

Get Fit. Be Nice. Reform Public Land Law. *New Year's Resolutions for 2007*

A new year; new Ministers; a four-year term, and a mandate to implement a set of environmental and social policies. So what are we waiting for?

Policies don't implement themselves – even good policies. Filling the gap between vision and implementation requires (1) sound enabling legislation, (2) effective institutional arrangements, and (3) money. Nowhere is this more true than for policies relating to public land.

Confining ourselves to the first of these three requirements, we offer you *Terra Publica's* agenda for legislative reform in 2007.

Sure, some of these reforms didn't appear in the Labor Party's election platform, but they're reforms for which governments don't need an explicit mandate: improving efficiencies, removing regulatory rigidities, replacing the opaque with the transparent, and the arbitrary with due process.

The Riparian Land Management Act 2007

If water is important, then so are rivers. If rivers are important, then so is the land through which they flow. Yet the governance of riparian land is a hotch-potch of often archaic provisions hidden away in various Acts, compounded by a dysfunctional legacy of unreformed common law, and providing little or no support for today's policy objectives.

We already have the *Coastal Management Act* 1995 and the *Road Management Act* 2004. Now we need the *Riparian Land Management Act* 2007.

This Act would consolidate and restate those parts of the law that work well; it would repeal those provisions which still reflect 19th century systems and values; it would re-cast riparian planning controls from reactive to proactive.

Above all, a Riparian Land Management Act would provide a clear focus for CMAs and Melbourne Water in their roles as waterway managers. It will provide them with the mechanisms needed to implement their river health programs and a clear legislative basis for the funding of riparian conservation programs.

Specifically, the new Riparian Land Management Act 2007 will –

- Endorse the riparian management objectives recommended by the Land Conservation Council in its 1991 *Rivers and Streams* Investigation

- Provide an explicit head of power for waterway managers, in lieu of the current provisions hidden away in the *Water Act* 1989
- Pick up and reform the provisions for Water Frontage licences (currently hidden in the *Land Act* 1958) and place them under the control of the waterway managers
- Re-define the primary focus of Water Frontage licences as conservation rather than grazing
- Repeal reactive planning scheme provisions related to rivers (e.g. the Floodway Overlay) and replace them with proactive management powers
- Restate, reinforce and modernise the 1881 decision to permanently reserve Crown land river frontages; and provide mechanisms for reserves to move when rivers change course
- Reform and codify the idiosyncratic common law 'doctrine of accretion' which allows some (but not all) riparian title boundaries to wander back and forth
- Repeal the archaic provisions of the *Water Act* 1989 which guarantee free water for certain 'domestic stock' and 'kitchen gardens'
- Incorporate the *Heritage Rivers Act* 1992 as a stand-alone Part of the new Act

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New Year's Resolutions – continued ...

The Crown Land Rationalisation Act 2007

By and large, the State's Crown land portfolio is a haphazard legacy of the century-before-last. It is a portfolio which consists of three disparate segments.

Firstly there's land of state significance, like Melbourne's principal gardens, the bed of Port Phillip Bay, National Parks, and the Murray River frontages. Secondly there's land of purely local importance, including hundreds of public halls, saleyards, municipal gardens and recreation reserves. And thirdly there's operational land – like roads, police stations, state schools, and the original 19th century bits of hospital complexes.

Only the state-significance segment can be regarded in any sense as having been deliberately chosen for retention in the portfolio. Much of it was initially included simply because it was unsuitable to be sold into freehold – but at least it has since been through the review processes of the VEAC or its predecessors.

The local-significance segment is a legacy of an era when land use decisions were made by government surveyors, attempting to foresee civic requirements far into the future. Often it is a legacy of an era when municipalities didn't even exist. This history results in a typical council managing a suite of properties, half of which it owns and half of which it doesn't. The end result is that lines of accountability are confused, investment decisions are distorted, and service provision suffers.

Councils are justifiably wary of government 'cost shifting' – but our new Act will ensure that local-significance land is handed over only when the recipient council judges it to be an asset rather than a liability.

Specifically, the new Crown Land Rationalisation Act 2007 will -

- Require land of State or Regional significance to be kept as Crown land and managed by an agency such as DSE or Parks Victoria.
- Require every parcel of state-significance Crown land to be given a pro-active Management Plan, whereupon it will cease to be subject to the relevant Planning Scheme
- Provide processes and mechanisms by which land may be added to or removed from this portfolio
- Allow Crown land of local significance (including most government roads) to be given (not sold) in freehold to those municipalities which want it
- Allow operational Crown land to be given (not sold) in freehold to the agency which manages it.

The Road Reform Act 2007

No, we don't need yet another road-related Act of Parliament. This one would be a self-destruct Act, amending a series of other Acts and then vanishing into history. Its focus would be little-used, unused and discontinued roads.

The *Road Reform Act 2007* would address the twenty-four issues identified at our November workshop, and written up in the October-November issue of *Terra Publica*.

Specifically, the new Road Reform Act 2007 will –

- Rationalise the current inconsistent and contradictory provisions governing road discontinuations (in the *Local Government Act 1989*, the *Planning & Environment Act 1987*, the *Land Act 1958*, the *Road Management Act 2004...*), and modernise provisions relating to exhibition, public input, review and appeal
- Clarify the extent of a Council's liability for those Municipal Roads which are omitted from its Road Register
- Amend the *Land Act 1958* to reflect a 21st century view of the values of unused government roads – including their important conservation values (maybe they should even be shifted into the *Crown Land Reserves Act 1978*)
- Modernise processes and criteria for roads becoming and ceasing to be Unused Roads; and set a basis for striking a balance between the needs of licensees and casual users
- Modernise provisions relating to the registration, subdivision and transfer of Unused Road licences
- Allow councils to obtain clear title to those roads which already vest in them, but which Land Registry still records as belonging to some long-dead subdivider
- Provide comprehensive rather than inclusive definitions of key statutory terms; and abandon reliance on the common law notion of the 'public highway'
- Allow councils power over names of common property 'roads'
- reform and codify the idiosyncratic common law governing easements (see the article on page 3 of this *Terra Publica*).

Is this agenda too ambitious? As we know only too well, one should only adopt New Year's Resolutions which have some remote possibility of being achieved. So perhaps we'll just stick with *Get Fit and Be Nice*. ■



For many years a public roadway has encroached onto private freehold.
Can Council now prevent the land owners from building a fence on their title boundary?

Question asked by a council whose citizens are about to be denied practical vehicular access to their properties.

Here's a case of a physical roadway which is a road for the purposes of the *Road Safety Act 1986*, but is not land whose cadastral status is road – in other words, it is not land shown on title as a road.

The land has not become a *public highway* under common law, because that requires not only acceptance by the public (which has occurred), but also dedication by the land-owner (which hasn't). Council can't declare the land to be a public highway under section 204 of the *Local Government Act 1989*, because that provision only applies to land whose legal status is already road. Nor will declaring it as a road under section 11 of the *Road Management Act 2004* be of assistance, because that provision cannot unilaterally be used over another person's land.

If you know about *adverse possession* (which allows a person to acquire someone else's land by long-term unauthorised occupation), you might look for some sort of corresponding doctrine under which ownership of land can be lost through long-term unauthorised public usage.

The nearest that the common law has to offer is the notion of the 'prescriptive easement' and its curious offspring, the 'doctrine of lost modern grant.'

An easement is an encumbrance on one parcel of land (the 'servient tenement') through which rights are enjoyed by another parcel of land (the 'dominant tenement'). The common law recognises only easements in favour of some specified parcel of land, not easements in favour of the public at large. (Easements in favour of public authorities are creatures of statutory law, and are known as *Easements in Gross*).

Easements can be created in various ways, one of them being 'by prescription' – *i.e.* through the land's long-term unauthorised usage. English common law once required the beneficiary to demonstrate usage dating back to the reign of Richard the First (you know – the Crusades and Robin Hood and all that) and although this requirement has been relaxed it remains an impediment to the application of the doctrine in Australia. Here we turn instead to something described by one Judge as "a revolting fiction" – the *doctrine of lost modern grant*.

It works like this: in cases involving 20 years' unauthorised enjoyment of an alleged easement, the Courts will simply pretend that a grant of rights was made in favour of the dominant tenement, but that the grant has now been lost. It is a fiction without universal approval: its application in some cases would, according to another learned Judge, "be overtaking the credulity of the most credulous."

Despite its peculiarities, the doctrine may be of assistance in the case in question – but only if the beneficiary is identified as some specified parcel of land, rather than the public at large. An action to obtain recognition of such an easement – either in the courts or through the Registrar of Titles – would have to be brought by the owner of the dominant tenement rather than by council.

But would it solve the problem? Use of the land may be permitted for the owner of the dominant tenement, but not for other users – although it's hard to see how they could be physically denied access.

Maybe the better solution is for council to acquire the sliver of land. Remember, the process of compulsory acquisition is much simplified where you're only acquiring 10% of a parcel for the purposes of road deviation or minor widening. ■

References -

Supreme Court of Victoria: Thomopoulos v Faulks & Anor [2006] VSC 262 (19 July 2006)

Bradbrook and Neave, *Easements and Restrictive Covenants in Australia*



Land Law for Managers of Roads, Streets and Lanes

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