Operational Responsibility for Public Roads*. For roads in forests and parks, however, there is still plenty of room for a bit of good old-fashioned push and shove.

Rich territory for metaphors?

There must be scores of cases where a road through land managed by DSE or Parks Victoria serves multiple purposes: one road may support operational purposes such as fire access; it may allow public use and enjoyment of the forest or park; it may provide access to abutting freehold properties; and it may even serve through traffic totally unconnected with the forest or park.

It's clear that DSE is the Responsible Road Authority, but what if the local council disagrees with DSE's management standards? The Code certainly anticipates such situations, but all it offers the negotiating parties is a checklist of discussion points, not a dispute resolution methodology.

The Code will be put to the test soon, when DSE releases its long-awaited Road Management Plan and associated Road Register for public comment. We anticipate that some stakeholders will respond by advocating the reclassification of certain roads to a higher rung on the proposed five-step scale; other stakeholders will call for higher design standards, more frequent inspections or lower intervention thresholds.

When push comes to shove, councils may have a difficult choice: they may have to accept a lower standard than their ratepayers are demanding; they may be faced with 'topping up' the DSE / Parks Victoria road maintenance budget, or they may even have to negotiate an agreement to accept responsibility under a section 15 transfer. ■

Roads which aren't Roads

Having fought their way through the thickets of terminology in the Road Management Act 2004, most practitioners will know that a road, even one open to the public, need not be a public road. A little harder to grasp is the fact that a road need not be a road.

The Act offers a definition of 'road' which in turn limits the meaning of other terms such as 'Road Authority' and 'Municipal Road.' Unfortunately, this definition is *inclusive*, rather than *comprehensive*: three specific types of road fall within the definition (you'll find them in section 3 of the Act), but there may be more. If so, what are they? Where are they?

Equally, the fact that the definition is not all-encompassing could be taken to imply that there are roads which are *not* roads under the Act. If so, what and where are they?

Part of the answers may be found by looking at land vested in Water Authorities, such as the land around reservoirs. Roads here do not (and can not) meet any of the three tests in the definition, but do they nevertheless fall under the Act?

Water Authorities are not 'State Road Authorities' under the Act, and therefore reservoir roads can not

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Roads which aren't Roads

be 'State Roads.' The Act provides that any road other than a 'State Road' is a 'Municipal Road' and is the responsibility of the relevant council. So if these reservoir roads *do* fall under the Act, the local Council has suddenly become responsible for roads on land vested in Water Authorities. A similar argument could be applied to roads on the land of all state agencies other than those which are State Road Authorities. That is, of course, a nonsense – or as the lawyers say '*reductio ad absurdum*.'

Our conclusion: roads around reservoirs (and roads in school grounds, university campuses, hospital complexes, and public housing estates) are not roads at all – at least not for the purposes of the Road Management Act.

Now, before you all go out and start hooning around the local reservoir, we should remind you that the Road Safety Act 1986 has a different definition of road: "*an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles*" So the thing we're talking about which is not a road may still be a road for the purposes of the Road Rules, and you must still keep to the left, be under .05, and not do doughnuts. ■

UPDATE

Aboriginal Heritage Act 2005

Aboriginal Affairs Victoria (AAV) has now registered four Registered Aboriginal Parties (RAPs).

- **Gunditj Mirring** – for most of Shires of Glenelg and Southern Grampians
- **Martang** – for large portions of the Southern Grampians and Ararat municipalities
- **Yorta Yorta** – for all of Moira and Greater Shepparton; large parts of Indigo, Wangaratta, Campaspe, Benalla and Strathbogie
- **Barngi Gadjin** – for all of West Wimmera and Hindmarsh, large portions of Horsham, part of Northern Grampians, and the southern portion of the Rural City of Mildura.

For more detail of the areas covered by these RAPs, see http://www1.dvc.vic.gov.au/aav/heritage/registered/index.html.

UPDATE

Retail Leases Act 2003

When Brimbank City Council took the Westvale Community Centre took to the Supreme Court in 2005, we might have hoped that the case would help clarify some of the issues surrounding non-commercial tenancies. Instead, the court added another layer of complexity.

It ruled that land leased to a community group may be 'retail premises' and so come under the Retail Tenures Act – even if the activity conducted is not a business, even if there is no hint of commerciality, and even if the tenant enjoys a nominal rental.

Several councils expressed alarm at community tenancies falling under the Act. The Department of Industry Innovation and Regional Development (DIIRD) has responded with a proposal for the Minister for Small Business to exempt community organisations from the Act.

DIIRD has backed away from attempting to define a 'community organisation.' That's a pity, because it would be a very useful definition to have for other purposes. Instead, DIIRD proposes to link the exemption to premises exempt from rates under section 154(2) of the Local Government Act, as if the exceptions in 154(3) did not apply; and all land falling under the *Cultural and Recreational Lands Act* 1963.

What we can't understand is why the proposed exemption will apply only to leases issued by councils. How about community use leases issued directly by DSE, or by Parks Victoria, or by other Committees of Management? After all, it's supposed to be the functional nature of the tenant entity that warrants the exemption, not the constitution of the landlord. ■

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Q & A

HOW DO WE STOP STOCK POLLUTING THE RIVER?

Question asked by the CEO of a Rural Water Authority.
Land along the river in question is Crown land

There are at least half a dozen heads of power which you might expect to regulate stock access to Crown waterways. Each one, however, has some deficiency which currently renders it ineffective.

The *Impounding of Livestock Act* 1994 deals with trespassing livestock. The common law tort of trespass relates to entering onto land in someone else's possession – not onto unoccupied Crown land. For the purposes of this Act, the definition of trespass is extended to include 'wandering without effective control or being at large' – but even this may not encompass stock entering a Crown water frontage adjacent to their normal pasture.

The *Fences Act 1968* requires occupiers of abutting freehold properties to construct dividing fences. This Act deals only with dividing fences between occupied properties, not between a freehold property and a Crown water frontage. There is no obligation to fence a Crown boundary.

The *Land Act* 1958 (section 403) requires an abutting owner who is 'in occupation' of a Crown frontage to take out a Water Frontage licence. Allowing stock onto a water frontage may constitute 'occupation,' but this is far from clear. Non-compliance with section 403 is an offence – but the offence is failing to take out a licence, not failing to restrain the stock.

The *Environment Protection Act* 1970 stands at one end of a chain of provisions which could prove an effective control over stock in waterways, but which at the present time has some missing links. The *State Environment Protection Policy (Waters of Victoria),* made under section 16 of that Act, comes close: "Animal wastes must not be dumped into surface waters and the runoff of animal wastes to surface waters needs to be minimised." That's of little value here: we don't want to see the words "needs to be minimised;" we want to see the words "is an offence."

The Environment Protection Act also provides for 'scheduled premises' and 'scheduled activities' for which licences may be required, and which may be the subject of enforceable regulations. Some intensive animal husbandry premises are 'scheduled premises,' but allowing cattle into a stream is not a 'scheduled activity.'

The *Water Act* 1989 empowers Catchment Management Authorities and Melbourne Water to make bylaws in relation to 'designated waterways.' Most rivers and streams in the State have been declared to be designated waterways, and bylaws have been made in relation to *works* on those waterways – but not relating to *uses*, such as the watering of stock.

The *Land Act* 1958 allows regulations to be made in relation to Crown frontages – but only for licensed frontages, not for the bed and banks, and only in relation to recreational usage. The *Crown Land (Reserves) Act* 1978 allows regulations to be made for reserved Crown land – but not all riparian Crown land is reserved, and the only regulations that have been made under it are site-specific.

The *Planning and Environment Act* 1987 is of little or no use: even if the inconsistent use of zones and overlays in Planning Schemes was overcome, the Act remains ineffective against pre-existing non-conforming uses.

So there are two answers to the question:

One: rely on non-legal strategies including education, economic incentives, peer pressure and generational change;

Two: fix the Acts listed above to give them some teeth.

Come to think of it, there's a third answer: both of the above. ■

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To register for one of our training courses, or to arrange an in-house course for your organisation, contact **Dorothy Jenkins**, our Training Course Coordinator on 9579 2635, or at dorothy@publicland.com.au

OUR PROFESSIONAL DEVELOPMENT COURSES

- *The Land, its Traditional Owners & the Law*
- *The Aboriginal Heritage Act 2006*

Our Presenter: Megan Goulding
Interim CEO, Wurundjeri Tribe Land Council

- *Crown Land Law, Policy and Practice*
- *Land Law for Managers of Roads & Lanes*
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- *Land Law for Coastal Authorities*

Our Presenter: David Gabriel-Jones
Principal, The Public Land Consultancy

- *Vegetation and The Law*

Our Presenter: Brendan Sydes
Principal Solicitor, Environment Defenders Office

- *Land Law for Service Utilities*

Specialist presenter to be engaged shortly…

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