

Expropriations

Land resumed by the Crown

In Australia, the ultimate takeover of land commenced in 1788 and continued until the Mabo case of 1993. By comparison, the expropriations we see, here at The Public Land Consultancy, are trivial.

From Mr Henry Dendy

In 1840, Mr Henry Dendy became the squire of a vast tract of land now known as Brighton and Bentleigh. Hence North Road, South Road, and East Boundary Road. His Crown grant of title contained a 'however' clause: the Crown could re-enter and resume land for roads. Hence 'New' Street, and many more roads now recognised as Crown land even though they had once been freehold.

From the Mayor of Emerald Hill

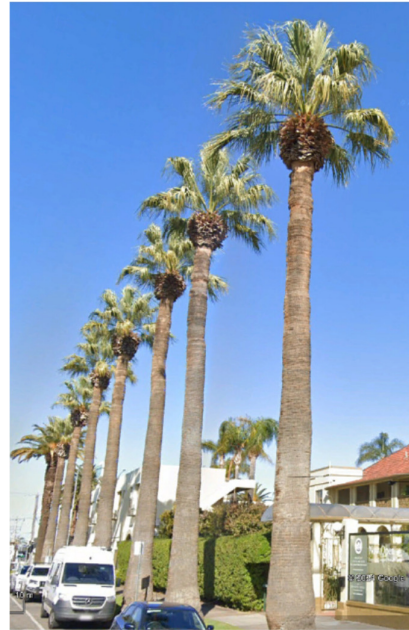
Forward to 1867, when a site for the South Melbourne Market was granted to the Mayor and citizens of the Borough of Emerald Hill. Again, the Crown reserved the right to resume *such parts of the said land as shall be required for making railways canals watercourses reservoirs drains or sewers.*

We are unaware of any railways or canals running through South Melbourne Market, but the possibility remains there to this day.

From the Chaffey Brothers

In 1886 the *Waterworks Construction Encouragement Act* entitled the Chaffey Bros to take possession of 'about 250,000 acres' of the Mallee. Again, the arrangement authorised the later resumption of land for '*timber reserves commons recreation grounds parks gardens roads or other public purposes,*' but only with the consent of the Chaffeys, and only in exchange for other land as compensation. So, all the major roads in Mildura are, indeed, government roads.

These examples cannot really be regarded as hostile takeovers. In general, the corresponding reconfigurations were to the benefit of the relevant landholders. Not so when we come to the *Water Act* of 1905...



Seventh Street, Mildura. Resumed from the Chaffey Brothers' grant. We don't know what happened to Streets First to Sixth.

From Riparian Landowners

Towards the end of the Nineteenth Century, policy makers came to regret the way in which riparian land – riverbeds, banks and frontages – had been granted to settlers as freehold. The practice ceased in 1881, but in 1905 the Victorian Parliament went a step further, and actually resumed certain riparian freehold – without compensation: '*Where any river creek stream or watercourse or any lake forms the boundary or part of the boundary, of an allotment of land heretofore alienated by the Crown the bed and banks thereof shall be deemed to have remained the property of the Crown...*'

So, if your property is bounded by a river, you don't own to the centreline of the waterway, despite what may be on your title. You only own as far as the top of the bank.

And consider this: in 1905 the bed and banks were not merely resumed, but were 'deemed never to have been alienated.' And that in turn (surely) means that Native Title had not been extinguished by the earlier grant of freehold. Interesting.

Continued page 2

Page 2

Waterways – a cadastral taxonomy

Page 4

Roads governance - A Compendium of Case-law

Page 5

Our Calendar of Professional Development courses April-May 2024

Expropriations, Continued

From Gippsland Farmers

Finally, let's look at railways. In some parts of the State, railway lines were mapped out before settlement. Consequently, the railway now occupies Crown land set aside for that purpose. Elsewhere, Crown allotments had already been alienated before the railways came along – and here the Railway Commissioners had to acquire it.

In most cases, we understand that this occurred at valuation. Under various Railway Lands Acquisition Acts the dispossessed landowners were fully compensated.



But for reasons we have been unable to fathom, this did not happen with the railway from Nyora to Woolamai, in Gippsland. The Act that authorised that line decreed: *'No person shall be entitled to receive or shall receive from the Board or the Commissioners or the Government of Victoria any purchase money for any land required for the said line...'*

It seems that here, normal practice was overwhelmed by the need to get trainloads of coal from Wonthaggi to Melbourne. ♦

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Readers of Terra Publica should not act on the basis of its contents which are not legal advice. If required, we can obtain formal legal advice from one of its legal associates.

The Public Land Consultancy acknowledges that our core work relates to the lands of Victoria's Traditional Owners. We promote recognition of Indigenous rights through study, policy and the law.

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 River

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.

Crown Land

Many of the State's major waterways occupy a strip of Crown land, containing the watercourse and its frontages, separating the freehold land on either side**. This Crown land, reserved or unreserved, is where water frontage grazing licences are most likely to be found.

Continued – page 3

Waterways A Cadastral Taxonomy (continued)

'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.

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 (except Melbourne Water) may declare a waterway to be a designated waterway.

Under section 188A all waterways in Melbourne Water's 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 reservation 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 2028* 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, and Lower Barwon Rivers 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 apply. For public land within these zones, restrictions apply to uses and works such as water diversions and timber harvesting. ■

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

Roads – A Compendium of Case Law

We are firmly of the belief that road governance should be framed by policy makers, not by the courts – nevertheless, the two perspectives often go hand in hand. The courts provide insights and interpretations of the law, to which policy makers sometimes respond, but sometimes don't...

Brodie v Singleton Shire Council High Court, 2001	The common law of 'Non-Feasance' is dumped. Negligence applies to road authorities.
Bass Coast v King VSCA 1998	All government roads are public highways – without requiring 'acceptance' by the public.
Johnson v Shire of Moyne SCV 2012	The process for revocation of an Unused Road licence.
Pulitano v Mansfield, SCV, 2017	The process for discontinuing a road
Fenelon v Dove VSCA 2010	An unused government road is still a public highway
Calabro v Bayside SCV 1999	Indefeasibility of title is overturned. For older road reserves, title documents cannot be believed.
Alesios Fishing v Geelong VCAT Preliminary matter 2022	Reconfirming the Calabro decision. One of the big-four banks sold land it did not own.
DPP v VicRoads and Downer County Court with referrals to VSCA 2017	Roads are workplaces, and therefore subject to the OH&S Act. A head contractor cannot divest responsibility to a sub-contractor.
Mayberry v Mornington Peninsula SCV 2019	Dedication and acceptance may apply only to the trafficked portion of a road reserve, not necessarily to the full width (!!)
Anderson v Stonnington VSCA 2020	An abutting owner cannot take possession of a public highway, no matter how
Kennedy v Shire of Campaspe VSCA 2015	Non-Compliance with a Road Management Plan can expose a Council to negligence actions.
Clarke v Shepparton VSCA 2017	Council acting as infrastructure manager cannot avail itself of the RMA protections for Council acting as road manager
Roads Corporation v Pearse, SCV 2012.	Abutting landowner can not adversely possess VicRoads freehold...
Bottos v CityLink VSC 2021	However, a road authority can adversely possess abutting private land.
Peninsula Blue v Frankston VCAT 2015	Approvals for access to an Arterial Road



Lunchtime Conversation
Tuesday 9 April 2024 12 noon to 12:45 pm

Victoria's State Borders

To enrol for this Conversation [click here](#)

Professional Development, April-May 2024

NOTE: some presentations are 3 sessions, each of 2 hours duration;
others are 2 sessions, each of 3 hours duration

	<p>Crown Land Governance Presenter: David Gabriel-Jones</p>	<p>Mon 22 April, 10am – 12pm Tues 23 April, 10am – 12pm Wed 24 April, 10am – 12pm</p>
	<p>Referral Authorities and the Victorian Planning System Presenter: Mark Bartley</p>	<p>Tues 30 April, 10am – 1pm Wed 1 May, 10am – 1pm</p>
	<p>Land Law for Managers of Rivers and Riparian Land Presenter: Jo Slijkerman</p>	<p>Mon 13 May, 10.30am – 12.30pm Tues 14 May, 10.30am – 12.30pm Fri 17 May, 10.30am – 12.30pm</p>
	<p>Land Information and its Interpretation Presenter: Rob Steel</p>	<p>Tues 14 May, 10am – 1pm Wed 15 May, 10am – 1pm</p>
	<p>Restrictions on Title Presenter: Nick Sissons</p>	<p>Tues 21 May, 10am – 1pm Wed 22 May, 10am – 1pm</p>
	<p>Native Title and Aboriginal Heritage Presenter: Bridgid Cowling</p>	<p>Tues 21 May, 10am – 1pm Wed 22 May, 10am – 1pm</p>
	<p>Leases and Licences of Public Land Presenter: Richard O'Byrne</p>	<p>Tues 28 May, 10am – 12pm Wed 29 May 10am – 12pm Thurs 30 May, 10am – 12pm</p>
	<p>Land Law and Subdivisions Presenter: Mark Bartley</p>	<p>Tues 28 May, 10am – 1pm Wed 29 May, 10am – 1pm</p>

Cost:

\$495 including GST, course notes and certificate of attendance

Accreditation:

These courses are eligible for CPD points for lawyers, planners, valuers, and FPET for surveyors.

Enquiries and Registrations:

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