

The Green Army

The cartoonists had a field day. David Pope of the Canberra Times proposed that the Green Army be put to work chopping down wind turbines. In the SMH cartoonist Alan Moir saw them formed up into a human chain with buckets to reduce rising sea levels.

The new federal government sees them as 'cleaning up riverbanks and creek beds, re-vegetating sand dunes and mangrove habitat, and a host of other environmental conservation projects.' And \$300 million has been allocated to make it work. You can read all about it in the policy statement.

As Tony Abbott told the Sydney Institute back in 2010:-

I have in mind a standing environmental workforce, perhaps 15,000 strong, comprised of short-term trainees plus regular workers and supervisors capable of supplying the skilled, motivated and sustained attention that large-scale environmental remediation needs.

For our part, we're sceptical, but open to persuasion. What would convince us?



These green platoons must not be accountable directly to Canberra, but to some responsible local authority, such as a CMA, a municipal council or Parks Victoria – and those authorities must be resourced to supervise and manage them.

They should not be used as a cheap substitute for a normal paid workforce – tempting though that may be to cash-strapped land managers. An auditable system will be required to ensure the work they're doing is

over-and-above the work that would have been done anyway.

And – they should not simply move in, do their thing, and then move out again. Arrangements must be made for on-going maintenance of the sites they work on. We don't want a repeat of the old Vermin and Noxious Weeds strategy, as explained by one unduly candid Nokko: *'Sure, we spray the weeds – but not all of them. That way they'll regrow and we'll still have work next year.'*



Even if we were reassured on all these points, there's still the small question of the arithmetic. The numbers just don't stack up.

According to the policy documents, things will kick off in 2014-15 with \$50 million for 250 projects, each employing 10 people, and each for 26 weeks.

That's 2500 people allocated \$20,000 each, or \$770 per week – about two thirds of average weekly earnings (AWE). Not heaps. But if the \$50m includes operational costs, as it should, then it comes down to \$550 per week – or half AWE.

By 2018-19 the scheme will expand to 1500 projects, each with a team of 10 people, each for 26 weeks, and thus employ 15,000 people. Now 15,000 at \$20,000 each is \$300 m per year. *But...*

But 15,000 people each employed for 6 months is a 'standing workforce' of only 7500 – isn't it? And a cost of \$300m in one year isn't \$300m over the three-year forward estimates period – is it?

In fact, if we actually had a 'standing environmental workforce' of 15,000 – even working for half AWE – we would need to allocate \$600 million every year – not \$300m over 3 years.

Perhaps our calculator is playing up. ■

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25 October 2013
- Road Risk workshop
8 November 2013
- Off-Title workshop
15 November 2013

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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

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.

Waterways as Property Separators

Many of the State's major waterways are cadastral separators. Here we find a strip of Crown land, containing the watercourse and its frontages, separating the freehold land on either side**. It is this class of waterway where Crown water frontage grazing licences are most likely to be found.

'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* refers to both 'waterways' and 'designated waterways.' Under section 188 a Waterway Authority (other than Melbourne Water) may declare a waterway to be a designated waterway. Under section 188A all waterways in Melbourne Water's waterway 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 this 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 2007* 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 River etc 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 applies. For public land within these zones, restrictions apply to uses and works such as water diversions and timber harvesting. ■

* The *cadastre*: the body of data defining the parcelation, legal status and ownership of land.

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

Readers of *Terra Publica* should not act on the basis of its contents which are not legal advice, are of a general nature, capable of misinterpretation and not applicable in inappropriate cases.

If we lease airspace above a road, what rent should we charge?

Question asked by a Property Management Coordinator in a Provincial City

In many property dealings we don't need valuations: the market itself determines the value. The hammer falls at the Saturday auction; that's the house's value. If the 'for lease' sign on your flat attracts no tenants, then the rent you're asking is too high. But in other situations market forces just don't operate.

With airspace above a road the only prospective tenant is likely to be the abutting landholder. That prospective tenant can, in effect, dictate the terms of any deal. If the rent is unattractive, end of story: Council as landowner can't turn around and offer the land to somebody else.

Let's assume that the proposal has been tenant-initiated, not landlord-initiated. What's it worth to that tenant? In a case like the Myer airbridge, or the Westfield bridge over the Nepean Highway at Southland, or the canal-over-road at Martha Cove, the relatively small volume of airspace imparts a disproportionately large benefit to the development as a whole. Negotiations might start from that enhancement value, rather than from the prevailing per-square-metre value of land in the vicinity.

But in other cases, like balconies over a city street, the developer always has the option of redesigning their structure entirely within their title boundaries. Here we might see a valuation method like this...

Valuation – Hypothetical
21 year lease for a 2-storey high stratum

- Ordinary freehold land - \$1000 / m2
- 33% discount for limited permitted use
- 75% discount for limited vertical column
- Capital value = \$1000 x 0.67 x 0.25
= \$ 167.50 / m2
- Annual value at 5% = \$8.37 / m2
- 21 years = say 10x annual = \$83.70 / m2

A slide from our 'Off-Title' presentation

Given the discounts for limited vertical column and up-front payment rather than annual rent, this may result in a fairly low figure – onto which it would be perfectly reasonable to add your administrative costs. It's the tenant's responsibility to provide the annual certificate of insurance, and the 3-yearly structural report, and the bank guarantee covering end-of-life demolition costs – but the landlord still carries the burden of checking tenant's compliance.

If you turn to the valuation literature, you find more complex formulae. One we came across factored in reduced construction costs due to absence of foundations, additional construction costs due to underlying traffic, reduced value due to additional end-of-life obsolescence costs, and additional value due to site prominence. ■

Can a road be adversely possessed?

Question asked by a Senior Engineer from a rural municipality

Yes it can, but only in certain rather obscure circumstances.

Adverse possession is the legal doctrine by which ownership of freehold land can transfer through long-term unauthorised occupation. It constitutes one of the few exceptions to the concept of 'indefeasibility of title' – the normal guarantee that Torrens title land belongs to the person named on the title.

There are plenty of encroachments onto road reserves, but in most cases they can't result in adverse possession. Some roads are Crown land, and there is no adverse possession against the Crown. Many others are 'public highways' (not to be confused with 'public roads') which are also protected against adverse possession.

That leaves certain old freehold road reserves which have not become public highways through usage, construction, or proclamation. Like all pre-1988 freehold roads their title will show the original subdivider as the registered proprietor, but unlike other roads which have become public highways that registered proprietor (or their heirs, successors or assigns) will indeed be the true owner.

If one of these old freehold roads has been fenced in or otherwise occupied for 15 years or more by someone other than this registered proprietor, it will have changed hands through adverse possession. The new owner may apply to the Registrar of Titles to have that fact documented under section 60 of the Transfer of Land Act.

Mere transfer of title, whether through adverse possession or otherwise, will not of itself extinguish the road status from the land. The encroacher will simply have become the proprietor of land which is still shown on title as a road. For the land to be freed from this encumbrance, the Registrar will need evidence that the road has been abandoned for at least 30 years. That evidence may take the form of a letter from the relevant council confirming that the road is not a public highway and has not vested in any authority pursuant to statute. ■

More questions please !!

Our Half-Day Workshops at the Law Institute of Victoria

<p>“Section 86” <i>Community delegation</i></p> <p>How best to facilitate community participation in public land management ? Maybe through...</p> <ul style="list-style-type: none">• Section 86, <i>Local Government Act</i> 1989• Committees of Management, <i>Crown Land (Reserves) Act</i> 1978• The <i>Associations Incorporations Act</i> 1981• Leases or licences <p><i>9am-12:30pm</i> <i>Fri 25 Oct 2013</i></p>	<p>Road Risk</p> <p>For nine years the <i>Road Management Act</i> 2004 has provided road authorities with robust protections against negligence claims.</p> <ul style="list-style-type: none">• Are the protections reasonable?• Why have they never been invoked in the courts to protect Councils against claims?• Why are premiums going up when they should be going down? <p><i>9am-12:30pm</i> <i>Fri 8 Nov 2013</i></p>	<p>Off-Title</p> <p><i>Repeated by popular demand !</i></p> <p>How private developments can spill across title boundaries onto...</p> <ul style="list-style-type: none">• Roads and lanes• Railway land, parks and reserves• River frontages and foreshores• ...at the surface or at stratum' <p>How they can be authorised, controlled, prevented or removed.</p> <p><i>9am-12:30pm</i> <i>Fri 15 Nov 2013</i></p>
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One-Day Professional Development Courses

<p>LAND LAW AND COASTAL ADAPTATION</p> <ul style="list-style-type: none">❖ Land Status in Victoria <i>How coastal lands and waters in Victoria are owned, legally categorised and designated, and their governing legislation</i>❖ Authority over Coastal Lands and Waters <i>How responsibility for coastal lands and waters is assigned and how power is exercised; the roles of Councils, Coastal Boards and Port Authorities</i>❖ Committees of Management and Tenures <i>The structures, powers and duties of delegated Crown land managers on the Victorian coastline; Leases, licences and Permits to use and occupy coastal lands and waters</i>❖ The Use and Development of Coastal Lands and Waters <i>Approvals needed under the Crown Lands Acts, Native Title Act, Coastal Management Act and Planning Schemes</i>❖ Climate Change <i>Risk obligations, risk assignment, insurance: How the governance of the coast may respond to climate change and rising sea levels; What's happening at State and Federal Government levels.</i> <p>Your Presenter <i>Richard O'Byrne, Associate with The Public Land Consultancy.</i></p>	<p>ENVIRONMENTAL LAW for Councils as Land Managers</p> <ul style="list-style-type: none">❖ Overview of law and legislation<ul style="list-style-type: none">• roles and responsibilities of governments and the courts• Statutory law and common law❖ Council as a manager of:-<ul style="list-style-type: none">• Roads and roadsides• Crown land reserves• Rivers and coasts• Freehold land❖ Councils' obligations for:-<ul style="list-style-type: none">• native vegetation• Aboriginal heritage• wildlife and habitat• drainage and waterways• weeds and pests• pollution and waste management❖ Risk management:-<ul style="list-style-type: none">• A land manager's duty of care• Negligence, nuisance and the common law• Protections under the Wrongs Act 1958• The Road Management Act 2004• The law relating to electricity line clearances <p>Your Presenter <i>Grant Arnold, Associate with The Public Land Consultancy.</i></p>
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The Public Land Consultancy

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October – December 2013

Leases and Licences of Public Land



Melbourne* Tue 8 October

Melbourne* Tue 3 December

Roads Streets and Lanes



Melbourne* Tues 15 October

Traralgon Mon 25 November

Melbourne* Tues 10 December

Rivers and Lakes



Melbourne* Wed 16 October

Melbourne* Wed 27 November

Volunteers and Grants



Warrnambool Tue 22 October

Traralgon Tues 13 November

Melbourne* Wed 4 December

Environmental Law and Risk for Councils



Melbourne* Thur 10 October

Geelong Tue 22 October

Horsham Tue 26 November

Melbourne* Thur 12 December

Coastal Adaptation



Warrnambool Wed 23 October

Melbourne* Mon 11 Nov

Subdivisions Law

Melbourne* Thursday 31 October

Building Law and Regulation

Melbourne* Wednesday 30 October

Crown Land law

Melbourne* Wednesday 20 November

Risk Management

Melbourne* Tuesday 26 November

Land Law for Service Utilities

Melbourne* Thursday 28 November

Native Title and Aboriginal Heritage

Melbourne* Tuesday 19 November

All courses are of one-day duration

Starting time 9:00 am. Finish 4:30 pm

For details of all these courses go to

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* Our Melbourne courses are conducted either at the Law Institute of Victoria, 470 Bourke Street or at Graduate House, University of Melbourne, 220 Leicester St Carlton

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