

COASTAL SPECIAL

Barney at Killarney

Killarney Beach is a quiet and beautiful part of Victoria's coastline, between Warrnambool and Port Fairy. Not the place you'd expect to find a pitched battle about horses.

For many years, there have been several racehorse-training businesses located close to Killarney beach. According to the industry, these businesses employ locals, and purchase supplies and services in the local economy. Last year's Melbourne Cup winner Prince of Penzance, famously ridden by Michelle Payne, is said to have been trained on the beach at Killarney.



But not all the locals are happy about that. Complaints have been received by Moynes Shire about horses damaging the dunes, horse poo on the beach, and trucks and horse floats taking up all the car park spaces, leaving none for other beach users.

The Government is currently reviewing the *Coastal Management Act 1995* and developing a new Marine and Coastal Act. A Consultation Paper is to be released in mid-2016, according to DELWP's website, so keep a lookout for it and have a say.

But keep your expectations in check – the information sheet says that there won't be wholesale changes to other related legislation such as the *Crown Land (Reserves) Act 1978*. Perhaps that's exactly what's needed.

Richard O'Byrne

Towards A New Marine and Coastal Act

Does Victorian coastal governance work?

We think it suffers from a fundamental flaw: the *Coastal Management Act 1995* has never been about coastal management, nor about coastal governance, only about coastal planning.

For example: the Victorian Coastal Strategy purports to promote 'beaches, estuarine and marine waters are clean and healthy.' It's an objective which is simply not backed up by the apparatus of governance. It can't even manage to clean up horse dung.

What we think is needed now:-

- Some teeth for the three Coastal Boards. How about giving them a say in the appointment of coastal Committees of Management? A say in what's 'detrimental' and what's not? A say in the rental for bathing box licences?
- A regulatory regime that applies to all 'coastal Crown land' – not just those parts which happen to be National Park or Crown Land reserve.
- Regulations which qualify as Statutory Rules and are therefore subject to Regulatory Impact Statements, exhibition and sunseting.
- A re-think of which uses are to be effectively exempted from CMA consent – and a corresponding revision of the blanket approval for pre-1995 uses and developments.
- Re-definition of municipal boundaries so that Local Laws apply 200 metres out to sea.
- Re-definition of the boundaries of Crown foreshore reserves so that it's possible for the jurisdiction of Committees of Management to be extended 200 metres out to sea.

Let's see what the proposals for a new [Marine and Coastal Act](#) wash up on the legislative shoreline. ■

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What's *that* on the beach?

(Doesn't look like sand...)

On some particular beach, is racehorse training legal? Do trainers need some authority? What penalty is there for training a horse on the beach without authority?

Let's try to map out the research we go through, here at The Public Land Consultancy, when we get such questions. Along the way, let's ask ourselves – could it all work better?

First, we need to find the legal status of the particular beach. It's probably (but not necessarily) going to be Crown land, and probably reserved under the *Crown Land (Reserves) Act 1978* – although it could be reserved under the *National Parks Act 1975*, or even be land vested in a port authority.



Are our horses above or below Low Water Mark?

Let's hope our horse riding is down the middle of the parcel, not along an edge – because then we might have to address the question of how that edge is defined, and how the boundary on paper corresponds to physical features on the ground. Cadastral boundaries are not always fenced or clearly marked, and obscure lines like 'Low Water Mark' (LWM) have a habit of moving around. We might have to engage a surveyor.

(Boundaries will also be a concern if our investigation takes us in the direction of Local Laws made by the relevant Council. Most municipal boundaries are at LWM – below which Local Laws are totally ineffective.)

Then we turn to whatever Act prescribes the principal governance regime for the land status in question. Let's look at three: the *National Parks Act 1975*, the *Crown Land (Reserves) Act 1978*, and the *Land Act 1958*. As we search through them, bear in mind the [presumption of consent](#) – the principle that any citizen can enter onto Crown land unless there is some law to the contrary.

If our beach is in a National Park, we turn to the *National Parks Act 1975*, where we find no specific mention of horses, and no clear head of power under which horse-training could be licensed. We do find powers to make regulations, including regulations setting penalties. Turning to the *National Parks Regulations 2014* we find various horse-related regulations: the Secretary may set aside areas into which horses may be brought, but elsewhere horse-persons are liable to fines of up to 15 penalty units.

How are such fines enforced? The National Parks Act redirects us to the *Conservation Forests and Lands Act 1987*. This lesser known piece of legislation does not of itself govern any land, but provides a uniform umbrella regime within which a whole bunch of Crown land legislation is administered. Here we find provisions for authorised officers, the issue of infringement notices, and the power to seek injunctions restraining unauthorised activities.

A larger proportion of the Victorian foreshore comes under the *Crown Land (Reserves) Act 1978* – an Act which is not uniform in its application. The foreshore is divided up into individual reserves, created at various times in history and for various nominated purposes. These purposes might be (for example) *public recreation*, or *conservation of the foreshore*, or something as specific as *the St Kilda marina*, or something as wide open as *public purposes*.

Detrimental or Not Detrimental?

Does the CL(R) Act allow these areas to be used for racehorse training? Before addressing this question, we need to ask: is the form of authority in question a licence or a permit? If it's a licence, it will require the Minister's approval under section 17B. We fought our way through all this in the [last edition of Terra Publica](#). This approval is either (1) subject to the 'not detrimental' test – and possibly also subject to parliamentary scrutiny, or (2) entirely at the Minister's discretion, or (3) irrelevant because no licence is legally possible.

What about permits, as against licences? 'Permit' is an undefined term. The Act itself is silent on what constitutes a permit, and in what circumstances it might be issued. Weird, considering all the highly prescriptive detail we find around leases and licences. Nevertheless, the Act allows regulations to be made governing the issue of permits – as we find if we turn to (for example) the *Crown Land (Reserves)(Nature Conservation Reserve) Regulations 2004*. ['2004?' we hear you ask, 'How can a regulation be older than 10 years?' That's because CL(R) regulations are not statutory rules, so there's no ten-year sunset. We're inclined to think there should be.]

Continued page 3

Q
&
A

Which coastal uses and works already have Coastal Management Act (CMA) approval?
Question asked by an infrastructure manager with a bayside Council

Section 37 of the CMA says the Minister's approval is required for all works and uses of coastal Crown land. There are no exceptions. However, a wide variety of minor works and pre-existing uses have already been given blanket approval. The latest version of this approval will be found in Victoria Government [Gazette Number 2004](#) dated 5 September 2013.

What's that on the beach continued...

Anyway – we need to find what regulations (if any) apply to our beach, and whether they have anything to say on the subject of horses. Difficult, because most CL(R) regs are not accessible on-line. You need to ask the Committee of Management (which may not know) or DELWP.

Now for the *Land Act 1958* – the mother of all land-related legislation in Victoria. It applies to unreserved and unalienated Crown land, something we call 'default status' Crown land. There's not much of it left in Victoria, the largest chunk being offshore – from LWM out to the 3-nautical mile limit.

A relatively small proportion of off-shore land is Marine National Park. Marine Sanctuary or Crown Land Reserve, but most is default status land under the *Land Act 1958*. So – what about the horses in the pictures?



Puissance De Lune: above or below Low Water Mark?

The Land Act has no provision for appointing managers, and no provision for making regulations governing activities and behaviours – so we are well and truly in the territory of the [presumption of consent](#). In the absence of any Act or regulation preventing an activity on Crown land, then we must assume it is permitted. Our horse-people can pretty well do what they like.

Unenforceable or just Unenforced?

In 1967 Sections 188A and 190 were inserted into the Land Act, with a view to dealing with unauthorised uses, but they have proved to be utterly ineffective. A hundred-plus so-called 'boatsheds' still stand on the beach at Werribee South.

Then we come to penalties for using the land without a licence or a permit. If by chance there is a relevant regulation, we hope it has been cross referenced by the *Conservation, Forests and Lands (Infringement Notices) Regulations 2013* – which would give it a measure of enforceability.

The prescribed penalties are trivial (the highest being 5 penalty units), so the real enforcement power is the injunction (sec 89 of the CF&L Act), which may be brought by the Secretary to restrain an offender. As far as we know, it's a power which has never been used.

Maybe there's some other Act altogether which can help us. Local laws? The *Local Government Act 1989* is unlikely to apply, because the municipal boundary will almost certainly be LWM.

The Planning Scheme is of no help, unless our beach happens to be in a residential zone, and even then horse-training is unlikely to qualify as 'intensive animal husbandry.'

What about the *Land Conservation (Vehicle Control) Act 1972* – which was specifically intended to protect the beach from trail bikes and dune buggies. Sorry, horses are not vehicles.

Turning to offshore legislation, we find no joy in the *Marine Safety Act 2010* – horses are not vessels.

Which brings us, finally, to the *Coastal Management Act 1995*. Ah yes! Let's look at section 37...

A person must not use or develop coastal Crown land unless the written consent of the Minister has first been obtained. Penalty: 40 penalty units.

Our horse training is not a *development* of Coastal Crown land, but it certainly is a *use*. It requires the Minister's consent –and there is a reasonable penalty, unlike the slap-on-the- wrist penalties we find under the CF&L Act. But here's the catch – the Minister's approval has already been given for "Any use or development of land that was lawfully commenced prior to ... 1995". Very hard to see a prosecutor proving beyond reasonable doubt that horse training on the beach did not pre-date 1995. Perhaps that's why the [caselaw database](#) records exactly zero prosecutions under section 37.

Could it all work better?

We suspect that it could. Some tentative suggestions are listed on Page 1. But disregard our suggestions, folks – put forward your own! The government is offering us a once-in-twenty-years opportunity. ■

Meanwhile, in the High Court

We often grapple with differences between legal-speak and plain everyday English. Take the word 'land' for instance: is the sea 'land'? [The High Court](#) has enlightened us, in a case relating to Macquarie Harbour, on the west coast of Tasmania.

The case was instigated by leases for eight aquaculture sites. The local council said they were rateable; the Tasmanian Valuer General said they were not 'land.' He didn't want the burden of having to put a value on the vast areas of off-shore Tasmania.

There's no doubt that off-shore areas are part of their adjacent State, at least as far out as three nautical miles. A couple of 1980 Commonwealth Acts say so. Three nautical miles – but measured from where? Something called the territorial baseline, which is generally at Low Water Mark but cuts across the mouths of rivers and inlets. So all of Macquarie Harbour is in Tasmania, just as all of Port Phillip and Westernport are in Victoria.

But here's an important difference: all of Macquarie Harbour lies within a municipality (West Coast Council) whereas a mere 1% of Port Phillip lies within a municipality – and that's a chunk of Corio Bay at Geelong.

The end result: the eight aquaculture farms are 'land' and they're rateable. We hope the citizens of West Coast municipality recoup their legal costs. ■

A Half-day Seminar from The Public Land Consultancy

Reconfiguring Coastal Governance

Friday 29 July 2016

9:00 a.m. – 12:30 p.m.

Law Institute of Victoria,
470 Bourke Street, Melbourne

The State Government is planning a new [Marine and Coastal Act](#), to replace the *Coastal Management Act 1995*.

The Public Land Consultancy will be making inputs to the conversation, based on our experience of working with coastal municipalities and authorities.

This seminar is designed for...

- Staff and clients of coastal municipalities and statutory authorities
- Coastal professionals – planners, property lawyers and surveyors

Here's your chance to learn more about coastal governance, and the issues we can expect to see analysed and debated over coming months



Speakers...

- Associate Professor **Geoff Wescott** – President of the Australian Coastal Society; Chair of the Expert Panel advising government on the proposed new Act
Why do we need a new Marine and Coastal Act? Insights into the Government's vision for coastal governance
- **Belinda Ainley** – Director, Ainley Coast and Environment; Member of the Victorian Coastal Council
Managing coastal projects: negotiating the complexities of coastal approvals
- **Graeme Davis** – District Manager Port Phillip and Western Port, Parks Victoria
Managing multiple governance roles – the onshore and offshore responsibilities of Parks Victoria
- **John Macey** – Licensed Surveyor; previously District Surveyor with DELWP
The coastal cadastre – what happens when coastlines move
- **Richard O'Byrne**, Associate, The Public Land Consultancy; previously Manager Bays and Marine, Parks Victoria
The view from The Public Land Consultancy: how we imagine coastal governance could be working better...

Cost: \$330 inclusive of GST

Enquiries and Registrations –

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Gundij Mirring elder Denise Lovitt at The Convincing Ground.

Yes – Native Title can extend off-shore
Yes – Aboriginal Heritage can include more than just 'stones and bones'

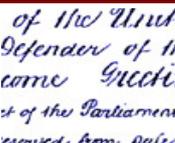
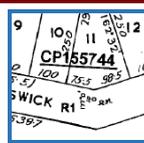
We are pleased to report the success of our half-day seminars on the forthcoming amendments to the *Aboriginal Heritage Act 2004*.

We've had big numbers enrolling in:-

- Melbourne (Wurundjeri & BoonWurrung country)
- Ballarat (Wadawurrung country),
- Port Fairy (Gunditj Mirring country),
- Warragul (Gunai Kurnai country), and
- Mildura (Millewa-Mallee country) – with further seminars being organised for:-
- Bendigo (Dja Dja Wurrung country and
- Shepparton (Yorta Yorta Country).

Half-day Training Courses

Cost: \$330 including GST, course notes and morning coffee

	<p>Aboriginal Heritage David Yarrow Thurs 14 July - Mildura <i>Dates to be fixed</i> – Horsham, Bendigo, Barmah</p>		<p>Rivers and Lakes Governance David Gabriel-Jones Fri 9 September - Melbourne</p>
	<p>Crown Land Governance David Gabriel-Jones Wed 13 July – Warragul Tues 30 August - Benalla</p>		<p>Roads Governance David Gabriel-Jones Wed 13 July – Warragul Tues 30 August - Benalla</p>
	<p>Encroachments and Utilities in Road Reserves Astrid Di Carlo Tues 26 July – Benalla Thurs 15 Sept - Melbourne</p>		<p>Protection of Roads under the RM Act 2004 Astrid Di Carlo Tues 26 July – Benalla Thurs 1 Sept - Melbourne</p>
	<p>Discontinuation, Closure and Deviation of Roads David Gabriel-Jones Wed 3 August – Warragul Tues 11 October - Melbourne</p>		<p>Unused and Little-Used Roads David Gabriel-Jones Wed 3 August - Warragul</p>
	<p>Restrictions on Title Astrid Di Carlo Thurs 25 August - Melbourne</p>		<p>Subdivisions – a Property Law Perspective Grant Arnold Wed 12 October - Melbourne</p>

Full-day Training Courses

Cost: \$550 including GST, course notes and working lunch.

	<p>Property Law for Statutory and Strategic Planners Astrid Di Carlo Tues 9 August - Melbourne</p>		<p>Referral Authorities and the Victorian Planning System Grant Arnold Thursday 4 August - Melbourne</p>
	<p>Land Law for Managers of Roads, Streets and Lanes David Gabriel-Jones Wed 25 August - Melbourne</p>		<p>Leases and Licences of Public Land David Gabriel-Jones Wed 7 September - Benalla</p>

Enrolments and Enquiries – Jacqui Talbot – jacqui@publicland.com.au

Unless otherwise noted, all courses are at **Law Institute of Victoria**, 470 Bourke Street Melbourne

CERTIFICATE IN PUBLIC LAND GOVERNANCE

Don't forget that by attending a selection of our one-day and half-day courses, and completing a research paper, you can qualify for a Professional Certificate in Public Land Governance

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