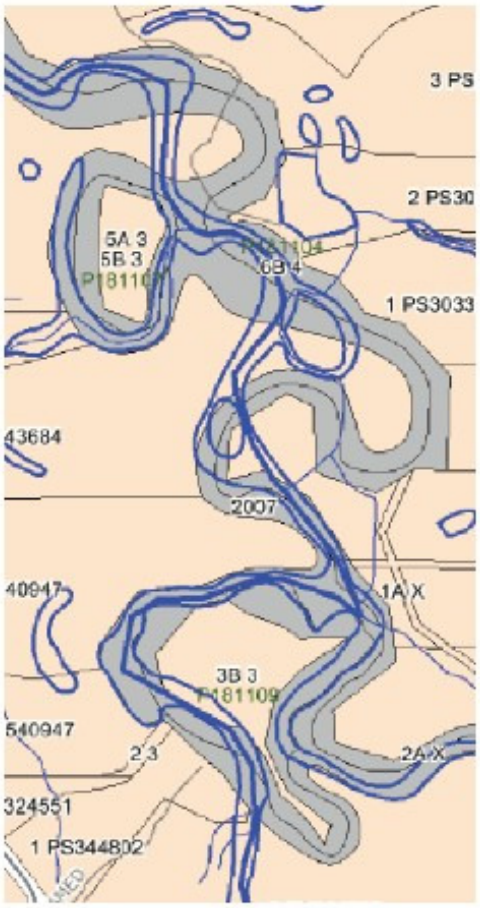
TERRA PUBLICA
VOL 13 NO 2 FEBRUARY 2013

A BLOCKAGE IN THE BOWEL?



No, these are not diagnostic images of a troublesome lower intestine. They are maps of the Goulburn River just north of Seymour – one from the nineteenth century Parish Plan, the other showing the river's current location.

You don't need to be a gastroenterologist to interpret them – but you may need help from a cadastral surveyor or a property lawyer.

These maps are symptoms of a painful condition called legislative constipation. The last decent movements of riparian land law occurred in 1881 and 1905 – even though a lot of new policy has been ingested into the system since then.

The victims are waterway managers and abutting landowners alike, with roughly zero chance of defining their property boundaries. The law, far from supporting them, resembles something requiring an enema.

So what's the treatment? The Government's Draft Victorian Waterway Management Strategy offers a tentative prescription:-

> *Action 9.3: Review legislation relating to the management of riparian land, particularly Crown land (focussing on the Land Act 1958), to streamline the administration and management of Crown frontages... Timeframe: 2016*

Here at The Public Land Consultancy we say enough diagnostics! Administer the dose of salts; proceed with the radical surgery!

For details of our treatment plan go to:-

- *A Review of the Management of Riparian Land* (for DSE), 2008
- *A New Waterway Management Act?* (presentation for RBMS), 2013.

And… check out our one-day course *Land Law for Managers of Rivers and Lakes*. ■

The Public Land Consultancy
ABN 69 067 045 520
Principal: David Gabriel-Jones
Email: terrapublica@publicland.com.au

57/151 Fitzroy Street
St Kilda, VIC 3182
phone: (03) 9534 5128

postal: PO Box 2251
St Kilda West, VIC 3182
fax: (03) 9593 9085
www.publicland.com.au

ADDENDUM

to our January 2013 edition

Last month *Terra Publica* looked at some of the law relating to fences – particularly fences of public land, such as roads, reserves and parks. The article focused on the anomalous section 21 of the *Crown Land (Reserves) Act* 1978.

A few readers have pointed out that in our scan of legislation, we omitted to mention what the *Road Management Act* 2004 has to say on the subject of fences. Our apologies for this oversight.

Schedule 5 of the Road Management Act provides that road authorities are not required to contribute to road fencing. This provision postdates and thus overrides sec 21 of the Crown Land (Reserves) Act, which would otherwise make those authorities liable for 50% of their fencing costs.

So in relation to roads, the anomaly covered the period from 26 Jan 1995 (when the amendment to the CL(R) Act was proclaimed) through until 1 July 2004 (when the RM Act was proclaimed). Fortunately, nobody seems to have noticed, and no harm was done.

The same can't be said for parks and reserves. Councils have 'care control and management' of Crown reserves, and Parks Victoria has 'care control and management' of National and other parks. Consequently, section 21 would appear to continue to apply, unmitigated by any subsequent legislation that we're aware of. Indeed the most literal reading of section 21 could hold it to apply to a council's freehold reserves.

As we concluded in the January article, what's needed is a rewriting of section 21, to make it correspond retrospectively to the long-accepted policy position, as confirmed in the Department of Justice discussion paper. ■

"Can we issue leases and licences of road reserves?"

Q & A

Question asked (separately) by property officers from two councils

Answer:– No, but…

Here, we need to recognise a basic contradiction between a road and a private tenure. Any road reserve controlled by council will be a 'public highway' (not to be confused with a 'public road') over which you or I or anybody else has a right to come and go. A lease on the other hand allows exclusive occupation – the right to lock people out. So from the outset we're in difficulties.

There's a very limited number of provisions which negotiate this contradiction. The *Land Act* 1958 allows a Government Road to be declared unused and then licensed; the same Act allows leases and licences of strata above and below the trafficked surface. The *Road Management Act* 2004 allows VicRoads to lease portions of the road reserve not required for traffic – but the same provision doesn't extend to councils.

So if a Council wants to approve some semi-private or commercial use, how is it to be authorised?

For short-term or ephemeral uses (like a procession), turn to section 99B of the *Road Safety Act* 1986. For longer-duration periodic usages (like footpath trading) you may need a Local Law.

One useful provision is Schedule 10 of the *Local Government Act* 1989, which at clause 10 allows a council to 'permit the erection and maintenance of gates and fences on or near roads.' In our opinion any such gates and fences must not deny public usage, but could (suitably designed) serve to contain stock, or demark a drinking area outside a pub, or extend a school playground.

And… check out our one-day course *Land Law for Managers of Roads Streets and Lanes*. ■

Q & A

"We've been researching Crown land regulations made under section 13 of the CL(R) Act… Can you please direct us to Terra Publica articles on the subject?"

Question asked by a major provincial law firm.

Sure – Here's something from TP in December 2004. Since then old Government Gazettes have been put up on the web, and Premier Bracks has disappeared into the mists of time – but otherwise (as far as we can tell) the article is still 100% correct.

"Er – just lying on the grass, Officer…"

You can be fined £5 for jogging In Melbourne's Kings Domain on a Sunday.

Or for lying on the grass (on any day of the week). Recalcitrants who persist after having been warned by a Police Officer may be 'forthwith apprehended.'

At least that's what it says in the Kings Domain Regulations, gazetted on 19th August 1936. If you plan to jog on the sabbath or lie on the grass you should, as a law-abiding citizen, check as to whether the 1936 regulations are still in force. This could take you some time, because you would have to physically read through every Government Gazette from 1936 until 1998, after when they are searchable on-line.

Inaccessibility isn't the only problem with *Crown Land (Reserves) Act* regulations – as will be seen from a brief comparison against Statutory Rules made under the *Subordinate Legislation Act* 1994, and Local Laws made under the *Local Government Act* 1989.

Making Statutory Rules requires the publication of a Regulatory Impact Statement and consideration of public submissions. Making Local Laws also involves exhibition and public submissions. The making of CL(R) regs, however, requires neither exhibition nor opportunities for public input.

Statutory Rules must conform to guidelines set out in the *Subordinate Legislation Act*, and may be disallowed by Parliament. Local Laws must conform to standards set out in Schedule 8 of the LG Act, and if faulty may be disallowed by the Governor in Council. CL(R) Regulations have no comparable guidelines, and once made are subject to no formal scrutiny or disallowance mechanisms.

Statutory Rules must be available for purchase and inspection. If a Council fails to have its Local Laws available at the front desk, then they are legally unenforceable. There is no equivalent requirement to display CL(R) Regs, which often are virtually invisible to the public.

Then there's the question of geography: CL(R) Regs apply only within the boundaries of the relevant Crown reserve – often a set of imaginary lines with little relationship to fences or physical features. In King's domain, only a surveyor could determine whether an alleged offence had been committed inside or outside the reserve.

From *Terra Publica* Dec 2004.
For the TP archive, go to:-
www.publicland.com.au/terra_publica

A final point of difference is lifespan. Stat Rules and Local Laws sunset after 10 years, but unless they're expressly rescinded CL(R) Act regulations are immortal.

These deficiencies have been recognised within DSE, which has just steered through the *Crown Land (Reserves) (Nature Conservation Reserves) Regulations* 2004. In this case DSE chose, as a matter of policy, to adopt many of the features of Statutory Rules – including a 10-year sunset.

In June 2003 Premier Bracks asked the 'Redundant Legislation' subcommittee of the Parliamentary Scrutiny of Acts and Regulations Committee to have a think about 'legislative instruments which are unnecessary or redundant.' Perhaps the subcommittee could take a look at the 1936 Regulations for Kings Domain.

If they do, let's hope they leave untouched the regulation prohibiting the breaking-in of wild horses. We wouldn't want anyone to be trodden under-hoof as they lie on the grass after a spot of Sunday jogging… ■

In-House Professional Development

Increasingly, clients are engaging us to run our courses in-house.

Advantages include opportunities for team building, round-table discussion, and simple logistics: no need to go to Melbourne; we come to you.

And, of course, there's a discount: you send 10 students and we charge for 8.

Right now, we have in-house courses slated for Horsham Council, Darebin Council, and the State Revenue Office.

ALERT

Catchment Management Authorities, Water Authorities, Country Fire Authority…

What type of Referral Authority will you be?

Recent changes to the *Planning and Environment Act* 1987 could have a significant impact on the role of some referral authorities, and their relationship with councils as responsible authorities.

The *Planning and Environment (General) Amendment Act* 2013 includes amendments providing for two types of referral authority; a 'determining' referral authority' – with the power to require a planning permit to be refused or be conditional (as is currently the case); and a "recommending' referral authority, whose advice a responsible authority is required to consider but is not obliged to accept.

A recommending referral authority would have recourse to VCAT should a responsible authority not take its advice.

Planning schemes will specify into which category of referral authority an organisation will fit, but the process by which this will be carried out is not yet clear. However the impact may be significant for CMAs, given a commitment prior to the last election in relation to the power of CMAs to 'veto' permits applications.

The Act also includes amendments that will specify the duties of referral authorities, including having regard to planning objectives and directions of the Minister for Planning, and the provision of reports as required by that Minister.

Referral authorities will also be included in the list of bodies required to act promptly to avoid loss or damage from unreasonable or unnecessary delay, and will need to keep a publicly accessible Register of permit applications received.

These provisions will be proclaimed progressively, but no later than 28 October 2013. Regulations will need to be developed to give support to the changes. ▪

Grant Arnold
Associate
Public Land Consultancy

Professional Development

Training Course Schedule

March-June 2013

Fri 1 March	Risk Law on Public Land and Roads
Wed 6 March	Coastal Adaptation
Mon 18 March	Planning Law – A Strategic Overview
Fri 22 March	Subdivisions Law
Wed 27 March	Managing Volunteers and Grants
Thurs 18 April	Crown Land Law and Policy
Mon 22 April	Roads Streets and Lanes
Tues 30 April	Building Law
Thurs 2 May	Rivers and Lakes
Tues 7 May	Leases and Licences
Mon 13 May	Coastal Adaptation
Mon 20 May	Planning Law – A Strategic Overview
Mon 27 May	Roads, Streets and Lanes
Wed 29 May	Native Title and Aboriginal Heritage

All these presentations are at
Law Institute of Victoria,
470 Bourke St, Melbourne

Enquiries and Registrations:
Lesley Simons – lesley@publicland.com.au
(03) 9534 5128

Cost: $495
inc GST, course notes and working lunch.
Discounts for course hosts.

All Courses are one-day duration
9:00 a.m. to 4:30 p.m.

Lawyers: CPD points;
Surveyors: FPET points