

Disestablishmentarianism

... is one of the longest words in the English language.*

It refers to the philosophy of separating church and state. It got a bit of a run when Archbishop Hollingworth was Governor-General, but its heyday was in the 1860s, when it took up a disproportionate amount of space on newspaper front pages in both Australia and England.

Until then, it had been seen as quite proper for the state to make hand-outs to the church. In a typical Victorian town, Crown land was reserved for churches – just as it was for town halls, court houses and army drill-halls.

We colonials were more liberal than the English (for whom the C-of-E was the one 'established' church), so our old plans show Crown land set aside for Roman Catholics, Presbyterians, 'Primitive Wesleyans' (that's Methodists) and 'Hebrew Synagogues.'

The Age, 14 Dec 2012

"Between them, the Uniting and Anglican churches have sold 15 properties this year. The former Presbyterian church in Napier Street, Fitzroy, went for more than \$2 million."

But that all came to an end in 1871, when the Victorian Parliament passed Act Number 391 – the *State Aid to Religion Abolition Act*. There were to be no more hand-outs. However, the Act provided that Crown land already reserved for church purposes could be disposed of by the relevant church, which could keep the proceeds.



Rev Bill Beagley hopes to sell the Holy Trinity Anglican Church, Williamstown

The Act is still on the statute books, and is still in use. Every year, as congregations dwindle and churches are deconsecrated, Crown reserves are handed over in fee simple, free of charge, for the relevant archbishopric to dispose of as it sees fit. The land is invariably sold off, and the title records the fact that it derived not from a Crown Grant, but from the provisions of 'Act 391.'

It's a hundred and forty-one years after the statutory separation of church and state, but taxpayers' assets are still being handed over to support sectarian causes. ■

* Although anti-disestablishmentarianism is longer.

Here at The Public Land Consultancy



This month we are pleased to welcome Grant Arnold as a Senior Consultant.

Grant brings with him extensive experience gained in the Department of Sustainability and Environment (DSE) and the Department of Primary Industries (DPI).

For the past three years Grant has managed DSE's statutory and strategic input into Victoria's land use planning system.

His experience and skills in environmental, natural resource, public land and agriculture policy will add value to the services we provide for local government and statutory authorities.

Grant can be contacted at grant@publicland.com.au

Also in This Edition

2012: Highlights of Our Year

Page 2: *Eight of the most interesting consultancies we undertook in 2012.*

Up the Creek. Again.

Page 3: *How sound riparian management continues to be confounded by the ghost of the old Lands Department.*

2012: Highlights of Our Year



The Land Mildura Riverfront Precinct
Our Client Places Victoria
The Issue Analysis of land reconfiguration proposals
Policy-makers and planners are framing visions for the \$17 million reinvigoration of this blighted but potentially exciting precinct. We were delighted to help assemble the tool kit they will need to convert visions into reality.



The Land 100 Yacht Clubs around Victoria
Our Client Yachting Victoria
The Issue Land law training for Yacht Club CEOs
They can sail from Sydney to Hobart – but engaged us to help navigate through the shoals of coastal land law



The Land Half Moon Bay, Sandringham
Our Client Bayside City Council
The Issue Management Strategy for the HMVS Cerberus.
How to prevent this nationally-listed artifact sinking beneath the waves? Marine engineering is part of the answer; our contribution was a plan for a new governance regime.



The Land Bolin Bolin Billabong, Yarra River
Our Client Manningham City Council
The Issue Wetlands Stormwater Harvesting Project
This multi-agency project had its engineering, ecological and financial arrangements all sorted – but still needed a strategy for future control and management.



The Land Eastern Beach, Geelong
Our Client City of Greater Geelong
The Issue Proposed Mineral Springs Complex.
As Councilors and planners imagined conference centres, hotels and spa baths, we mapped the legal and policy hurdles their visions would need to negotiate...



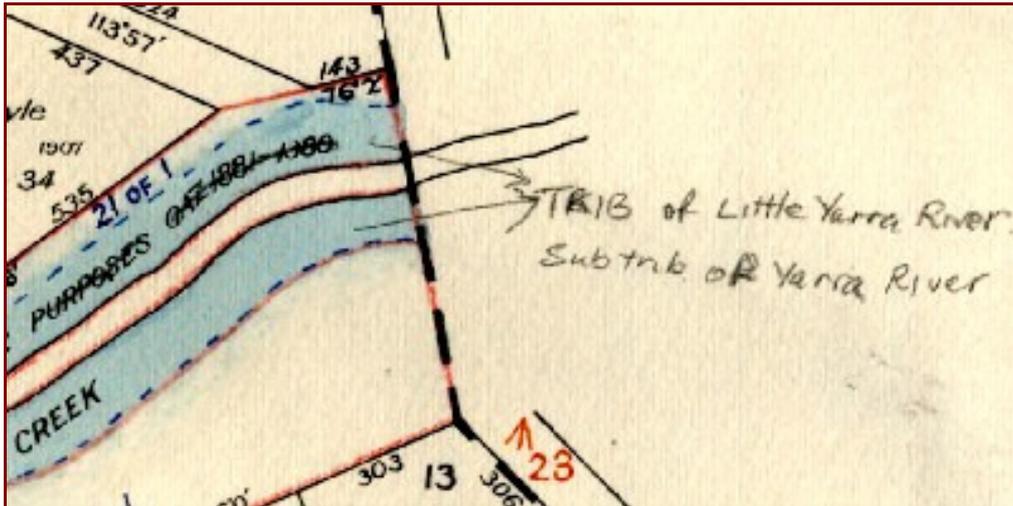
The Land The coastline from Bayside to Bass Coast
Our Client South-East Councils Climate Change Alliance
The Issue Review of Climate Change 'Workbook'
For coastal councils to respond to climate change, they must work in a multi-disciplinary framework spanning both planning and property law, and both private and public land. We were happy to help map out this framework.



The Land Lake Boga Foreshores
Our Client Goulburn-Murray Water (G-MW)
The Issue Risk Management Strategy
As the newly appointed manager of Lake Boga, G-MW needed a risk minimisation strategy to deal with some 140 unauthorised structures and occupations.



The Land Hilltop Wind Farm, Central Victoria
Our Client Pacific Hydro
The Issue Access to Unused Government Roads.
Topography suitable for wind farms is topography with access challenges... We provided a primer (for the client and for the relevant municipality) on the usability of so-called 'unused' roads.



Up the Creek. Again.

In *Terra Publica* of March-April 2011¹ we paddled up Kannanook Creek, Frankston. Now let's dip our oars into Britannia Creek, near Warburton.

Our chart is the Parish Plan as found on the DSE website². What's this? A scribbled note "TRIB of Little Yarra River. Sub-trib of Yarra River." Arrows connect it to an earlier (and far neater) notation – one of a family of such notes very familiar to aficionados of Parish Plans:-

Crown land forming bed of creek and 150 links from each bank is permanently reserved for public purposes GAZ 1881 – 1389

But this reference to page 1389 of the 1881 Government Gazette has been crossed out – presumably by our scribbler. What's going on here?

The authors of the 1881 reservation intended it to apply to nearly all rivers in the State (or Colony, as it then was). They listed more than 200 of them by name, and in doing so made a few slips. Some they named twice. The reserve fronting the Murray River includes land we now recognise as being in NSW.

And as for the Yarra catchment, they avoided a lengthy list by referring simply to "the Yarra and all its tributaries." Their intention was crystal clear to any reasonable person – including the person who originally drafted the Britannia Creek Parish Plan.

But then along came the 20th Century Department of Crown Lands and Survey. Some bright spark there realised that many waterways in the Yarra catchment are not tributaries of the Yarra itself, but *tributaries of tributaries* of the Yarra! OMG, as we might say these days. What an astounding revelation!

Having discovered (or should we say, invented) this anomaly, what do you imagine the old Lands Department then did about it? You might expect them to have put a rectifying notice in the next edition of the Government Gazette (which could at the same time have reserved the unreserved strip beyond the 150-link line formed when nearby Crown allotments had been laid out post-1881). No. That would have been far too sensible.

Instead, they set some poor junior the task of going through all the relevant Parish Plans and inserting the aforementioned scribbled notes, and thereby repudiating the permanent reservation.

By our reckoning there must be dozens of such sub-tributaries. Britannia Creek is a tributary of the Little Yarra; the Wandin Yallock is a tributary of the Woori Yallock; Chum Creek is a tributary of the Watts River. The Crown land along them all was de-reserved not by an Act of Parliament, but by the stroke of a pencil.

What are the consequences of this bit of stupidity? The waterways concerned come under the *Land Act 1958* rather than the *Crown Land (Reserves) Act 1978*. No Committee of Management can be appointed over them, and no regulations proclaimed. Whether Native title has been extinguished, partly extinguished, or resurrected is beyond us. Nearby landowners can't trust their titles where they show an abuttal to a reserve. Indeed the land could be sold off as freehold, without further Parliamentary approval.

*In 2013 we'll be getting a new Victorian Waterway Management Strategy. The draft suggests it will "review and/or reform legislative and administrative arrangements to improve Crown frontage management."*³

Who knows – perhaps we'll see the scribble erased from the Britannia Creek Parish Plan. ■

¹ Past editions of TP are archived at www.publicland.com.au/terra_publica.html

² More precisely:- Township of Britannia Creek, Parish of Warburton, County of Evelyn.

³ <http://www.water.vic.gov.au/environment/rivers/draft-victorian-waterway-management-strategy>

Coming up during 2013

- A new Victorian Coastal Strategy
- A new Victorian Waterways Management Strategy
- Review of the Water Act 1989
- The State of the Environment Report

What will these mean for you? Keep up to date by booking in to our one-day PD courses.

Professional Development

During 2013 we'll be running all our one-day courses at the Law Institute of Victoria in Melbourne, and at selected provincial locations.

For details of all our PD courses, go to www.publicland.com.au/professional_development

To express your interest in any of our courses, contact our Training Coordinator, Lesley Simons lesley@publicland.com.au

Q & A

“How can a river reserve be removed from a paddock (where there's no actual river)?”



Question asked by a surveyor in a major engineering firm, having discovered that his client's property is bisected by a permanent Crown reserve, where a river once used to run.

Answers 1 and 2: It's difficult, but not impossible.
Answer 3: There's a better way – equally difficult, but far more effective in the longer-term.

The circumstances of the case are these: in 1881 Crown land in the bed, banks and frontages of most Victorian rivers was permanently reserved. Over time, many rivers have moved (some through natural causes, some through artificial) but the permanent reserve has stayed put. What looks like someone's paddock is in fact a Crown reserve; what looks like river frontage is in fact someone's freehold land.

It's a situation that runs counter to any sensible economic or conservation objectives. The freehold landowner may be unable to sub-divide in the manner dictated by normal commercial and planning considerations. The Crown has no direct control over the actual river frontage, but owns a piece of land it doesn't want. Under section 401A of the *Land Act* 1958, members of the public are allowed to enter the Crown reserve (i.e. the middle of the paddock) for recreational purposes, and the landowner is obliged to provide them with stiles or unlocked gates. The public has no equivalent rights, however, over the land where the actual river actually runs.

What's called for is a land exchange, but here we find deficiencies in the current legislation. Section 12A of the *Land Act* 1958 allows freehold land to be swapped for Crown land – but not if the Crown land is permanently reserved. Section 11(1) of the *Crown Land (Reserves) Act* 1978 allows the Governor-in-Council to adjust the boundaries of a permanent river reserve, but only where the river now occupies other Crown land.

So **Answer No 1** is – (a) You get DSE's agreement to steps (b) to (d); (b) you surrender to the Crown the freehold where the river now runs; (c) you get the

Governor-in-Council to shift the permanent reserve to the land you've just surrendered; and (d) purchase the now-unreserved Crown land. Add a bit more complexity if the land the river has shifted into is someone else's freehold. Oh, allow at least two years and hope that nothing goes wrong in the process...

Answer No 2 – Site-specific legislation. Most sessions of Parliament consider a proposal with a title something like “Land (Revocation of Reservations) Bill 2012.”

Again, allow two years and hope the parliamentary program isn't disrupted by an election. Even after proclamation of your new Act, you may still have to purchase the land.

Answer No 3 (We like this one) – a generic legislative amendment. The Governor-in-Council should be given power to enter into land exchanges, even where the Crown land is permanently reserved, to rectify anomalies resulting from movements of rivers. This could take the form either of an amendment to section 12A of the *Land Act*, or to section 11 of the *Crown Land (Reserves) Act*.

Whichever route you choose, you must first convince the Minister that the outcome is something the Government should support. Remember that Ministers like to hear phrases like ‘no loss of public land’ and ‘net gain of conservation values’ and ‘wide community support.’ Good luck. ■

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Since we first ran this article in October 2004 another surveyor has proposed
Answer No 4: *Send in engineers with bulldozers to put the bloody river back where it's supposed to be!* □

Readers of Terra Publica should not act on the basis of its contents which are of a general nature, capable of misinterpretation and not applicable in inappropriate cases. They do not, nor are they intended to, constitute legal or specific advice. The Public Land Consultancy is available to provide advice on public land matters and will, on request, arrange legal advice for clients from its associated legal firms.