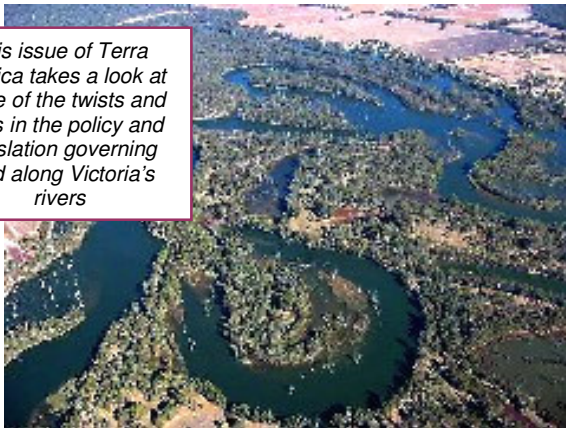


“Shall We Gather At The River?”

On the Sunday School picnic, we sang with great gusto but an imperfect understanding: what exactly should we gather:- wildflowers? firewood? pebbles? In the end, we gathered nothing; just as well, because in so doing we may have committed various secular offences.

Riparian land needs protection, not only from marauding Sunday-schoolers, but from those recalcitrants who still see rivers as tips, quarries, and cheap watering troughs for their stock. In the long term, education and generational change will prevail, but meanwhile there must be active monitoring backed up by enforceable regulations. Unfortunately, the current regulatory regime for riparian land is haphazard and therefore less effective than it should be.

This issue of Terra Publica takes a look at some of the twists and turns in the policy and legislation governing land along Victoria's rivers



You'll find a limited analysis of this regime in the recently-published Regulatory Impact Statement (RIS) for the *Land Regulations 2006*. The limitations of the RIS are due to the constraints of the *Subordinate Legislation Act 1994*, which is premised on the assumption that regulations (or subordinate legislation) are framed under sound and well-considered Acts (or primary legislation). In the case of the *Land Act 1958*, this assumption is a long way from reality.

Despite its limitations, the RIS provides some interesting insights into the governance of riparian land in Victoria. Victoria has about 34,000 linear km of water frontages (two frontages to most rivers; only one to the Murray). About 9000 km is freehold land, but 25,000 km remains Crown land. Being long but narrow, Crown frontages occupy the relatively small area of 100,000 ha, or 1.1% of Crown land in the state – a figure which understates their importance for conservation, recreation, habitat and the quality of the water flowing past them.

As the result of a far-sighted decision taken in 1881, most of this Crown frontage is reserved, but there's also plenty of unreserved frontage. Both reserved and unreserved frontage may be licensed to abutting owners, and some 10,300 such licences are in operation, usually for the purpose of grazing. Along many rivers you'll find all combinations of these types of land status:- reserved and licensed, reserved but not licensed, unreserved and licensed, and finally, unreserved and unlicensed. It's this mosaic, and its correspondingly complex legislative coverage which results in what can only be described as a dysfunctional governance regime.

The *Land Act 1958* empowers the regulation of activities and behaviours – but only on *licensed* (not unlicensed) Crown frontages (not the bed and banks), and only if the miscreants are engaging in *recreation*. Any Sunday-school child could jump through those loopholes. The *Crown Land (Reserves) Act 1978* also provides for regulations, but only for the *reserved* land. It is a head of power without arms and legs: no regulations have ever been made under it for the 1881 reserve.

Planning Schemes also apply to waterways – but they are targeted at owners and occupiers of land, rather than occasional visitors or trespassers. Although they may constrain long-term uses and developments, they are ineffective against ephemeral activities.

If we're looking for legislation with teeth to control riparian land, it might be found in the *Water Act 1989*. That Act empowers Catchment Management Authorities to make by-laws in relation to waterways and their 'surrounds' (a curious term); and empowers them to designate land 'abutting or within 20 metres of a waterway' (a curious phrase) to which it can close off access and prevent unauthorised works. Some CMAs have made by-laws; but as far as we know none has yet used the 'designated land' power.

Good citizens don't need regulations; but for the rest of us there's no better deterrent than the prospect of a decent penalty. Under the *Water Act* a first offence on 'designated land' may incur a fine of 20 penalty units (which converts to \$2150.00), and serial offenders can get up to 6 months jail. The *Land Act*, however, sets a maximum fine of a mere 0.2 penalty units, or \$21.50.

Way back in August 2002, the Government released the Victorian River Health Strategy, which included a commitment to hand over management of Crown frontages from DSE to the CMAs. A transfer would be a great opportunity to sort out some of these twists and turns in riparian policy and legislation. Otherwise we might just as well sit around on the riverbank, singing hymns. ■

The RIS for the *Land Regulations 2006* is at www.dse.vic.gov.au
> About Us > Legislation > Regulatory Impact Statements



Q & A

“How can a river reserve be removed from a paddock (where there’s no actual river)?”

Question asked by a surveyor in a major engineering firm, having discovered that his client’s property is bisected by a permanent Crown reserve, where a river once used to run.

Answers 1 and 2: It’s difficult, but not impossible.

Answer 3: There’s a better way – equally difficult, but far more effective in the longer-term.

The circumstances of the case are these: in 1881 Crown land in the bed, banks and frontages of most Victorian rivers was permanently reserved. Over time, many rivers have moved (some through natural causes, some through artificial) but the permanent reserve has stayed put. What looks like someone’s paddock is in fact a Crown reserve; what looks like river frontage is in fact someone’s freehold land.

It’s a situation that runs counter to any sensible, modern, economic or conservation objectives. The freehold landowner may be unable to subdivide in the manner dictated by normal commercial and planning considerations. The Crown has no direct control over the actual river frontage, but owns a piece of land it doesn’t want. Under section 401A of the *Land Act* 1958, members of the public are allowed to enter the Crown reserve (i.e. the middle of the paddock) for recreational purposes, and the landowner is obliged to provide them with styles or unlocked gates. The public has no equivalent rights, however, over the land where the river actually runs.

What’s called for is a land exchange, but here we find deficiencies in the current legislation. Section 12A of the *Land Act* 1958 allows freehold land to be swapped for Crown land – but not if the Crown land is permanently reserved. Section 11(1) of the *Crown Land (Reserves) Act* 1978 allows the Governor-in-Council to adjust the boundaries of a permanent river reserve, but only where the river now occupies other Crown land.

So **Answer No 1** is – (a) You get DSE’s agreement to steps (b) to (d); (b) surrender to the Crown the freehold where the river now runs; (c) get the Governor-in-Council to shift the permanent reserve to the land you’ve just surrendered; and (d) purchase the now-unreserved Crown land. Add a bit more complexity if the land the river has shifted into is someone else’s freehold. Oh, allow at least two years and hope that nothing goes wrong in the process...

Answer No 2 – site-specific legislation. Most sessions of Parliament consider a proposal with a title something like “Land (Revocation of Reservations) Bill 2004.”



Again, allow two years and hope the parliamentary program isn’t disrupted by an election. Even after proclamation of your new Act, you’d still have to purchase the land.

Answer No 3 (we like this one) – a generic legislative amendment. The Governor-in-Council should be given power to enter into land exchanges, even where the Crown land is permanently reserved, to rectify anomalies resulting from movements of rivers. This could take the form either of an amendment to section 12A of the *Land Act*, or to section 11 of the *Crown Land (Reserves) Act*.

Whichever route you choose, you must first convince the Minister that the outcome is something the Government should support. Remember that Ministers like to hear phrases like ‘no loss of public land’ and ‘net gain of conservation values’ and ‘wide community support.’ Good luck.

* * * * *

Since we first ran this article in October 2004 another surveyor has proposed

Answer No 4: *Send in engineers with bulldozers to put the bloody river back where it’s supposed to be!* ■

Readers of Terra Publica should not act on the basis of its contents which are of a general nature, capable of misinterpretation and not applicable in inappropriate cases. They do not, nor are they intended to, constitute legal or specific advice. The Public Land Consultancy is available to provide advice on public land matters and will, on request, arrange legal advice for clients from its associate Maddocks, of 140 William Street, Melbourne.

NOT KNOWN AT THIS ADDRESS

You might imagine that a working landlord-tenant relationship requires (a) the landlord to know the tenant's name and contact details, and (b) the tenant to realise that the property concerned is not theirs, but belongs to someone else – *i.e.* the landlord. Well that's not how it works with Crown land unused roads (URs) and water frontages (WFs).

The real estate market does not recognise URs and WFs as stand-alone properties, but as adjuncts of the freehold properties they abut. When the parent property changes hands or is subdivided, effective tenure of the Crown land also changes – but do the parties know it has changed?

The *Sale of Land Act 1962* (section 32) requires a vendor to provide a statement of matters affecting the land being sold. An abutting UR or WF is not "the land being sold" and therefore its details need not be divulged. Nevertheless, many solicitors will ensure that the parties to the sale, and DSE as landlord, know what's what. In other cases, the purchaser blithely imagines that the back paddock goes right down to the water's edge, and the one-chain-wide stand of trees is a shelter belt left uncleared by a previous owner.

Fixing section 32 is part of the solution; the other part involves communication between DSE's Land Registry, which knows that the parent property has been sold or subdivided, and DSE's Transaction Centre, which doesn't.

A working landlord-tenant relationship does not involve sack-loads of returned mail. ■

Q & A

"The Planning and Environment Act refers to 'reserved land.' What exactly does this mean?"

Question suggested by a municipal Director of Planning

'Reserved' is one of those words (like 'vested') which is not easily explained. It occurs in a dozen sections of the *Planning and Environment Act 1987*, but it's not one of the terms defined in section 3. Nor will you find it among the defined terms in clause 70 *et seq* of the VPPs.

In Section 46 of the Act it's clearly a reference to land reserved under the *Crown Land (Reserves) Act 1978* – because it says so.

Sections 6, 19, 20 and several sections in Part 5 all refer to the "reservation of the land for public purposes" and corresponding processes of approval and compensation. These references must mean "land reserved under the planning scheme" – not because the Act says so, but because there's no other plausible interpretation. That, of course, leads to the question – what (if any) land is reserved under a planning scheme?

Before the 'new format' schemes were introduced in 1997, public land was not explicitly zoned, but shown as 'reserved' for some nominated public purpose. If and when the reservation was removed, the underlying zoning would re-emerge. The new format schemes abolished this system: all land, whether public or private, is now subject to a specified zone plus zero, one or many overlays.

One such overlay is the Public Acquisition Overlay (PAO), which clause 45 of the VPPs provides for as follows:-

45.01-6 Reservation for public purpose

Any land included in a Public Acquisition Overlay is reserved for a public purpose within the meaning of the Planning and Environment Act 1987, the Land Acquisition and Compensation Act 1986 or any other act.

Hence land under a PAO is reserved land for the purposes of sections 6, 19, 20 and Part 5.

Section 20 requires a little more interpretation. The section empowers the Minister to exempt a planning authority from the exhibition and notification of an amendment, but 20(3)(ba) withdraws this power where land is "set aside or reserved as public open space." The meaning of 'reserved' we have figured out, but what about 'set aside'?

'Set aside' could conceivably mean 'set aside as a reserve under the *Subdivision Act 1988*;' it could mean 'reserved under the *Crown Land (Reserves) Act 1978*;' perhaps it means 'zoned PPRZ or PCRZ...' Fortunately, most users of the planning system need not attempt to answer to this question, because it relates only to the exercise of Ministerial powers: the only person who needs to resolve this one is the Minister.

Finally, let's look at section 201. It governs Planning Certificates, which for purposes relating to valuation and compensation may include information about the land's 'underlying zone.' Since the concept of underlying zoning disappeared from planning schemes in 1997, this section is essentially no longer operative. ■

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Principal Solicitor, The Environment Defenders Office

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Presenter: Dr Geoff Parr-Smith

Crown Land Law, Policy and Practice

Thursday 22 Aug Maddocks, Melbourne
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Land Law for Managers of Roads Streets & Lanes

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Surf Coast Shire, Torquay
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Date to be fixed
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