A Review of the Management of Riparian Land in Victoria

A Report for the Department of Sustainability and Environment

15 May 2008

The Public Land Consultancy

Department of Sustainability and Environment

PO Box 500
East Melbourne Victoria 3002
Telephone: (03) 9637 8000
Facsimile: (03) 9637 8100
ABN 90 719 052 204

June 2008

A REVIEW OF THE MANAGEMENT OF RIPARIAN LAND IN VICTORIA

Riparian land is land that abuts waterways such as rivers, creeks and wetlands. It is critically important for river health (for example by improving water quality and providing shade and organic inputs) and for terrestrial biodiversity (for example by providing ecological connectivity). The Government's recently released *Green paper on land and biodiversity at a time of climate change* recognises this importance and suggests several approaches to improve its management.

Enclosed is a report entitled *Review of Riparian Land Management in Victoria,* commissioned by the Department of Sustainability and Environment, to provide background and inform riparian policy development for the Green Paper. It represents a comprehensive discussion of the administrative and statutory issues with regard to riparian land management and proposes a range of options for improving their management.

The report, prepared by The Public Land Consultancy, contains the views of the consultant alone and does not contain the views of Government nor the Department of Sustainability and Environment.

The next step in the further development of approaches to riparian management will include discussions and consultation with stakeholders on the priority issues to be dealt with and how these should be progressed.

I hope that the report will provide significant food for thought and also provide valuable information for those with an interest in the management of rivers and their riparian zones as part of those discussions and consultations.

Yours sincerely

Dr Jane Doolan
Executive Director
Sustainable Water Environment and Innovation
Office of Water

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By

The Public Land Consultancy
57 / 151 Fitzroy Street, St Kilda 3182
www.publicland.com.au

15 May 2008

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Disclaimer

This Report has been written by The Public Land Consultancy under commission from the Department of Sustainability and Environment. The views contained in the report are those of The Public Land Consultancy, and do not necessarily reflect the views of the Department.

Acknowledgements

The Consultant gratefully acknowledges the assistance and advice provided by many people, including the following -

Project Manager

Peter Vollebergh	Department of Sustainability & Environment

Members of the Steering Committee

Caroline Douglass	Department of Sustainability & Environment
Glen Forster	Department of Sustainability & Environment
Lisa Goeman	Department of Primary Industries
Sarina Loo	Department of Sustainability & Environment
Ian Mansergh	Department of Sustainability & Environment
Merv McAleice	Department of Sustainability & Environment
Tom O'Dwyer	Goulburn Broken CMA
Jan Smith	Melbourne Water

Other people who provided invaluable support, advice and assistance

Dave Allen	Melbourne Water
Grant Arnold	Department of Primary Industries
Greg Bain	Melbourne Water
John Barry	Land Titles Office
Wade Bland	Port Phillip Westernport CMA
Rhonda Boyle	Department of Sustainability & Environment
Sally Burgess	Department of Sustainability & Environment
Ian Campbell-Fraser	National Native Title Tribunal
Paul Coghlan	Department of Sustainability & Environment
Anthony Costigan	Department of Sustainability & Environment
Graham Davis	Parks Victoria
Glen Dixon	Wimmera CMA
Michelle Dixon	Department of Sustainability & Environment
Frank Donoghue	West Gippsland CMA
Caroline Douglass	Department of Sustainability & Environment
Michelle Ezzy	Melbourne Water
Mal Gibson	West Gippsland CMA
Robert Giles	Giles Title Searching

Megan Goulding	Goulding Heritage Consulting
Maurie Grealy	Department of Sustainability & Environment
Matt Jackson	North Central CMA
Lisa Kitson	Environment Protection Authority
Vicki Lanigan	Southern Rural Water
Veronica Lannigan	North East CMA
Jon Leevers	North Central CMA
John Macey	John Macey Surveying
Wayne Malone	Department of Sustainability & Environment
Merv McAleice	Department of Sustainability & Environment
Margaret McMahon	Department of Sustainability & Environment
Natalie Martin	North East CMA
Gavin Matheson	Department of Sustainability & Environment
Adam Melis	Department of Sustainability & Environment
Kishor Melvani	Department of Sustainability & Environment
Phil Moden	Valuer Generals Office
Bill O'Connor	Department of Sustainability & Environment
Tom O'Dwyer	Goulburn Broken CMA
Natalie Ord	North East CMA
Greg Peters	Corangamite CMA
Joan Phillips	Department of Sustainability & Environment
Sean Phillipson	East Gippsland CMA
Elyse Riethmuller	Wimmera CMA
David Rittman	Parks Victoria
Simon Robertson	Environment Protection Authority
Mark Schirmer	Corangamite CMA
Leon Stackpole	Environment Protection Authority
Wayne Tennant	Goulburn Broken CMA
John Tulloch	Surveyor General's Office
Bruce Turner	Phoenix Facilitation
Mark Turner	Corangamite CMA
Geoff U'Ren	Department of Sustainability & Environment
Ann van de Meene	Parks Victoria
Trent Wallis	Mallee CMA
Chris Williams	Trust for Nature
Kevin Wood	Glenelg Hopkins CMA

Out thanks also go to the people who participated in the Workshop on 8 August 2007, whose names are listed in Appendix 9.7

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1 Executive Summary

1.1 Foreword

At a time when society is urgently seeking practical responses to the challenge of climate change, the need to recognise riparian land as a crucial biodiversity resource is more pressing than ever.

Riparian land has long served a number of functions, but an imbalance between the weight given to these functions has often resulted in outcomes skewed against environmental sustainability.

This report seeks to make a contribution to the body of effort now being directed to redressing this imbalance.

Government Policy

The timing of this report coincides with the government's Green Paper 'Land and Biodiversity at a time of Climate Change,' which suggests three approaches likely to be adopted in the subsequent White Paper:-

- *Improve the management of riparian areas and encourage the development of stewardship arrangements with adjacent landholders and other potential managers*
- *Review the Crown frontage licensing process for the 2009 renewals to better reflect broader environmental outcomes*
- *Improve statutory and administrative instruments for managers to improve riparian zone management*

In seeking to support and inform these three approaches, this report addresses the legal, administrative, regulatory and institutional arrangements governing riparian land in Victoria, and proposes specific strategies to make those arrangements more effective.

The reform of governance systems will not, of itself, rehabilitate riparian land. Community awareness is the primary driver of change, and government financial resources are the primary mechanism of change – but for effective delivery of results we also need working instruments of governance.

* * * * *

1.2 Overview of this Report and the Issues it Addresses

1.2.1 Overview of Chapter 3 – Riparian Land Status

The better management of riparian land for biodiversity outcomes is often impeded by the complexities of riparian land status. This chapter recommends more rational systems of land status, and more effective mechanisms for reforming land status.

Riparian Crown Land

The present sub-categorisation of riparian Crown land is inordinately complex: although it is all Crown land, it is sub-divided into a matrix of sub-categories which do not necessarily reflect its values, promote good management, or enable good governance.

It is dealt with under two Acts – the Land Act 1958, whose principal object is to allow the disposal and occupation of surplus Crown land, and the Crown Land (Reserves) Act 1978, whose principal object is the protection of public values on Crown land to be retained for some public purpose. This arbitrary dichotomy does not support modern management objectives, and sends confused messages about the importance of riparian land.

It is recommended that all riparian Crown Land be reserved under the Crown Land (Reserves) Act 1978; that the gazetted purpose of the reservation be "Public Purposes (Protection of the Riparian Environment)," and that the legislative provisions relating to Crown frontage licences be transferred from the Land Act 1958 to the Crown Land (Reserves) Act 1978.

Riparian Freehold

Much riparian land is in freehold ownership. Agencies charged with protecting the public interest on such land may need to exercise some level of control over it which may or may not coincide with the interests of the landholder.

Compulsory acquisition is a familiar, but expensive and insensitive process for gaining control over freehold land.

It is recommended that agencies consider the adoption, in appropriate circumstances, of programs and strategies aimed at gaining a level of control over riparian freehold through the purchase of lesser interests in the forms of covenants, easements, and leaseholds.

Changing Riparian Land Status

There are three situations in which biodiversity or recreational values on riparian land may require some change of land status–

- where rivers have moved,
- where it is desirable to bring freehold frontages into public ownership, and

- where surplus public land is to be disposed of as freehold.

The riparian cadastre is further complicated by two curiosities of the common law - the doctrine of accretion and adverse possession. The mechanisms currently available to deal with these situations are cumbersome, and often inadequate to the task.

It is recommended that amendments be made to the Land Act 1958 and Crown Land (Reserves) Act 1978 enabling land exchanges in a wider range of circumstances.

In the more complex situations there is a need for a process by which reconfiguration of both Crown land and freehold may be planned. Planning schemes already provide a framework which has been used for various restructures (perhaps the best-known being at Phillip Island) but it is unsuitable for riparian reconfigurations.

To facilitate the rationalisation of riparian land, it is recommended that the Victoria Planning Provisions be amended to include an improved Restructure Overlay (RO).

1.2.2 Overview of Chapter 4 – Riparian Land Protection, Management and Works

Statutory Protections

Several existing Acts provide heads of power which could be brought to bear on the protection and enhancement of riparian land values. These include:-

- The Planning & Environment Act
- The Conservation Forests and Lands Act
- The Water Act Part 10
- The Environment Protection Act
- The Catchment and Land Protection Act
- The Land Act
- The Crown Land (Reserves) Act

This is a situation where multiple tools should be available to different riparian agencies, to be employed as and when circumstances arise. By and large, these are heads of power already in existence – what is needed in many cases is not the amendment of primary legislation, but the use of that primary legislation to make subordinate instruments.

It is recommended that:-

- all riparian Crown land be rezoned to Public Park and Recreation Zone (PPRZ) under the relevant planning scheme, unless it is already zoned Public Conservation and Resource Zone (PCRZ); and that all land (both Crown and

freehold) within 20 metres of a declared waterway be included in the Environmental Sensitivity Overlay (ESO)

- a new Riparian Management Code be written under the Conservation Forests and Lands Act, and subsequently recognised by or incorporated into various other statutory provisions
- all riparian Crown land be deemed to be 'designated land' for the purposes of Part 10 of the Water Act, and that by-laws be made relating to its use and development
- allowing stock into waterways be made a 'scheduled activity' for the purpose of the Environment Protection Act
- Special Area Plans be made under the Catchment and Land Protection Act specifying how and by whom degraded stretches of priority rivers are to be rehabilitated
- all unreserved riparian Crown land be reserved under the Crown Land (Reserves) Act, and that new regulations be made under the Land Act and/or the Crown Land (Reserves) Act (depending on whether frontage provisions are transferred from the former to the latter) regulating a range of public activities and behaviours.

Management: Stock Control and Fencing

The management of stock on riparian land is widely regarded as the most pressing issue facing riparian agencies charged with protecting natural resource systems.

There are at least half a dozen heads of power under which one might expect to find tools for regulating stock access to waterways. These include the Impounding of Livestock Act, the Fences Act, the Environment Protection Act, the Land Act and Crown Land (Reserves) Act, the Water Act and the Catchment and Land Protection Act. Each one, however, needs some amendment before it can effectively serve this purpose. A range of options for legislative amendment is explored, and six recommendations are made which, if adopted, would provide a range of tools available to be deployed in suitable circumstances.

Management: Stock and Domestic Water Rights

The problem of stock on riparian land is exacerbated by misunderstandings about an abutting owner's rights to take water free of charge – a right which some hold to be jeopardised by the construction of a fence. Whether this is a correct interpretation of section 8 of the Water Act is a moot point.

It is recommended that policy be clarified on the question of who has rights to take stock and domestic water, and in what circumstances; that it be confirmed that such rights, where they exist, are not related to the presence or absence of a fence; and that a right to take water does not constitute a right to allow stock into the water. If any

doubt remains that the Water Act reflects this policy, then the Act should be amended accordingly.

Works: Current CMA Landholder Agreements

There is little if any consistency between the various CMAs' documents establishing agreements with landholders to undertake works, and then to maintain those works. Issues of concern include the legal validity of the documents, the survival of any agreement if the property changes hands, and duplications or inconsistencies between these contracts and Crown frontage licences.

It is recommended that all 10 suites of agreements be redrafted to meet a minimum set of legal and administrative standards; that the CMAs agree amongst themselves on a consistent set of technical standards.

At the same time, a commitment should be made to introducing a new form of status-neutral Riparian Agreement.

Management & Works: New Forms of Agreement

A continuing program of CMA-funded works on riparian land would benefit from a new form of legal agreement. It should be 'status-neutral' (that is, be applicable to both Crown and freehold land); it should 'run with the land' (that is, survive any change of land ownership); and it should simplify rather than duplicate or add to other statutory consents.

It is recommended that the CF&L Act be amended to allow the Secretary to enter into 'Riparian Agreements' which, in addition to being status-neutral and running with the land, could offer other attractive benefits for landholders: they could offer tax and rate relief (as is already the case for Trust for Nature covenants), and they could incorporate the requirements of other statutory consents.

Under this 'one stop shop' option, a Riparian Agreement could incorporate all the requirements of a Crown frontage licence, and therefore eliminate the need for the landholder concerned to hold such a licence. Likewise, it could eliminate the need for a separate water diversion licence.

One legal difficulty encountered by many current works agreements relates to fence-lines: often the best alignment for a fence is not the legal title boundary. It is recommended that the CF&L Act be amended to allow the negotiation of 'Give and Take' fence-lines which will enable a fence to be constructed on a practical boundary, allow each side of the fence to be administered as if the fence were on the actual title boundary, and yet ensure that the legal ownership and land status remain unaffected.

1.2.3 Overview of Chapter 5 – Crown Water Frontage Licences

There are some 30,000 kilometres of Crown frontages alongside rivers in Victoria1 . Of this, some 22,000 km is abutted by freehold land, and a substantial proportion of this length is subject of Crown water frontage licences. The other 8000 kilometres of riparian Crown land is State Forest, National Park etc.

A substantial proportion of riparian Crown land is licensed to abutting owners, mainly for grazing. There are almost 10,000 licences, nearly all issued for 5-year terms – the next renewal being due in October 2009.

If biodiversity values are to be adequately protected, several deficiencies in the licensing system need to be remedied. There is no explicit provision requiring an abutting owner without a licence to construct a fence; there is a history of issuing licences only to the abutting owner; the controls extend only to frontages, not to the bed and banks, and some abutting owners have a statutory right to graze the bed and banks without any licence.

Elsewhere in the report it is recommended that these licences be phased out in favour of status-neutral Riparian Agreements. Meanwhile, it is recommended that various minor amendments be made to the Land Act and the Water Act to clarify the law or allow more flexibility in its application.

One complication that impedes inter-agency cooperation is a view that the Information Privacy Act prevents DSE from providing data about Crown licences to CMAs. A simple method of rectifying this problem is recommended.

Economics of Crown Frontages

Economic theory suggests that landholders will choose to manage riparian land for biodiversity rather than for agriculture, if the net benefits of conservation are seen to outweigh the net benefits of agriculture. The parameters that influence this choice are identified and evaluated. Of particular interest is

- the rate on which Crown frontage rentals are set, and
- no allowance being made for the saving of fencing and watering costs which would have to be borne by the landholder if there were no Crown licence

A simple model is proposed for predicting how landholder behaviour would respond to changes in the various parameters, particularly the removal of the implied subsidy. The model can also be used to speculate about the total revenue stream from frontage licences if rents were to increase.

It is recommended that government undertake an independent review of frontage economics, in order to sustain a better informed dialogue with stakeholders. Contingent on the outcome of such a review, Crown rentals should be increased to the true market value.

It is also recommended that CMAs do not seek to retain this revenue, because it will be a diminishing income stream. Rather, funding for riparian works should be funded from budget appropriations as a public good.

Freehold Titles and Crown Frontages

An important opportunity to review and revise Crown licences is presently being lost. Parcels of freehold land and abutting licensed Crown frontages are often viewed as component parts of a single rural property unit, yet the current licensing system fails

to recognise any connection between the licenced Crown land and the 'parent' freehold property. As a result, incoming landowners may be unaware that part of 'their' new property is Crown land, and DSE may be unaware that its tenant has changed.

A number of options for rectifying this situation are explored, and it is recommended that certain enhancements to DSE's internal data systems be implemented, whereby inquiries at Land Registry preliminary to the sale or subdivision of freehold land trigger notifications to other areas of DSE alerting them that the Crown frontage may also be about to change hands. DSE and the relevant CMA may then use this as an opportunity to review and/or renegotiate the Crown licence.

Crown Frontages – the 2009 Renewal

The 5-yearly renewal of Crown licences, which is to occur in October 2009, presents a significant opportunity to advance the cause of good riparian management.

Any reform of riparian policy will require the eventual review of all Crown frontage licences. On review, some may continue unchanged; others may be reissued subject to new terms and conditions; some may be reassigned to other tenants; yet others will be cancelled. As there are some 10,000 licensed frontages across the State, this program of review may take as long as ten years. It is assumed here that the CMAs will conduct the on-ground inspections and consultations with landholders; DSE will remain as formal landlord and deal with the licensed land as the CMAs recommend.

A three stage strategy is proposed for implementing this review.

- Before October 2009, the highest priority cases should be reviewed, and some licensees given notice of major change or non-renewal at 2009.
- At 2009, licences should be renewed, but for a conditional term: 5 years, or until the sale or subdivision of the abutting freehold, or until the negotiation of a CMA grant – whichever event occurs first. All reviewed licences should be for the purpose of 'protection of the riparian environment,' rather than the current purpose, which in most cases is grazing.
- After 2009, the review will continue, on a strategic basis: if a parent freehold property is sold or subdivided, the opportunity should be taken to review the frontage licence; if the landholder accepts a grant, that is also an opportunity for review.

At the following 5-yearly renewal (2014) there should be a much reduced residual number of unreviewed frontage licences. The longer-term objective of the review will be for all licensed frontages to move onto the new status-neutral Riparian Agreements. For an intermediate period, two systems will be operating in parallel.

1.2.4 Overview of Chapter 6 – Aboriginal Rights and Values

Riparian land has particular significance for indigenous people. In Victoria, this significance has been recognised in law through the Commonwealth Native Title Act 1994 and the State Aboriginal Heritage Act 2006.

Native Title

Native Title exists only on Crown land, having been extinguished on freehold. In many parts of the State, native title is virtually confined to the riparian strip, which is the only remaining Crown land in the landscape.

Under the Native Title Act 1994, actions which may affect native title (including the undertaking of works, the grant of tenures and the making of regulations) must meet strict tests. Without clear compliance with the Act the validity of such acts cannot be assured.

It is recommended that the implementation of riparian policy be validated, and Aboriginal rights be formally recognised, through certain Indigenous Land Use Agreements (ILUAs) made between government and the Aboriginal community.

Aboriginal Heritage

All riparian land in Victoria is designated as an 'Area of Cultural Sensitivity' for the purposes of the Aboriginal Heritage Act 2006. Causing harm to Aboriginal heritage is a criminal offence under this Act, as is undertaking an act likely to harm Aboriginal heritage. One defence is through the preparation of a Cultural Heritage Management Plan (CHMP).

The Act prescribes certain circumstances in which a CHMP is mandatory. In other circumstances, it is left to the proponent to decide on a risk management strategy.

In order to ensure that Aboriginal heritage is recognised and protected, and that riparian land managers are not at risk of committing criminal offences, it is recommended that in addition to complying with the statutory requirements of the Act, CMAs develop 'due diligence' procedures for riparian works, even in circumstances where a CHMP is not mandated.

1.2.5 Overview of Chapter 7 – Roles and Responsibilities

Various authorities and agencies have roles in relation to riparian land, as do communities and individual landholders. Some of these roles involve actual land management; others may be better described as control, monitoring, support or coordination.

Central to this analysis are the CMAs, which government has identified as 'caretakers of riparian condition,' although details of this role have not been spelled out. The Victorian River Health Strategy indicated that CMAs will themselves become managers of Crown frontages[2]; but another view is that CMAs will become monitors, coordinators and facilitators of other land managers. This chapter charts a course between these two views.

The chapter considers current deficiencies in riparian roles and responsibilities, which take two broad forms:

- Geographic gaps in land management, particularly for unlicensed linear Crown land
- Functional and coordination gaps, particularly between DSE and the CMAs

In addressing these gaps, the following principles have been adopted:-

- Agencies should be recognised as having a core business; any additional roles should be complementary to that core business and corporate culture
- Priority for filling geographic gaps should be set in accordance with the priorities identified in the Regional River Health Strategies (RRHSs)
- Any extension of an agency's roles or area of responsibility must be separately resourced

The biggest geographic gap is management responsibility for linear unlicensed riparian Crown land. This is of particular significance when it aligns with areas of high priority under the relevant RRHS. For high-priority riparian Crown land it is recommended that:-

- Parks Victoria, Municipal Councils, and community-based Committees of Management be appointed as land managers, wherever appropriate
- CMAs be either appointed as Committees of Management or engaged to undertake management functions on behalf of DSE for high priority riparian land which cannot be placed under these agencies

For low-priority riparian Crown land, it is recommended that:-

- Existing delegated managers continue
- Further appointments be made as opportunities arise
- DSE builds its own capacity as 'default' manager.

Functional gaps and inefficiencies should be addressed by improved high-level coordination, and cooperation and liaison between the CMAs and DSE.

In the longer term, a range of possibilities emerges for building CMAs' roles as caretaker of riparian condition. These may be regarded either as a set of 'pick and choose' options or, preferably, as an evolutionary process of strategic incrementalism.

Outside public sector agencies, there is also an expanding role for the community – not only as individual landholders, but also as volunteers and delegated managers.

1.2.6 Overview of Chapter 8 – The Reform of Riparian Legislation

Primary Legislation

Three options are considered for introducing the numerous legislative reforms recommended in this report. The option of piecemeal amendments to various Acts, if and when those Acts come up for review, is rejected as being unlikely to deliver results in a timely manner, if at all.

The option of a separate, stand-alone Riparian Land Management Act (comparable to the Coastal Management Act or the Road Management Act) has its attractions, but seems to deliver no more than can be achieved by the third option, namely, the simultaneous and coordinated amendment of a series of existing Acts.

This third, preferred option would be effected through a Riparian Land Reform Act which, when proclaimed, would have the effect of amending other Acts, after which it would be rescinded.

To help illustrate how this option would work, Appendix 9.2 includes a set of drafting instructions for Parliamentary Counsel.

Subordinate Legislation

This report recommends the adoption of several pieces of subordinate legislation. These include:-

- A Code of Riparian Land Management Practice, under the CF&L Act, which would in turn be referenced by other items of subordinate legislation
- A revised Restructure Overlay (RO) and a revised Environmental Sensitivity Overlay (ESO) within the Victoria Planning Provisions
- New regulations for riparian Crown land – under the Land Act and/or the Crown Land (Reserves) Act
- Regulations to support the Riparian Agreements and Give and Take Fenceline Agreements, proposed for inclusion in the CF&L Act
- New by-laws under Part 10 of the Water Act, governing activities on designated land
- Regulations under the Aboriginal Heritage Act, exempting certain low-impact conservation works on riparian land from the requirements of that Act
- Regulations governing stock in waterways, if allowing stock into waterways is made a 'scheduled activity' under the Environment Protection Act.

To introduce each of these items separately would be cumbersome, confusing and costly. Stakeholder groups wanting to understand their meaning and impact would have great difficulty in comprehending the package as a whole and making useful contributions to its development.

The preferred option is for the proposed Riparian Land Management Act to contain provisions authorising the coordinated and simultaneous drafting and approval of these items. A process is outlined (in the drafting instructions for the Bill) which would allow an abbreviated and unified process, while satisfying all the essential requirements of modern legislative practice.

1.3 A Fourteen-Point Strategy

In addressing the issues outlined above, this report makes a series of recommendations. The following table summarises fourteen principal themes which could underlie the implementation of the Government's riparian policy to be articulated in the forthcoming Biodiversity White Paper.

The fourteen are grouped according to the Chapter headings in the body of the report.

1.3.1 Proposals relating to riparian land status

Proposal	Reasons
1 Reserve all unreserved riparian Crown land under the CL(R) Act • Change the purpose of the Crown reservation from 'Public Purposes' to 'Public Purposes – Protection of the Riparian Environment.' • Shift water frontage provisions from the *Land Act* 1958 to the *Crown Land (Reserves) Act* 1978	To establish that riparian Crown land is a biodiversity resource rather than a service utility To confirm that, in the main, riparian Crown land is not available for alienation To give riparian Crown land the same degree of legislative protection as applies to all other Crown reserves
2 Simplify methods of changing riparian land status • Rationalise the range of procedures available for transactions involving riparian Crown land • Facilitate the reconfiguration of riparian freehold, where necessary, through Planning Scheme Amendments; modernise the Restructure Overlay (RO) in the VPPs for this purpose • Facilitate the acquisition of 'lesser interests' in riparian freehold,	To extend and simplify the range of land dealings available to support desirable riparian environmental outcomes To provide adequate tools for dealing with land along rivers which have changed course To exercise conservation-related controls over riparian freehold without becoming its owner

including easements and covenants	To devolve responsibility for site-specific riparian reconfigurations from Parliament to executive government

1.3.2 Proposals relating to riparian planning and management

Proposal	Reasons
3 Adopt a suite of tools to manage stock access to streamside land • Adopt a suite of complementary legislative and regulatory tools relating to fencing, livestock management, and stock-related water pollution • Review and clarify the 'Private Rights' to water in waterways for stock and domestic purposes	To provide DSE, CMAs, the EPA and municipalities with better powers to regulate stock on riparian land and to keep stock out of waterways To remove economic impediments currently mitigating against the introduction of off-stream stock watering
4 Introduce new status-neutral Riparian Agreements • Introduce new legally binding Agreements which will apply to all riparian land under a landholder's control, whether it is Crown land or freehold • Design the Agreement to replace both Crown frontage licences and CMA grant agreements • Through the new Agreements, provide for:- o payment for ecosystem services; o 'give-and-take' fence-lines; and o 'one-stop-shop' compliance with various riparian regulations	To facilitate good riparian outcomes independently of the often arbitrary distinction between Crown and freehold land To enable riparian fence-lines to be determined by environmental rather than cadastral criteria To provide legal protection for CMA-funded works on both Crown and freehold riparian land To simplify landholder dealings with government agencies and compliance with various other riparian regulations
5 Improve the recognition of riparian	To provide agencies and landholders with

land in regulatory regimes, including Planning Schemes • Adopt a Code of Riparian Practice under the CF&L Act • Recognise the Code under Planning Schemes, Water Act by-laws, Licence conditions, CMA grants programs etc • Amend Planning Schemes to bring riparian land under the PPRZ zoning and ESO Overlay	a uniform benchmark for riparian land management best practice To have best practice legally recognised across the regulatory regime To promote a best practice culture for riparian management by engaging stakeholders in the development of the Code
6 Enable the application of existing, but latent, legislative powers to riparian problems • Conservation Forests &Lands Act – make the extensive powers of this Act available to CMAs by nominating the Water Act as a 'relevant law' • Water Act – allow CMAs to use the extensive powers of this Act by 'designating' riparian land, as is already the case for Melbourne Water • Crown Land (Reserves) Act – open up management and regulatory options available under this Act by reserving all unreserved riparian Crown land	To access wider powers for the management of riparian land and protection of riparian environmental values by:- o Empowering CMAs to make binding agreements, to adopt codes of practice, to issue PIN notices, and to recover enforcement costs under the CF&L Act o Empowering CMAs to make and enforce by-laws and regulations for riparian land in addition to designated waterways o Empowering DSE to appoint committees of management, make and enforce regulations, and enter into management agreements under the CL(R) Act

1.3.3 Proposals relating to Crown water frontage licences

Proposal	Reasons
7 Adopt a 3-stage strategy to review all Crown frontage licences – *(including those which may be replaced by new*	

Riparian Agreements) • Before 2009 – extension program to familiarise licence-holders with the policy; immediate renegotiation or cancellation of highest priority cases • At 2009 – cancel some licences, change conditions of others, renew the remainder for a conditional term: '5 years, or until transfer of parent property, or until acceptance of a CMA grant' • After 2009 – progressively review all remaining licences; reviewed licences to be for 10 year term; replace with new status-neutral Riparian Agreements where possible	To ensure a transition from grazing-focussed culture to a conservation-focussed culture To bring every water frontage licence in the State up to a minimum environmental standard To cancel or re-assign those licences which cannot be brought up to standard To provide tangible, localised links between government policy and on-the-ground outcomes To gain landholder support by linking the review to financial incentives and the introduction of new, rationalised status-neutral Riparian Agreements
8 Use market-based approaches to setting Crown licence rentals • Offer payments for ecosystem services on riparian Crown land, where their provision goes beyond a landholder's basic duty of care • Consider raising Crown licence rentals to remove hidden subsidies	To encourage landholders to retain management responsibility for Crown frontages, even when grazing is removed To promote a cultural shift towards landholder provision of ecosystem services To remove economic disincentives currently working against the conservation of frontages
9 Reform and streamline the administration of Crown frontage licences • Streamline DSE records systems to link data relating to frontage licences to data relating to their 'parent' freehold titles • Recognise and utilise (where appropriate) the option of issuing no licence, or issuing the licence to a tenant/manager other than the	To support riparian environmental programs by establishing and maintaining effective landlord-tenant relationships To enable immediate liaison with new property owners to ensure they understand their responsibilities as frontage licensees To help ensure that the abutting landowner does not assume automatic or monopoly control of the Crown frontage

abutting owner	

1.3.4 Proposals relating to Aboriginal rights and values on riparian land

Proposal	Reasons
10 Recognise native title to riparian Crown land • Seek to negotiate a State-wide 'Alternative Procedure Agreement' for all riparian Crown land in the state • As a fall-back, negotiate a series of Area Agreements and Body Corporate Agreements	To formally acknowledge the rights of Aboriginal people in relation to riparian Crown land To provide certainty about the native title status of riparian Crown land To establish firm rules for all future actions which may affect native title
11 Protect Aboriginal heritage on riparian land • Fully comply with the letter and intent of the Aboriginal Heritage Act 2006 • Adopt due-diligence procedures, standards and protocols for riparian works which respect Aboriginal heritage. • If necessary, make new regulations under the AH Act specifically for riparian conservation works.	To ensure protection of Aboriginal heritage values in accordance with government objectives as adopted in the Aboriginal Heritage Act 2006 To ensure that all riparian conservation programs can proceed without the inadvertent commission of criminal offences To reduce the burden of compliance costs under the current Aboriginal Heritage Regulations 2007

1.3.5 Proposals relating to riparian roles and responsibilities

Proposal	Reasons
12 Retain, strengthen and expand the roles and responsibilities of all	

agencies with existing riparian roles • Aim to have a designated land manager appointed for all high-priority unlicensed riparian land – Parks Victoria, the relevant municipality, community-based Committees of Management or the CMAs themselves • Allow the CMAs to evolve as regional 'caretakers of riparian condition' through an incremental program of role expansion:- o engage CMAs to monitor Crown frontage licences on behalf of DSE o empower CMAs to undertake works on high-priority unmanaged and unlicensed riparian land o Appoint CMAs as the formal landlord for Crown frontage licences • Adopt a Service Agreement between the CMAs and DSE under which DSE will continue to provide centralised services including Crown licence administration	To ensure that all high priority riparian land has a clearly identified manager To build on the established community goodwill towards the CMAs as 'caretakers of riparian condition' To allow CMAs to evolve through a staged, evolutionary, manageable process of attaining skills, developing systems and building budgets To recognise the principle of subsidiarity – or the assignment of roles to their correct level in a hierarchical system To retain state-level responsibility, control, policy coordination, and accountability to the electorate To benefit from economic efficiencies through provision of centralised specialist support systems To remove inefficiencies arising from duplications of functions, poor role definition, and cross-agency referrals To recognise and engage local government as a key provider of riparian outcomes at the local level
13 Further develop the partnership model for engaging the private sector in riparian management • Encourage responsible landholder involvement in riparian management through:- o payment for the provision of ecosystem services, particularly on abutting Crown frontages o simplification of regulatory compliance through status-neutral Riparian Agreements o deterrence of mismanagement	To encourage and build on widespread community support for sound riparian environmental management To use market-related mechanisms to influence landholder decision-making in favour of good riparian management To build on the positive aspects of the well-established Crown water frontage licensing system To utilise voluntary inputs for riparian

through the withdrawal of benefits or imposition of cost penalties • Develop avenues for responsible community involvement in riparian management through:- o Expansion of support programs for riparian-focussed community groups o Promotion of three models of community involvement, under the Crown Land (Reserves) Act, the Catchment and Land Protection Act, and the Associations Incorporations Act	management in circumstances where taxpayer-funded resources would otherwise be limited To be able to offer a range of sound legal frameworks for community-based riparian management in a range of circumstances

1.3.6 A proposal for the reform of riparian-related legislation

Proposal	Reasons
14 Implement legislative change through an omnibus Act • Introduce all the recommended legislative changes through a single Riparian Land Reform Act which will amend six or eight existing Acts, and can then be repealed. • As a provision of the Riparian Land Reform Act, introduce a single public consultative process for the making of subordinate legislation (regulations, bylaws and codes under various Acts, and amendments to the VPPs under the Planning and Environment Act)	To provide a clear platform for the expression of government policy objectives for the riparian environment To maximise the gains for riparian management by ensuring that legislative reform occurs simultaneously and holistically To establish a suite of complementary riparian legislation, but without adding another layer of complexity To provide stakeholders and the public with a single, clear and comprehensive opportunity to participate in the implementation of riparian policy To ensure that subordinate riparian legislation is consistent, complementary, and is made expeditiously.

* * * * *

2 Introduction

2.1 Overview of this Chapter

Although earlier studies and policies have provided a clear rationale and direction for riparian management, implementation is occurring within a legal and administrative framework which is often proving inadequate for the task. It is the aim of this project to show how the gap can be filled.

The chapter commences with an account of the lack of alignment between the ecological and legal interpretations of riparian land. It goes on to catalogue the reasons riparian land is important – an importance not always accommodated by the governance regime, despite having been repeatedly recognised in a series of studies and reports.

The main problems facing riparian land are well-understood, and often remedies have been proposed and resources committed. As this report demonstrates, these remedies are not always supported by the instruments of governance.

Various strategic opportunities for remedying these deficiencies are now emerging. These include:-

- The forthcoming Biodiversity White Paper
- The 2009 review of Crown Frontage licences
- The on-going demographic and cultural changes occurring in rural Victoria

In this context, this project was commissioned to undertake four defined tasks. The project was supported by internal consultation within government agencies – and its first recommendation is that this consultation now be extended to external stakeholders.

2.2 Riparian Land in Victoria

2.2.1 What is Riparian Land?

Riparian land is land abutting waterways such as rivers, creeks, lakes or wetlands.

The length of Victoria's waterways is substantial, and has been estimated at 128,000 km, being both sides of most rivers and the southern side of the Murray[3].

The width of the riparian zone may be defined in two ways – either in terms of ecology and hydrology, or in terms of the law and the cadastre.

The Ecological View of Riparian Land

The Victorian River Health Strategy (VRHS) defines the riparian zone as:-

> *The riparian zone includes the area of land that adjoins, regularly influences, or is influenced by, a river, stream or natural waterway, including the regularly wetted floodplain and any associated floodplain wetlands*

The Commonwealth Land and Water Resources Research and Development Corporation offers a similar definition of riparian land4, as follows:

> *Using a functional approach, riparian land is defined as 'any land which adjoins, directly influences, or is influenced by the body of water.'*
> *With this definition, riparian land includes*
> *- the land immediately alongside small creeks and rivers, including the river bank itself;*
> *- gullies and dips which sometimes run with surface water;*
> *- areas surrounding lakes;*
> *- wetlands on river floodplains which interact with the river in times of flood.*

Other functional definitions of riparian land may omit references to floodplains. Some definitions will relate to the present-day strip of remnant vegetation; others will refer to the original width of the vegetated strip, as it was before clearing.

The Legal or Administrative View of Riparian Land

There are numerous points at which riparian land is referred to in statute or reflected in the cadastre. However, these references may or may not align with the functional definition of riparian land, thus leading to some of the complexities addressed in this report.

Here are four examples of administrative definitions of the riparian zone which reflect, to a greater or lesser extent, the functional characteristics to which they seek to reflect:-

- **Crown land frontages** – these are strips of riparian land which have been retained in Crown ownership for public purposes. In many places they are 20m wide, but often they are some greater or lesser width, and in many places they do not exist at all. This inconsistency reflects the historical sequence of events at the time of settlement, rather than any deliberate recognition of ecological values or topographic features. There are estimated to be 25,000 km of Crown land river frontage in Victoria.
- **Designated land** – land abutting waterways may be 'designated' under the Water Act 1989, thereby empowering Catchment Management Authorities to exercise certain controls over it. This power could be used to align some administrative systems to the functional characteristics of the riparian zone, but to date this power has not been used.

- **Aboriginal heritage** – certain provisions of the Aboriginal Heritage Regulations 2006 apply to land within 200m of those waterways which have a legally recognised name. This legal definition may have a close degree of correlation to the functional values which the regulations seek to protect, but it is nevertheless a definition which relies on an arbitrary width and an arbitrary sub-set of waterways as a whole.
- **The Land Subject to Inundation Overlay** (LSIO) is one of several components of the Victorian Planning Provisions which seek to protect values within the riparian zone. Land covered by the LSIO is usually bounded by contours or known flood levels rather than by title or land status boundaries – and thus the LSIO is one of very few examples of a riparian administrative definition coinciding exactly with the riparian functional characteristic it seeks to reflect.

2.2.2 Why Riparian Land is Important

Riparian land serves several important functions – not all of which may be satisfied simultaneously. This incompatibility often underlies some of the more intractable policy conflicts which this report seeks to address.

Importance for Biodiversity

Riparian land provides the link between terrestrial and aquatic ecosystems. It can act as a buffer to reduce the impacts of modified land use and disturbance within the catchment on the river. If well vegetated, riparian land provides much of the organic matter, woody debris and shade required to make aquatic ecosystems healthy.

Intact riparian vegetation is also important in the terrestrial landscape. It contains highly diverse flora and fauna, can act as a refuge for fauna in dry times, is often the only remaining remnant native vegetation in largely cleared catchments, can act as a wildlife corridor, and it may act as important refuges and biolinks with likely changes in the landscape due to climate change.

The significance of the riparian zone for biodiversity is reflected in the set of Action Statements adopted under the Flora and Fauna Guarantee Act. Of the 230 approved Action Statements, a significant proportion relate in some way to the riparian environment.

Importance for Agriculture

Through its proximity to water, riparian land has intrinsic value for agriculture.

Being often more fertile than other land, riparian land supports better quality pasture and shade vegetation and is more attractive to stock. Its relative fertility often makes riparian land more attractive for cropping, particularly horticulture. Market gardens, vineyards, and orchards are often found on or near riparian land; until recently, tobacco farming occupied much of the riparian land abutting the Ovens.

Riparian land also provides livestock with direct access to water. Although this is an age-old practice, it comes into question in an age when water for all other purposes is taken by artificial infrastructure.

Importance for Recreation

As a recreational resource, Victoria's riparian land is arguably as significant as playing fields and sports centres.

Of the 230 parks and reserves managed by Parks Victoria, 155 or 67% abut or straddle a river or creek.

Rights of recreational access to riparian Crown land have been enshrined in legislation since 1983 (Land Act 1958, section 401A)

About half of Victoria's recreational fishing occurs on inland waters. 358 rivers or creeks are listed on the DPI website as supporting recreational fishing.

Importance for Aboriginal Communities

Aboriginal heritage is often associated with riparian land, as a consequence of which all land within 200 metres of named waterways is prescribed as being an 'area of cultural sensitivity' under the Aboriginal Heritage Regulations 2007.

In many regions of the State, riparian Crown land is the only area where native title continues to exist, having been extinguished everywhere else by the grant of freehold title.

Importance as a Service Utility

In the past, larger rivers served as avenues of commerce, and the land alongside them served to support that traffic. Navigable rivers are still recognised as 'public highways' by the common law.

Many road reserves follow the valley floor, providing access between settlements, and to and from freehold properties.

2.2.3 Riparian Land: its Recognition in Policy

Although some of the values associated with riparian land can co-exist, others are to some degree incompatible. In particular, the continuing use of riparian land for grazing and cultivation has been long recognised in policy as being difficult to reconcile with conservation of environmental values.

The following major statements of policy have been adopted over the past 20 years

The LCC Rivers and Streams Investigation 1991

In its *Rivers and Streams Special Investigation* (commissioned in 1989 and completed in 1991), the Land Conservation Council made a recommendation, subsequently accepted by government, that Crown land water frontages be managed for a clear hierarchy of purposes. The report recommended that riparian Crown land should be

used firstly for conservation, then for recreation where consistent with conservation, and then for stock grazing provided there was no conflict with conservation or recreational objectives.

> ***E1*** *That public land water frontages be used to*
>
> *(i) conserve native flora and fauna as part of an integrated system of habitat networks across the State*
>
> *(ii) maintain or restore indigenous vegetation*
>
> *(iii) protect adjoining land from erosion, and provide for flood passage*
>
> *(iv) protect the character and scenic quality of the local landscape*
>
> *(v) provide protection for cultural heritage features and associations*
>
> *(vi) provide access for recreational activities and levels of use consistent with (i)-(v) above*
>
> *(vii) where this does not conflict with (i)-(vi) above, allow access for water, and for grazing of stock by adjoining landholders under licence*

The LCC's 1991 recommendations applied only to Crown land, in accordance with its charter[5]. In 2002, the government re-endorsed the LCC's 1991 recommendation through the VRHS, and in doing so noted that a parallel policy direction is also required for freehold land:- *Clear policy direction is required which indicates the preferred direction for the management of all riparian land regardless of tenure.*

The Biodiversity Strategy 1997

In relation to rivers and streams, the 1997 Biodiversity Strategy recognised the following priorities:

- Incorporation of the 1991 LCC recommendations for Rivers and Streams into relevant plans and strategies.
- Development of an in-stream and riparian strategy for Victoria, which will help achieve better river management and restoration outcomes, particularly to increase community and landholder custodianship in the rural landscape.
- Promotion of instream and riparian vegetation protection and restoration as a key environmental outcome for the Natural Heritage Trust program.
- Advocacy of protecting and enhancing native vegetation in the instream and riparian environments in extension and voluntary programs to landholders and the community

- Development and communication of 'best practice' in restoration of riparian vegetation to natural resource managers and landholders and its inclusion in relevant codes of practice.

The Victorian River Health Strategy 2002

The Victorian River Health Strategy (VRHS)[6] makes the case that enhanced condition of riparian lands is critical to the achievement of improved levels of river health.

The VRHS puts particular value on the width, connectivity, quality, quantity and structure of riparian vegetation:-

> *Our rivers will be ecologically healthy…*
> *• supporting a diverse array of indigenous plants and animals within their waters and across their floodplains;*
> *• flanked by a mostly continuous and broad band of native riparian vegetation;*

The VRHS re-endorses the hierarchy of riparian purposes proposed in 1991 by the LCC, and advocates the exclusion of stock from riparian land in most circumstances, to protect vegetation, the riverbed and banks, and water quality.

The State Environment Protection Policy (Waters of Victoria) 2003

In June 2003 government adopted the SEPP (Waters of Victoria) which provides a legal framework aiming "to protect and rehabilitate the aquatic habitats of our rivers, lakes, wetlands, estuaries, bays and oceans, and the social and economic values they support."

The SEPP sets the goal of net gain in extent and quality of coastal, aquatic and riparian vegetation. It seeks to encourage landholders and occupiers of Crown land to minimise sediment runoff through various measures, including the control of stock access to surface waters.

2.3 The Problem

Despite the undoubted importance of riparian land, the considerable sums already invested by government, and the repeated endorsement of principles set out in the LCC's 1991 recommendations, progress towards the restoration of riparian land has been slower than many would wish. Now that climate change is bringing a sense of increasing urgency to many environmental issues, it is timely to consider the acceleration of the pace of riparian reform.

2.3.1 The Condition of Riparian Land

A series of studies over the past 20 years paints a picture of growing recognition of riparian values, and growing acceptance of measures for their protection, but uneven progress towards tangible results.

The State of the Rivers Task Force, 1986

The initial 'The State of the Rivers' report (1983) drew attention to the undesirable changes in the river environment that had occurred over the previous century. A concept that river management works should be based on a whole-catchment philosophy was subsequently developed. The State of the Rivers Task Force report[7] (1986) expanded on this approach, and gave a river by river assessment of needs.

A Standing Committee on Rivers and Catchments was established to advise government on priorities for co-ordination of catchment activities around the State, approve catchment management plans, and resolve disputes between agencies. Its 'Environmental Guidelines' (1990) provided an introduction to river morphology and ecology, general environmental guidelines for river management, and specific guidelines with case studies for the most common in-stream and bank management strategies and works.

Index of Stream Condition 1999 and 2004

The Index of Stream Condition[8] (ISC) combines information on five key aspects of river health. These components, or sub-indices, measure changes in hydrology, water quality, streamside zone (vegetation), physical form (bed and bank condition and instream habitat) and aquatic life.

The Streamside zone sub-index incorporates measures of several riparian indicators: width of the vegetated strip, longitudinal continuity, structural intactness, cover of exotic vegetation; regeneration of native species; and billabong condition.

A statewide picture of this sub-index is provided in the 2007 Catchment Condition Report of the VCMC[9]. It shows that the condition of streamside zone is moderate to poor across much of Victoria, owing to extensive clearing. The worst areas are in the west, including the Corangamite, Hopkins, Barwon and Moorabool basins. The best streamside zones occur in forested areas of the Otways, the North East, and East Gippsland.

VEAC River Redgums Forests Investigation 2007

In 2007, the draft report of the River Redgums Forests Investigation by the Victorian Environment Assessment Council (VEAC), recommended that domestic stock grazing of public land water frontages be subject to a phase-out to be completed within five years. This represents a significantly stronger position than that adopted 16 years earlier by VEAC's predecessor, the LCC.

> *This approach differs from the intent of earlier government-approved recommendations of the Land Conservation Council. For example, the LCC (1991) Rivers and Streams Investigation recommended that grazing continue on stream frontages where it does not conflict with several other uses, notably conservation of native flora and fauna, and restoration of indigenous vegetation.*

Although this recommendation has provided some impetus for the removal of grazing as part of frontage protection programs undertaken by catchment management authorities and DSE, it has had little if any effect on grazing elsewhere even where it seems likely that damage is occurring.

VCMC Catchment Condition Report 2007

Most recently (October 2007), the Victorian Catchment Management Council (VCMC) has published its five-yearly report on the condition of Victoria's catchments.

The report provides a qualitative summary of the condition of rivers and streams in the 10 Victorian catchments. It reports that in only one of the ten catchment are rivers and streams in good condition; in two they are in moderate condition; in a further three they are in either moderate or poor condition, and in the final four they are in poor condition.

The VCMC report quotes two measures of Index of Stream Condition (ISC) made in 1999 and 2004 which help quantify this picture. In 2004, the ISC reported that about 21% of major rivers and tributaries in Victoria were in good or excellent condition; 47% were in moderate condition; and 32% were in poor or very poor condition. Several basins recorded a lower ISC rating in 2004 than they had in 1999, although overall, further deterioration of stream condition appears to have been controlled.

2.4 Addressing the Problem

2.4.1 Regional River Health Strategies

The nine non-metropolitan CMAs and Melbourne Water[10] have all completed Regional River Health Strategies, which establish prioritised programs of activities, including riparian works.

The intent of a Regional River Health Strategy is to:

- *establish objectives for river systems and river reaches, and to set priorities to achieve them*
- *engage communities in both the development and implementation of the strategy*
- *articulate the priorities for all relevant river health activities across an entire CMA region*
- *build an evidence-based and robust case for government investment in river health*[11]

For this, they rely on a working set of legal and administrative instruments which, as noted by the VRHS, are not necessarily available. This deficiency in the apparatus of policy implementation is the main focus of this report.

2.4.2 The Apparatus for Implementation

Implementation of the Regional River Health Strategies will require various inputs: community education, financial resources, legal powers, and effective administrative systems. This project focuses on the latter two.

Financial Resources

Various State and Commonwealth schemes continue to provide funding for waterway-related programs. These include:

Protecting & Repairing Our Water Resources Initiative
As part of Our Water Our Future, this initiative has committed $100M over 4 years (2004/05 through 2007/08) improve and manage the Environmental Water Reserve in priority or stressed rivers and aquifers, and to improve water quality, habitat, and flows in rivers and wetlands

Large Scale River Restoration
About $40M is committed for 'Large Scale River Restoration' as part of the Victorian River Health Program which is improving water quality, habitat and flows

Healthy Waterways Program
This program provides approximately $9.1M annually towards on-ground catchment actions including riparian protection and enhancement including fencing, weed control (including willows) and revegetation

Victorian Water Trust - Healthy Rivers Initiative
This Initiative provides $16m over 4 years (2003/04 through 2006/07) to accelerate delivery of the Victorian River Health Strategy

National Action Plan (NAP) for Salinity & Water Quality
The State and Commonwealth Governments have also committed $304 million until 2007/08 to tackle salinity and improve water quality across Victoria

Natural Heritage Trust (NHT) National Water Initiative (NWI)
is a comprehensive strategy driven by the Australian Government, under which funds have been made available for river health outcomes

Legal Powers

Some of the earlier studies and policies are quite specific about the types of changes required, and the measures needed to bring about such change – but stop short of addressing the legal and administrative complexities of change implementation.

Having made a case for the protection of riparian land, the VRHS, for instance, identifies three legal or administrative issues with the potential to impede the development and implementation of protective measures. These are:-

- ***the mismatch between ecological and administrative definitions of riparian land***

  Our current patterns of riparian land status and tenure date back to the earliest days of settlement, and often do not coincide with current views of riparian values. Changing land status to reflect ecological considerations would be extremely difficult, so alternative management approaches will be adopted in preference.

- ***the variety of possible land tenures***

  Riparian land may be:-
  • either reserved or unreserved Crown land
  • either unlicensed or licensed for grazing or for cultivation
  • Crown land reserved for other purposes, such as National or State Parks, State forest and a range of other public purposes;
  • privately owned land.

- ***the dynamic nature of rivers***

  Management is made more complex by the fact that rivers are dynamic, sometimes changing their course during floods. As a result of this, the relationship to the river of the various reserved and unreserved frontage lands may have changed. Often the exact boundaries of the various reserved and unreserved Crown lands have not been formally surveyed and therefore are effectively unknown.

Administrative Arrangements

As with many areas of public policy, riparian governance is the business of several different agencies – notably the Department of Sustainability & Environment, the Department of Primary Industry, the CMAs and Melbourne Water, Rural Water Authorities, Parks Victoria, and municipalities in their roles as local government, as Crown land Committees of Management, and as administrators of Planning Schemes. Private citizens are involved in two ways: as land owners (including those who are tenants of Crown frontages), and as voluntary community-based support groups such as LandCare.

The VRHS nominates CMAs as 'caretakers of riparian condition,' a role which was seen as encompassing responsibility for Crown water frontages:-

> *As a matter of principle, the responsibility for the management of Crown water frontages outside parks and forests reserves, and coastal and urban land should reside with CMAs as caretakers of riparian land to facilitate an integrated approach to the management of riparian land.*

Without going into details, the VRHS alludes to certain impediments to this expansion of CMA roles:-

> *However, there are a number of practical and legislative issues to be resolved before this can be progressed.*

It commits DSE to:-

> *… work with CMAs to resolve the practical and legislative issues associated with the transfer to CMAs of responsibility for the management of Crown water frontages…*

Their current Statements of Obligation[12] go part way towards this objective, describing the CMAs as 'Caretakers of River Health' rather than 'Caretakers of Riparian Condition.'

2.5 Strategic Opportunities

In addressing the need for accelerated progress towards achieving riparian policy goals, administrators should avail themselves of three forthcoming opportunities: the forthcoming Biodiversity White Paper, the 2009 renewal of Crown water frontage licences, and ongoing demographic change in rural Victoria.

2.5.1 The White Paper *Land Health and Biodiversity at a time of Climate Change*

The Call for Submissions

The government's call for submissions[13] posed a set of questions, nearly all of which have direct relevance for this paper:-

- *How can Government best prioritise investment in its management of public land?*
- *What is the best way that public and private land managers can work together to manage across the landscape?*
- *How do we best incorporate Indigenous knowledge and aspirations of Indigenous people into land management decisions?*
- *How can the community support a move towards more sustainable land use?*
- *What mechanisms should Government be using to encourage sustainable use of land and water resources?*
- *How can Government best support voluntary change?*
- *How can Government use market-based instruments in sustainable land and biodiversity management?*

- *What land management standards does the community expect of private landholders and government?*
- *What is the role of regulation to manage sustainable landscapes and protect biodiversity?*
- *How is the statutory planning system best used at the state and local government level for determining appropriate land use?*
- *How can we improve our monitoring systems?*

The call for submissions goes on to note that Victoria has established a strong network of organisations to lead sustainable environmental management. Catchment Management Authorities provide regional strategic planning and the Victorian and Australian Governments have directed investment through CMAs.

The call for submissions asks for inputs on what is working well and where improvements can be made:-

- *Are the current institutional arrangements working and how could they be improved to deliver sustainable land, water and biodiversity outcomes?*
- *Do we have the right mix of organisations?*
- *Have the integrated catchment management and Landcare models been effective or are better alternatives available?*
- *Have current institutional arrangements, including the approach for directing investment through the Catchment Management Authorities been effective? Can CMAs be improved?*
- *What should the next iteration of Regional Catchment Strategies deal with?*

The Green Paper [14]

The Green Paper, launched in April 2008, responds to submissions received, and sets out proposals for the Government's future program. It contains three specific approaches to riparian management.

- Under the heading 'Building ecological connectivity' it notes that public land outside the major reserve systems can provide a good starting point for building ecological connectivity. Improving vegetation on riparian land will provide connectivity, carbon, and river health benefits.'
- Under the heading 'Using carbon markets for biodiversity and land health' it raises the possibility of better public land management, such as the revegetation of Crown land river frontages, contributing to carbon sequestration
- Under the heading 'Rivers, wetlands and estuaries' it poses the questions:-
  Q. How can we improve the capacity of landholders and other potential managers to manage wetlands on private land, riparian zones, and refuges? What actions or programs will be most effective?

Q. Wetlands have had less attention than rivers as aquatic assets. What criteria should we use to decide priority wetlands for management?
Q. What changes to management objectives for rivers, estuaries and wetlands are likely to be needed as a result of climate change?

From the Green Paper to the White Paper

The Green Paper (a discussion and options paper) is to be followed later in 2008 by a White Paper, which will be a statement of government policy for the next 50 years[15]. The Green Paper itself (page 48) suggests approaches likely to be followed in the White Paper:-

- *Improve the management of riparian areas and encourage the development of stewardship arrangements with adjacent landholders and other potential managers*
- *Review the Crown frontage licensing process for the 2009 renewals to better reflect broader environmental outcomes*
- *Improve statutory and administrative instruments for managers to improve riparian zone management*

2.5.2 The 2009 Expiry of Crown Licences

Crown water frontage licences are, in the main, issued for 5-year terms, with the next expiry date being October 2009. It is legally possible to alter or revoke a licence at any time, but licensees often believe themselves to hold on-going rights, so intervening at any time may be difficult. If there is to be any revision of Crown licence allocations or conditions, then it will best occur at the time of licence expiry.

2.5.3 Demographic Change

The 2007 report of the Victorian Catchment Management Council (VCMC)[16] describes trends in rural Victoria affecting catchment condition.

The Social Landscape

The report refers to three broad social landscapes– all going through processes of change. Each in its own way provides opportunities for the protection or enhancement of riparian biodiversity values:-

- Agricultural production landscapes – where farmers are ageing, population in decline, and farms are being aggregated in to larger and fewer units
- Rural Amenity landscapes – land often with water proximity, where land values make broadacre farming uneconomical, and which is being purchased by buyers from provincial centres and Melbourne
- Transitional landscapes – where rural reconstruction is bringing new settlers, boutique rural industries, and environmental aspirations

Changing Land Ownership and Use

The report identifies demographic trends which policy makers should recognise as fostering opportunities for improving future catchment health

Changing ownership of riparian freehold land presents risks and opportunities – perhaps most pronounced where the change involves a subdivision. VCMC notes the poor (even perverse) alignment between regional planning and natural resource strategies and land management outcomes.

The change point in land ownership, which can be the point at which change in land use occurs, provides the opportunity for better alignment of statutory planning and natural resource management planning.

2.6 This Project

2.6.1 Background

The Project Brief sets four tasks:-

Task 1

Current institutional/administrative/legal/legislative issues
This task is to investigate, analyse and make recommendations regarding the institutional/administrative/legal/legislative impediments and possibilities for improved riparian management considering management objectives and land tenure.
The contractor will be expected to:

- collate and outline all relevant issues;
- identify the positive and/or negative implications of each issue;
- for each issue, provide options and recommendations on short-medium term solutions/tools within more or less existing institutional and/or legislative arrangements and also provide some longer term options/tools which may see changed institutional and/or legislative arrangements, and;
- advise on the priority of tackling each issue, taking into account the importance of that issue as an impediment to good riparian management and the resources (time, effort, $) associated with rectifying it.

Task 2

Mechanisms for the protection of on-ground riparian protection/restoration work
This task is to investigate mechanisms for the protection of on-ground riparian restoration/protection work, regardless of land tenure.
Included in this task are:

- an examination of each CMA's landholder agreement(s) with regard to the legislative framework under which it is made, consistency with other CMAs, effectiveness and comprehensiveness;
- make recommendations about other options which may be able to be used to ensure that ongoing responsibility for frontage management is secured (in most cases to adjacent landowners), and;
- recommend possible improvements to landholder agreements, including the possibility of a 'template' agreement(s) which can be used and modified by all CMAs.

Task 3

Mechanisms for the protection of current values (where limited protection/restoration work is proposed), including Crown frontage licence renewal 2009
This task includes:
an examination of 'non on-ground' options available for the management of frontages to prevent their further degradation, protect their existing values and progressively improve these values over time. It includes consideration of options which could apply under the existing licensing regime, and;
making recommendations to amend the licensing regime for the 2009 renewal of licences that would improve the environmental outcomes for frontages.

Task 4

Roles and responsibilities for the management of riparian areas

Examine and describe current roles, responsibilities, powers and functions of stakeholders in riparian management (particularly, CMAs, DSE and landholders), and make recommendations for changes to facilitate improved riparian land management, given current institutional and legislative arrangements (NB: this task may involve some adjustment of the detail of existing arrangements, but is basically within the current institutional and regulatory framework).
Consistent with legislation, regulations and government policy, identify and recommend various options, and how to implement the options, for riparian management by the relevant stakeholders. This will include:

- consideration of the various existing riparian land management functions, roles and responsibilities undertaken by DSE and Parks Victoria, and the advantages and disadvantages, including costs and administrative/statutory processes, associated with their transfer to the CMAs, and;
- identification of any additional functions which could be conferred on CMAs to enhance their role as caretaker of riparian condition across private and public land tenures.

2.6.2 Steering Committee

This project was overseen by a Steering Committee which included

- Peter Vollebergh – DSE (Project Manager)
- Caroline Douglass – DSE
- Glen Forster – DSE
- Lisa Goeman – DPI
- Sarina Loo – DSE
- Merv McAliece – DSE
- Tom O'Dwyer – GBCMA
- Jan Smith – Melbourne Water

2.6.3 Consultation

Stakeholder Consultation

This paper has been drafted on the basis of targeted consultation within government agencies. It is expected that further consultation with other stakeholders will occur at a later stage.

The project was supervised by a steering committee consisting of representatives of

- DSE – River Health (chair)
- DSE – Crown Land Management

- DSE – Environmental Policy and Climate Change
- Melbourne Water
- Goulburn-Broken CMA
- Department of Primary Industry (DPI)

CMA Support

All nine CMAs and Melbourne Water nominated officer contacts to provide advice and support to the consultant.

Workshop

Central to the drafting of this report was a workshop held on 8 August 2007, and attended by 34 practitioners from DSE, DPI, the CMAs, Melbourne Water and Parks Victoria.

The workshop considered five sets of issues presented by the consultant:

- Land Status
- Statutory Protection of Values
- Crown frontage licences
- Contractual Protection of Works
- CMA Functions

Detailed notes of the Workshop are included as Appendix 9.7

2.6.4 Further Consultation

Although this project has benefited from inputs from various government stakeholder groups, certain major stakeholders are yet to be consulted. Notably, these stakeholders are:-

- The farming community, represented by the Victorian Farmers' Federation (VFF)
- Municipal Councils, represented by the Municipal Association of Victoria (MAV)
- The Environment and Conservation movement, represented by Environment Victoria (EV) and Victoria Naturally (VN).

The report makes a number of recommendations with potentially major repercussions for these stakeholder groups. These include:-

- The systematic review and reform of 10,000 water frontage licences
- The adoption of a range of measures to promote the removal of stock from waterways

- The possibility of setting licence fees to make them comparable to alternative fencing and watering costs
- Encouraging municipal councils to become Committees of Management for riparian land in urban areas
- Encouraging community groups to become Committees of Management for stretches of riparian land.

In these circumstances, it is seen as essential that consultation with these groups commence at the earliest opportunity.

2.6.5 Recommendation

R1 Consult with External Stakeholders

Government should continue to actively engage external stakeholder groups (including the Victorian Farmers Federation, the Municipal Association of Victoria, and Environment Victoria / Victoria Naturally) in relation to riparian management issues. Such consultations should include the matters covered in this report, in order to help refine the report's recommendations.

Priority

It is understood that government already has a program of consultation in place, arising from the 'Land and biodiversity at a time of climate change' Green Paper. [17]

* * * * *

3 Riparian Land Status

3.1 Overview of this Chapter

RIPARIAN LAND STATUS

The better management of riparian land for biodiversity outcomes is often impeded by the complexities of riparian land status. This chapter recommends more rational systems of land status, and more effective mechanisms for reforming land status.

Riparian Crown Land

The present sub-categorisation of riparian Crown land is inordinately complex: although it is all Crown land, it is sub-divided into a matrix of sub-categories which do not necessarily reflect its values, promote good management, or enable good governance.

It is dealt with under two Acts – the Land Act 1958, whose principal object is to allow the disposal and occupation of surplus Crown land, and the Crown Land (Reserves) Act 1978, whose principal object is the protection of public values on Crown land to be retained for some public purpose. This arbitrary dichotomy does not support modern management objectives, and sends confused messages about the importance of riparian land.

It is recommended that all riparian Crown Land be reserved under the Crown Land (Reserves) Act 1978; that the gazetted purpose of the reservation be "Public Purposes (Protection of the Riparian Environment)," and that the legislative provisions relating to Crown frontage licences be transferred from the Land Act 1958 to the Crown Land (Reserves) Act 1978.

Riparian Freehold

Much riparian land is in freehold ownership. Agencies charged with protecting the public interest on such land may need to exercise some level of control over it which may or may not coincide with the interests of the landholder.

Compulsory acquisition is a familiar, but expensive and insensitive process for gaining control over freehold land.

It is recommended that agencies consider the adoption, in appropriate circumstances, of programs and strategies aimed at gaining a level of control over riparian freehold through the purchase of lesser interests in the forms of covenants, easements, and leaseholds.

Changing Riparian Land Status

There are three situations in which biodiversity or recreational values on riparian land may require some change of land status–

- where rivers have moved,
- where it is desirable to bring freehold frontages into public ownership, and
- where surplus public land is to be disposed of as freehold.

The riparian cadastre is further complicated by two curiosities of the common law - the doctrine of accretion and adverse possession. The mechanisms currently available to deal with these situations are cumbersome, and often inadequate to the task.

It is recommended that amendments be made to the Land Act 1958 and Crown Land (Reserves) Act 1978 enabling land exchanges in a wider range of circumstances.

In the more complex situations there is a need for a process by which reconfiguration of both Crown land and freehold may be planned. Planning schemes already provide a framework which has been used for various restructures (perhaps the best-known being at Phillip Island) but it is unsuitable for riparian reconfigurations.

To facilitate the rationalisation of riparian land, it is recommended that the Victoria Planning Provisions be amended to include an improved Restructure Overlay (RO), and that the Victorian Environment Assessment Council (VEAC) be empowered to accept appointment as a Planning Authority.

3.2 Riparian Crown Land

Related Sections

Section 5.2 considers Crown Water Frontages and their licensing
Section 5.5 considers the 2009 renewal of frontage licences

3.2.2 Reserved and Unreserved

The primary division of Crown land into unreserved and reserved is founded in the history of settlement of the state, when it served to distinguish land available for alienation from land to be retained in public ownership. Unreserved Crown land is treated by the *Land Act* 1958 as being a disposable commodity awaiting alienation into private ownership; reserved Crown land is recognised under the *Crown Land (Reserves Act* 1978 as being retained because it has some public value or to serve some public purpose.

Effectively, the program of disposal of Crown land came to an end in the 1940s. There is still a need from time to time to convert Crown land (including riparian Crown land) to freehold, but it can generally be said that any land which is still

Crown land has been retained as such because it has some special value or characteristic, rather than because it is simply awaiting disposal. This is especially true of riparian Crown land.

Some riparian Crown land remains unreserved – due to the sequence of 19th Century events rather than any substantive policy decision – and despite recommendations of the LCC that it should be reserved. This unreserved land includes:-

- rivers omitted from the 1881 reservation of rivers and their frontages
- strips of land outside the width specified in the 1881 reservation
- the bed and banks expropriated by the 1905 Water Act, which legal opinion holds to be unreserved, even where the river concerned had been reserved in 1881.

3.2.3 Reservations- *Temporary* and *Permanent*

A further distinction of relevance to riparian Crown land is the designation 'temporary' or 'permanent.' These terms do not relate to the anticipated duration of the reservation, but to the method by which it may be revoked. A temporary reserve may be revoked by Order in Council (i.e. by executive government); a permanent reserve may be revoked only be a new, site-specific Act of Parliament. As a result, each session of Parliament sees the debate and passage of a Bill dealing with parcels of land, of which some are substantial in extent and value, but others are relatively small and insignificant.

3.2.4 The Purpose of Reservations

Every Crown reserve has an official gazetted public purpose. The Crown Land (Reserves) Act 1978 lists 32 such purposes – but it is an open-ended list. It is likely that, across the state, there will be 1000 or more purposes of Crown reserves.

The official gazetted purpose serves as a statutory guide to and constraint upon the management of the land and the uses to which it can be put.

Generic 'Public Purposes'

The purpose for which most reserved riparian Crown land has been reserved is 'public purposes.' This was the purpose specified in the 1881 reservation. It reflects the 19th century view that frontages served a wide range of functions: navigation, trade and commerce, access to properties, stock watering, recreational fishing, and as *de facto* roads[18].

Site-Specific Purposes

Many discrete parcels of Crown land are reserved for some more closely-specified purpose. The 19th Century saw riparian Crown land reserved for camping (for drovers and their stock) or as 'water reserves.' Other riparian Crown land was reserved for recreation, for municipal purposes, for the extraction of gravel and so forth. Several of the purposes listed in section 4 of the current Crown Land

(Reserves) Act 1978 are riparian-related, where their wording sometimes reflects their 19th century origins:-

- Camping grounds and watering places for travelling stock
- Watersheds and gathering grounds for water supply purposes…
- The protection of the beds or channels and the banks of waterways.

In more recent times, often in response to recommendations by the Land Conservation Council (LCC) or its successors the Environment Conservation Council (ECC) and Victorian Environment Assessment Council (VEAC), many discrete parcels of previously unreserved riparian Crown land have been reserved. DSE practice has been not to use the LCC/ECC/VEAC terminology, but to choose a reserve purpose from the section 4 list, or to adopt the generic purpose 'public purposes.'

As recommended by LCC-ECC-VEAC	**As reserved by DSE**
Natural Features Reserve Bushland Reserve	*Conservation of an Area of Natural Interest*
Nature Conservation Reserve	*Preservation of Species of Native Plants'*
Public Land Water Frontage	*Public Purposes*

3.2.5 Frontage, Bed and Banks

The cadastre recognises that the cross-section of a waterway is divided into segments – being bed, banks and frontages. This is significant because some provisions of the Land Act 1958 apply to frontages, but not to the bed and banks.

Bed and Banks

The Land Act definition of bed and banks is:-

> **"bed and banks"**, in relation to a watercourse—
>
> (a) includes the land over which the water in the watercourse normally flows and the land that is normally covered by that water;
>
> (b) does not include land abutting on or adjacent to the bed and banks that is from time to time temporarily covered by floodwaters from the watercourse;

Note that the Land Act definition varies from the definition found in the Water Act 1989, which extends the waterway up to a defined lip, if there is one, at the top of the bank. This discrepancy is not considered worth rectifying.

Water Frontage

The Land Act definition of Water Frontage is land which has a frontage to a watercourse – thus it does not include the watercourse itself, and must be taken as commencing at the edge of 'the land over which the water in the watercourse normally flows.'

Section 3 of the Land Act includes this definition:-

> **"water frontage"** means Crown land (including land temporarily or permanently reserved)—
>
> (a) which has a frontage to the sea or a watercourse within the meaning of Part XII; and
>
> (b) which is not under a lease, licence or residence area right; and
>
> (c) which is not reserved as a water reserve along any public road under the **Crown Land (Reserves) Act 1978**; and
>
> (d) which is not vested in trustees or in a municipal council or placed under the control of a public authority or in respect of which a committee of management has been appointed under the **Crown Land (Reserves) Act 1978**.

Note the anachronism here: the definition of 'water frontage' excludes land under licence, yet the substantive provisions of the Act explicitly authorise water frontage licences (see also section 5.2).

3.2.6 Implications for Management

Implications of Crown land remaining Unreserved

The principal concern about some riparian Crown land remaining unreserved is that unreserved Crown land may be disposed of as freehold, without public scrutiny (it was this concern that gave rise to the Metropolitan Parks being permanently reserved in recent years). There may be policy barriers against this occurring, but no legal barriers. Illegal encroachments, when discovered, could easily be legitimised by the sale of the land.

On unreserved Crown land, it is not possible to employ any of the provisions of the Crown Land (Reserves) Act 1978, which are available only on reserved Crown land. These include:-

- The ability to appoint a Committee of Management under section 14
- The ability to make and enforce regulations under section 13
- The ability to issue leases and licences under section 17 et seq
- The ability to retain revenue for re-investment in the reserve

Implications of Temporary / Permanent designation

	Advantages	**Disadvantages**
Temporary	Allows flexibility. May be changed by executive action – *i.e.* without having to go to Parliament. Enables adjustments to reserve boundaries or purpose. Accidental or benign encroachments can readily be legalised.	Insecurely retained as Crown land. Could be disposed of without public scrutiny. Illegal encroachers may be encouraged to seek freehold.
Permanent	Securely retained as Crown land; cannot be disposed of secretly or capriciously Illegal encroachers cannot readily be appeased	No flexibility. No variations possible to boundaries or purpose. Even minor excisions can be made only by Act of Parliament. Accidental or benign encroachments cannot readily be legalised

Implications of Reserve Purpose

Each Crown reserve (including riparian reserves) has its official gazetted public purpose. This purpose may, if narrowly defined, serve to constrain the land's use and development in some direction; if broadly defined, serve to allow wider flexibility in its use and development.

If a Committee of Management is appointed for the reserve, it is required by the Crown Land (Reserves) Act 1978 to 'manage improve maintain and control the land for the purposes for which it is reserved.'

Tenures must be for purposes consistent with the purpose of the reserve, or 'not detrimental' to that purpose.

Implications of the Definition of Frontage

The definition of "water frontage" in section 3 of the Land Act 1958 is self-contradictory, because it excludes land held under licence – yet the substantive provisions of the Act go on to authorise licences over frontages.

The legislative difference between frontages and bed and banks leads to some situations which may be at variance with desired policy outcomes:-

- Section 403 of the Land Act 1958 requires a landowner in occupation of a Crown frontage to take out a licence, but the same does not apply to a landowner in occupation of the bed and banks.
- Section 130 of the Land Act allows licences to be issued for grazing over any unreserved Crown land, and over any frontage whether reserved or unreserved. The maximum term of a sec 130 licence over a frontage is 35 years, but for a section 130 licence over bed and banks is 99 years.
- Section 401 of the Land Act allows anyone to enter licensed frontage for recreation, but not the bed and banks.

Implications for Regulations

The dual governance of riparian Crown land (partly under the Land Act 1958 and partly under the Crown Land (Reserves) Act 1978) results in some duplications and some gaps in the circumstances in which regulations may be made.

The Land Act (section 401A(1)) allows regulations to be made governing recreational use of licensed frontages. Such regulations have in fact been made, and are known as the Land Regulations 2006. Note that this does not authorise regulations relating to licensed bed and banks, nor regulations for unlicensed frontages, nor regulations for usages other than recreation.

The Crown Land (Reserves) Act 1978 (section 13) allows a far wider range of regulations – but they are available only on reserved Crown land. Such regulations have been made for specific riparian reserves, but not for the vast majority of 'public purposes' frontage reserves.

The availability of powers to make regulations on riparian Crown land is summarised below:-

Riparian Crown Land	**Licensed**	**Unlicensed**
Unreserved	Regs under Land Act (but only for frontages, not bed & banks; and only in relation to recreational usage)	No regs possible
Reserved	Regs under either Land Act (as above) or Crown Land (Reserves) Act, or both	Regs under Crown Land (Reserves) Act

3.2.7 Past Studies

LCC Recommendation

The 1991 Land Conservation Council Special Investigation of Rivers and Streams is the benchmark for any consideration of riparian Crown land status in rural Victoria.

Many of its recommendations (some reproduced as Appendix 9.4.4) have been implemented, and its overall philosophy has been accepted into the state's prevailing riparian management culture.

Nevertheless, several recommendations have yet to be implemented in full. Notable amongst them are:-

- Access for water and grazing of stock should be allowed, where it does not conflict with conservation and recreational uses
- No new cultivation licences should be issued, and inappropriate cultivation should be phased out
- public land water frontages should be permanently reserved under section 4 of the Crown Land (Reserves) Act 1978.

Review of Crown Land legislation, 1999

Land Victoria conducted a major review of Crown land legislation in 199919. Although never implemented, it constitutes perhaps the most comprehensive and fundamental analyses of this area of law in recent decades. Amongst its 53 proposals were three which, between them, could provide a mechanism to facilitate the rationalisation of Crown land status – both riparian and non-riparian:

> *4 The distinction between temporary and permanent reserves should be removed*
>
> *8 All revocations and excisions should occur by Order in Council and be subject to Parliamentary disallowance of certain Orders*
>
> *51 Expand current provisions to enable the Minister to exchange Crown land for freehold land for any purposes*

3.2.8 Options

Reserve all Unreserved Riparian Crown Land

By Order in Council made under section 4 of the *Crown Land (Reserves) Act* 1978 , proclaim that all unreserved Crown land within, say, 100 metres of certain streams is reserved. The reservation would be 'temporary,' so that adjustments could still be made by executive action, and 'subject to survey' to allow boundaries to be better defined as and when required.

The list of streams to be captured by this Order would need to be defined. Options for this definition include:

- Listing by name (as for the original 1881 Order)
- Definition by reference to 'designated waterways' recognised under the *Water Act* 1989
- Definition by reference to waterways recognised under the *Geographic Place Names* Act 1998 – as is used for the *Aboriginal Heritage Regulations* 2007
- Definition by geographic characteristic – *e.g.* all waterways with catchments greater than, say, 100 hectares.

Change the purpose from 'Public Purposes' to 'Protection of the Riparian Environment'

For the existing permanent reserve, this would require legislation.

Any new reservation should be for the same purpose as the existing reservation – so if this option is adopted, the new reservation would also be for the purpose 'protection of the riparian environment' – otherwise, it would be for 'public purposes.'

Move provisions relating to Water Frontages to the Crown Land (Reserves) Act 1978

This would take the form of legislation amending both Acts.

Although it would be possible to move the provisions, unreformed, from one Act to the other, this would be an opportunity to address the various other matters discussed above.

3.2.9 Analysis

The Nature of these Options

The three options in the table below are independent. It would be possible to adopt none, some or all of them – but it is recommended that they all be adopted as a complementary suite of reforms.

Option	**Advantages** **Strengths**	**Disadvantages** **Weaknesses**	**Cost** **Effort**
• Reserve all unreserved riparian Crown land	Enables use of CL(R) Act powers – Committees of Management, regulations, tenures Reinforces perception that this land has	Reservation 'subject to survey' may leave definitional uncertainties Would have to be 'temporary' to allow for adjustments of	Initial cost: low. [could only be done 'subject to survey,' because cost of state-wide survey would be exorbitant] Ongoing cost: occasional survey as required Effort: community

	public values Does not require legislation	boundaries	consultation.
• Change purpose of 1881 reservation to "Public Purposes (protection of the riparian environment)'	Clear policy statement of the significance of riparian land Presumption against uses and tenures detrimental to the riparian environment	Needs legislation Would have to recognise pre-existing non-conforming uses (but there are precedents for this)	Initial cost: low (putting Bill through Parliament) Ongoing cost: periodic review / re-authorisation of pre-existing non-conforming uses Effort: community consultation
• Shift Water Frontage provisions from Land Act to CL(R) Act	Clear policy statement of the significance of riparian land Opportunity to sort out related legislative problems	Needs legislation Would not, of itself, resolve problems arising from the reserved / unreserved dichotomy	Initial cost: low (putting Bill through Parliament) Ongoing cost: nil Effort: community consultation

3.2.10 Recommendations

R2 Reserve all unreserved riparian Crown land

Identify all the major waterways in the State (whether included in or omitted from the 1881 reservation) preparatory to rationalising and modernising the governance regime for riparian Crown land.

By Order in Council under section 4 of the *Crown Land (Reserves) Act* 1978, temporarily reserve all unreserved riparian Crown land within 100m of those major waterways, subject to survey, for the purpose of 'Public purposes (protection of the riparian environment).' This reservation to include:-

- The bed, banks and frontages of rivers omitted from the 1881 reservation
- Parts of frontages outside the width of reservation specified in 1881
- Bed and banks resumed by the Water Act 1905

R3 Change the reserve purpose to 'Public Purposes (Protection of the Riparian Environment)'

Through legislation, change the purpose of the Crown reservations on major waterways from 'public purposes' to 'Public purposes (protection of the riparian environment).' Allow pre-existing uses which do not conform to this purpose to continue, subject to periodic review (for this purpose, follow the precedent set in 1985 by sections 17A and 17C of the Crown Land (Reserves) Act 1978).

R4 Move provisions relating to Water Frontages from the Land Act 1958 to the Crown Land (Reserves) Act 1978

By legislation, transfer the provisions relating to Water Frontages from the *Land Act* 1958 to the *Crown Land (Reserves) Act* 1978.

At the same time, resolve the problems resulting from the legislative distinction between frontages and bed & banks, which affect regulations, tenures, and the obligations of abutting owners.

Priority

Very high priority. These reforms will not, of themselves, cause any improvement in riparian condition – but will send clear, and widespread messages about the importance of riparian land and the cultural change which has occurred in relation to its values.

The first option (reserve all unreserved riparian Crown land) has flow-on implications. Some other recommendations in this report rely on the land being reserved. In particular, the appointment of managers under the Crown Land (Reserves) Act can only occur if the land in question has been reserved.

3.3 Riparian Freehold Land

3.3.1 Description of the Topic

This section

- discusses riparian freehold land, and the ways in which government authorities may acquire interests in freehold land.
- compares acquisition of full freehold title to acquisition of lesser interests including leases, covenants and easements.
- considers two areas of common law which often affect riparian freehold– *adverse possession* and the *doctrine of accretion*.

Related Sections

Section 5.4 discusses the legal relationships between a freehold property and the neighbouring Crown frontage

Section 4.6 proposes a new status-neutral Riparian Agreement which would run with the title of riparian freehold land

3.3.2 The Nature of Ownership

Land ownership is one of the most complex areas of law. Freehold in Australia is held in 'fee simple' – which is the most absolute form of ownership, capable of being sold, gifted or bequeathed, and subject only to the ultimate (or 'radical') ownership of the Crown.

Ownership is usually, but not always, recorded on title, in which case the owner is known as the registered proprietor. The repository of title information is Land Registry (part of DSE), where ownership is recorded either under the *Property Law Act* 1958 (for Old Law, or General Law land) or under the *Transfer of Land Act* 1958 (for Torrents title land).

More than one party can have a legal interest in freehold land. Of particular interest are three forms of interest which may be held by persons other than the nominal owner:

- Interests held in the form of tenures
- Interests held in the form of covenants
- Interests held in the form of easements.

These three forms of interest in freehold land may provide avenues for public sector agencies to exercise control over riparian freehold, in cases where they may otherwise be faced with having to buy it outright.

Tenures

Legal rights to a property ('interests') can be shared between a landlord and a tenant by way of a lease. Note that a lease 'conveys and interest,' but a licence does not. A lease is for some specified duration or term.

A public sector agency which is empowered to hold real property may take a lease of freehold land. CMAs, Water Authorities, and the Secretary for DSE are each empowered by their respective Acts to hold real property.

Parks Victoria is, in general, not empowered to hold real property, with the exception of taking land on lease (section 4(2)(da), *Parks Victoria Act* 1998).

Covenants

A covenant is a form of restriction (or 'encumbrance') on title which may be used to protect riparian values or works. There may be made under either common or statutory law.

Common law covenants must be in favour of some nominated party, can only be in negative terms (i.e. they state what the land owner must *not* do) and are enforceable only by parties to the covenant.

Trust for Nature covenants are made under the *Victorian Conservation Trust Act* 1972. They are entered into voluntarily, but once established are binding, and run with the land. The Act allows Trust for Nature to acquire covenants over any land -

> "which the Trust considers to be ecologically significant, of natural interest or beauty, of historic interest or of importance in relation to the conservation of wildlife or native plants…"

They may be either positive or negative, and are enforceable by any anybody.

A new form of status-neutral covenant (described as a 'Riparian Agreement') which would run with the title of riparian freehold land, is proposed in section 4.6.

Easements

An easement is an area of land owned by one party, but where rights exist in favour of land owned by some other party. The land burdened by the easement is the 'servient tenement' and the land benefiting from the easement is the 'dominant tenement.' Easements may be created and abolished by either statutory or common law.

An 'easement in gross' is a form of easement in favour of some statutory authority, often a service utility. Here there are only servient tenements, not dominant. Easements in gross are creatures of statutory law.

Summary: Leases, Covenants and Easements

	lease	**covenant**	**easement**
• Landowner's rights and obligations	May receive rent Must allow tenant 'quiet enjoyment' of the property	Common law covenant: must not do matters specified Statutory covenant - must do / must not do matters specified	Continues to exercise all rights not incompatible with easement Must allow other party to use/enjoy rights conferred by the easement
• Financial consideration	Rental (usually periodic) from other party to landowner	Landowner may require payment from other party (may be either periodic or one-off)	Landowner may require payment from other party (single up-front payment)
• Other Party's rights and obligations	Must pay rent – either periodic or up-front	May enforce conditions of covenant	May use/enjoy the land for the purposes of the easement Must not otherwise interfere with the landowner's rights
• Occupation	Grants exclusive occupation to the tenant	Occupation remains with the landowner. Other party may have rights to inspect etc	Occupation remains with the landowner. Other party has rights to enter, etc for the purposes of the easement
• Duration	Fixed term (may be a very long term)	In perpetuity, or until removed from title	In perpetuity, or until removed from title

Compulsory Acquisition

Many government authorities have powers of compulsory acquisition. The Secretary for DSE holds such powers under the *Conservation Forests and Lands Act* 1987 (the CF&L Act). The *Catchment and Land Protection Act* 1994 does not provide CMAs with such powers, but they are available to CMAs acting as Waterway Authorities under the *Water Act* 1989.

As is well known, these powers may be used to acquire full title to freehold, but what is not so well-known is that they can also be used to acquire lesser interests such as leases and easements, and to apply covenants. Section 17 of the CF&L Act, for instance, empowers the Secretary for DSE to acquire easements in gross. This power appears never to have been used.

3.3.3 Riparian Freehold and the Common Law

The riparian cadastre may be further complicated by two curiosities of the common law.

The Doctrine of Accretion

This common law doctrine holds that if a cadastral boundary is defined by a topographic feature such as a river, rather than by metes and bounds (*i.e.* lengths and bearings), then that boundary may move as the topographic feature moves.

Accretion and evulsion (or diluvion) are the terms applied, respectively, to the gradual building up and wearing away of waterside land.

Without attempting to explain all the nuances of the doctrine, its essential features include:-

- A boundary may move only if the river moves 'gradually and imperceptibly'
- A river which changes course artificially (*e.g.* due to river improvement works) or catastrophically (*e.g.* in a flood) will not cause a change to boundaries, even those boundaries defined by a relationship to the river: they will remain where they were before the change of course

The 1881 Crown reserve does not move, even though it is defined by relationship to the river. If the river moves (whether gradually and imperceptibly, catastrophically, or artificially); the Crown reserve stays where it was in 1881.

The Surveyor General advises that very few cases come before him each year to be resolved, and his rulings are generally accepted by the parties. No case in recent times has gone to the courts.

Adverse Possession

Adverse Possession is the long-standing common law doctrine that ownership of land can pass from the nominal owner to a trespasser, if the trespasser has been in possession for a certain period of time, contrary to the interests of the nominal owner,

and the nominal owner has been indifferent to the possession. In Victoria the time period in question is 15 years.

Statutory law does not inhibit adverse possession, indeed the *Transfer of Land Act* 1958 recognises adverse possession as one of very few exceptions to the principle of indefeasibility of Torrens title.

It should be noted that ownership changes when the 15 years has run, not when the Registrar of Titles records the change of ownership at some later date.

Movement of a river, whether gradual or sudden, can result in land in the nominal ownership of one party coming into the possession of another. Any attempt to rationalise land status along a stretch of waterway which has changed course will thus face a further set of complications. Land appearing on one landowner's title, but which has been cut off more than 15 years earlier by a moving river, may in fact be owned by the landowner into whose possession it has now come.

No Adverse Possession against the Crown

Statutory law provides certain protections against adverse possession. The *Limitation of Actions Act* 1958 affirms that there is no adverse possession against the Crown, nor against certain other categories of public land. Consequently there can be no adverse possession of riparian Crown land. This is true whether it is unreserved, temporarily reserved or permanently reserved.

3.3.4 Implications for Riparian Outcomes

Implications for Management Agencies – Lesser Interests

By acquiring an interest in freehold land (sometimes described as *burdening* or *encumbering* the land), a party other than the land holder sets up a system of entitlements and obligations which may be more robust than other forms of contract or agreement.

The management agency gains a measure of control over the land without (in the case of easements and covenants) becoming its occupier.

Implications for Land Owners – Lesser Interests

Creation of a lesser interest (in the case of easements and covenants) does not dispossess the nominal landowner. The landowner may continue to occupy and manage the land within the constricts of the encumbrance.

The creation of a lesser interest (lease, covenant or easement) usually results in a devaluation of the land, and consequently interests must be purchased at market value. The disposal of an interest will thus result in a monetary benefit to the land owner, without total loss of the land. Monetary benefit might be a one-off payment or a periodic rental. This may prove attractive in many circumstances.

Implications for Management Agencies – Common Law

Under the *Limitation of Actions Act* 1958, Crown land is invulnerable to adverse possession.

Crown land may, however, be lost through the accretion of abutting freehold. (The best-known case of this type involved a coastal property at Portsea owned by Mr Lindsay Fox.) This is not seen as being a high priority issue for riparian Crown land.

The main implication of these Common Law doctrines for public sector management agencies is that, by relying on title information, agencies may find themselves dealing with a party who is not, in fact, the owner of the land in question. Since there is no reliable way of ascertaining the true owner, short of engaging a licensed surveyor and/or commencing action in the Supreme Court, this is a hazard which land managers should at least be aware of, and recognise the circumstances in which caution needs to be exercised.

Implications for Land Owners – Common Law

As rivers move, freehold boundaries may change either through the Doctrine of Accretion or through Adverse Possession, or both. These forces may work to the benefit or the detriment of any single land owner. The resolution of uncertainties and disputes which may arise between land owners is a civil matter to be resolved between the parties.

It seems that this does not often involve litigation: no cases involving accretion and fifteen cases involving adverse possession have come before the Supreme Court since 1998, but only one has involved a waterway. The Surveyor General advises that each year he is called on to resolve two or three cases involving the doctrine of accretion, and that the parties generally accept his rulings.

3.3.5 Options

The first two options discussed here are methods of protecting values on riparian freehold – the first by acquiring the full freehold title, the second by acquiring a lesser interest in the freehold. Elsewhere, this report considers the legal protection of riparian works, explores a third way of acquiring an interest in freehold land, and recommends adopting a new form of Riparian Agreement (section 4.6).

Protect Riparian Values by Acquiring Freehold Title

In particular circumstances riparian values may best be protected through acquisition. This option would be used where there is no role for private occupation or usage – for instance where the land is to be used for a bike path or other permanent recreational access to the waterway. Upon acquisition the land could be retained as freehold (if, for instance, there was a possibility of its later resale) or surrendered to the Crown and reserved.

Protect Riparian Values by Acquiring Lesser Interests

It may be appropriate to acquire a lesser interest in the freehold through taking a lease, acquiring an easement, or applying a covenant in circumstances where a public sector agency wishes to exercise a measure of control over freehold land, without taking full responsibility for its management, and without dispossessing the land owner.

Such circumstances might include:-

- Applying a covenant relating to vegetation and stock management
- Applying a covenant relating to the form of future subdivision
- Applying a covenant relating to future land use
- Acquiring an easement relating to public access or agency access
- Taking a lease for the purpose of protecting agency works or infrastructure

Reform the Common Law of Accretion

This area of the Common law serves to complicate the determination of freehold ownership in cases where rivers have moved. The doctrine is sensitive to the manner in which boundaries were defined by the nineteenth century surveyor, and to whether the movement was gradual, artificial or catastrophic. In an age when the hydrology of rivers is artificially manipulated such distinctions may be meaningless, and may not serve any sound policy end.

If reform is considered desirable, the matter should firstly be referred to the Victorian Law Reform Commission.

Reform the Common Law of Adverse Possession

In recent years Parliament has provided a range of statutory defences against adverse possession of public land. No defences have been provided for private land, and no reforms of the underlying doctrine attempted. Although adverse possession contributes to the complexity of the riparian cadastre, it has far wider implications, affecting freehold land in many non-riparian situations.

Again, if reform is considered desirable, the matter should firstly be referred to the Victorian Law Reform Commission.

3.3.6 Analysis

The Nature of these Options

The four options in the table below are independent. It would be possible to pursue none, some, or all of them.

Option	**Advantages** **Strengths**	**Disadvantages** **Weaknesses**	**Cost** **Effort**

• Protect riparian values through the purchase of freehold title	Allows full control over the land The interest acquired is an asset which may be re-sold on the open market	Cost of acquisition of freehold title is higher than the cost of acquisition of a lesser interest	Cost could be considerable, but would only be expended on a positive benefit-cost analysis Specialist skills required, particularly for compulsory acquisitions Already available but seldom utilised
• Protect riparian values by acquisition of leases, covenants and easements	These all allow some exercise of authority over freehold land, without having to acquire it in full. The cost of acquisition is less than the cost of acquiring the full fee simple title	Compared to full freehold title, rights to the land are still shared with the land owner The interest acquired is an asset, but one which could not be re-sold on the open market	There is a cost of acquisition, commensurate with the devaluation of the landowner' s interest in the property Specialist skills required, particularly for compulsory acquisitions Already available but never utilised
• Reform the doctrine of accretion	Would simplify the riparian cadastre Would support indefeasibility of title	Would also affect freehold land other than riparian land (e.g. coastal land)	Cost and effort hard to estimate. May be substantial effort for little end benefit.
• Reform the law relating to adverse possession	Would simplify the riparian cadastre Would support indefeasibility of title	Would also affect freehold land other than riparian land (e.g. urban land)	Cost and effort hard to estimate. May be substantial effort for little end benefit.

3.3.7 Recommendations

R5 Explore innovative avenues for the acquisition of Freehold Land

DSE and CMAs should recognise the value of protecting riparian values through the strategic acquisition of lesser interests, rather than full freehold title.

R6 Reform archaic areas of Common Law

Government should refer reform of the common law doctrine of Adverse Possession to the Law Reform Commission
Government should refer reform of the common law Doctrine of Accretion to the Law Reform Commission

Priority

Consideration of the acquisition of 'lesser interests' is moderately important. Reform of the common law is seen as being of low priority.

3.4 Changing Riparian Land Status

3.4.1 Description of the Topic

This section discusses the tools available to government to plan and implement changes to the riparian cadastre.

It discusses three situations in which change of status may be necessary – where rivers have moved, where it is desirable to bring freehold frontages into public ownership, and where surplus public land is to be disposed of as freehold.

It describes the limited range of mechanisms currently available for achieving change, and explores options for a more comprehensive, pro-active set of strategic change mechanisms.

Related Sections

Section 4.3 considers the acquisition of freehold land by riparian management agencies

Section 4.5 considers Native Title and its implications for changes of land status

3.4.2 The Issue: Why Make Status Changes?

Bringing Riparian Freehold into Public Ownership

Despite the substantial legacy of Crown frontages reserved in the nineteenth century, there are many cases of municipalities and other planning agencies seeking to acquire freehold frontages for conservation, recreation or linear trails. This may happen by negotiation, by compulsory acquisition, or by reservation in the course of a freehold subdivision.

At the end of the process the acquired land may remain as freehold held by the acquiring agency, or may be surrendered to the Crown and reserved under the Crown Land (Reserves) Act. In either case it would probably (but not necessarily) be rezoned under the Planning Scheme as Public Conservation and Resource Zone (PCRZ) or Public Park and Recreation Zone (PPRZ).

Appendix 9.6.1 includes two examples:

- Diamond Creek Greensbough, where the Shire of Nillumbik wants to build a bike path
- Yarra River in Abbotsford, where Parks Victoria wants to re-establish public access to the river.

Where Rivers have Moved

There are numerous examples of rivers having moved well outside of the courses they occupied when the surrounding land was first surveyed. This can result in the river

now occupying freehold land, while the Crown reserve is dry land within what appears to be private property.

In these circumstances the public benefits of the Crown Reserve have been lost, control of the actual river frontages is in the hands of a private landowner, and the orderly use and development of a freehold property is impeded by the presence of a Crown reserve where the river used once to run.

The common law doctrines of accretion and adverse possession may have resulted in some variations to original title boundaries, but rather than simplifying patterns of land status and ownership, these common law doctrines may have served only to complicate them further.

The extent of this problem is unknown, but feedback from CMAs and DSE suggests there are sufficient cases to warrant the development of mechanisms to address it.

Appendix 9.6.2 provides one example of this phenomenon - the Lerderderg River at Bacchus Marsh.

Disposing of Surplus Riparian Crown Land

The disposal of riparian Crown land occurs much less frequently than its acquisition. Reasons for this are threefold:-

- Disposal of Crown land requires it to be assessed as "Government Land" (GL) – i.e. land whose values can adequately be protected even if it is sold as freehold. Only in rare circumstances would riparian land fall into this category.
- If the land is a Permanent Reserve then its disposal requires an Act of Parliament.
- Native Title must be assumed to exist on Crown land, unless extinguishment can be demonstrated, and so disposal must comply with the provisions of the Commonwealth *Native Title Act* 1994.

Riparian Encroachments

The most common set of circumstances in which riparian Crown land is sold off is where there is an illegal encroachment. The transaction is not driven by the Crown as vendor, but by some abutting freehold owner.

One such case was at Middle Creek, Leneva, between Wodonga and Beechworth (see box). Here a substantial residence had inadvertently been constructed straddling the boundary of the Crown reserve. Although frontage land would not normally be assessed as GL, sale proceeded in this case because of hardship considerations. The revocation of the permanent reserve was effected by Parliament through the *Land (Reservations and Other Matters) Act* 1999.

Dimensions of the Issue

One of the problems with considering change mechanisms for riparian land status is that the extent of the issues are not quantified. Discussion of the issue here is based on certain known cases (like the Lerderderg at Bacchus Marsh) and anecdotal evidence.

It is recommended below that a desktop study be undertake to try to get some dimensions on:-

- The extent of river movement
- The likelihood of developments and subdivisions being adversely affected by irrational cadastral boundaries
- Municipal plans/aspirations for riparian linear reserves
- Encroachments onto the Crown reserve

3.4.3 Change of Status – The Tool Kit

A string of powers are available for government agencies to deal in riparian land, and yet they are not comprehensive: dealings involving small numbers of parties are possible but often difficult; dealings involving more than a few parties become so complex as to be administratively and economically unattractive.

Acquisition of Freehold Land

Several river-related agencies have opportunities or powers to acquire freehold – through subdivision, negotiation or compulsory acquisition.

Head of Power ***Acquiring Authority***	**Type of dealing** **Purpose**	**Comment**
• Section 18, Subdivision Act 1988 *The Municipality*	Transfer of freehold to council Public Open Space	Initiated by land owner New reserve must be entirely within the parcel being subdivided
• Section 13 of the Conservation Forests and Lands Act 1987 *The Secretary for DSE*	Acquisition by agreement or compulsory acquisition For the purpose of the CF&L Act or an Act listed in Schedule 1 to that Act	Land purchased to be subsequently disposed of in the course of an exchange would not fall within the ambit of the provision The Water Act is not

		an Act listed in Schedule 1
• Section 130 of the Water Act 1989 *Water Authorities* (including CMAs acting as Authorities with waterway management districts),	Acquisition by agreement or compulsory acquisition "for or in connection with, or as incidental to, the performance of its functions or the achievement of its objects.	Includes power to acquire the residual interests held by abutting landowners in those river bed and banks resumed by the Crown in 1905 (now dealt with under section 385, Land Act)
• Section 5(1) of the Crown Land (Reserves) Act 1978 *The Minister for Environment and Climate Change*	Acquisition by agreement Reservation for any of the purposes listed in the CL(R)Act	Must be by agreement Cannot be used to acquire land intended to be disposed of – for instance in the course of an exchange
• section 5(4) of the Crown Land (Reserves) Act 1978 *The Minister for Environment and Climate Change*	Acquisition must be for one of the following purposes:- (l) the preservation of areas of ecological significance; (m) the conservation of areas of natural interest or beauty or of scientific historic or archaeological interest; (n) the preservation of species of native plants; (o) the propagation or management of wildlife or the preservation of wildlife habitat In the Metropolitan Area only, acquisition may be	Not available for purposes other than those listed

	for (w) public parks gardens and ornamental plantations; (x) areas for public recreation including areas for camping;	
• Sec 30, Crown Land (Reserves) Act *The Minister for Environment and Climate Change*	Acquisition by Gift or bequest "where in the opinion of the Minister it is expedient to do so for or in connexion with giving effect to the objects of this Act"	Could possibly be used to acquire land intended for subsequent disposal – for instance in the course of an exchange – provided the eventual result gave 'effect to the objects of' the Crown Land (Reserves) Act

Disposal of Freehold Land

Various agencies with riparian freehold landholdings also have power to dispose of land.

Head of Power **Disposing Authority**	**Type of Dealing**	**Comment**
• section 132(1)(e) and (f) of the Water Act 1989 *a Water Authority*	Sale of freehold land	Sale must be by public tender or auction, but may be by private treaty if so authorised by the Minister for Water
• section 15 Conservation Forests and Lands Act 1987. *The Secretary for DSE*	Sale of freehold land	Disposal must be for the purposes of a 'relevant law' – which could be a new regulation made under the CF&L Act

Disposal of Crown Land

Reserved Crown land can not be sold or otherwise dealt with except in accordance with some Act which expressly authorises such dealings (section 8, Crown Land (Reserves) Act 1978). This means that to dispose of reserved Crown land, the reserve must first be revoked. For temporary reserves, this can be achieved by executive action in the form of an Order in Council.

For a permanent reserve, this can normally be achieved only by a new, site-specific Act of Parliament. There is one exception to this general rule: section 11 of the *Crown Land (Reserves) Act* 1978 allows the Governor in Council to, in effect, move a riparian permanent reserve if a river has changed course.

Existing Statutory Provisions for the disposal of Crown land

Head of Power **Disposing Authority**	**Type of Dealing**	**Comment**
• Section 10, Crown Land(Reserves) Act Governor in Council	Revocation of temporarily reserved Crown land	Land becomes unreserved Crown land
• Section 11, Crown Land (Reserves) Act Governor in Council	Revocation of permanent reserve of a waterway	Only where the waterway has moved, the new course is on Crown land, and the new course has been or is being permanently reserved
• New, site-specific Act of Parliament Governor in Council	Revocation of permanently reserved Crown land	Most sessions of Parliament consider a 'Lands Miscellaneous' Bill for this purpose
• Section 12A of the Land Act 1958 Minister for Environment and Climate Change and Governor in Council	Exchange of Crown land for freehold land	Can only be a two-party exchange Crown land to be disposed of must not be permanently reserved Freehold land to be

		acquired must be intended for reservation under the *Crown Land (Reserves) Act* 1978

Limitations of Existing Tools

The following four hypothetical cases demonstrate the complexity of attempting to remedy the riparian cadastre using existing the powers described above. DSE officers who handle land sales, acquisitions and exchanges advise that dealings such as those below are seldom undertaken. Timelines for such sequences of transactions would be anything from 2 to 10 years.

- **Case 1 River moves; Same Landholder on both sides**
    - Landholder enters into binding agreement with two Ministers – Minister for Environment & Climate Change, and Minister for Finance. Would also require endorsement of the Land Monitor.
    - Landholder surrenders new course of river to the Crown for no payment (section 30, CL(R) Act – which allows Minister to accept gifts of land).
    - Governor in Council (GinC) permanently reserves old course; and revokes permanent reserve of old course (sec 11, CL(R)Act).
    - GinC grants old course to landholder (sec 209, Land Act) for no consideration.

- **Case 2 Different Landholders each side – Landholder-Initiated**
    - Agreement between two landholders on (a) current location of freehold boundaries in light of doctrine of accretion, and (b) current ownership of freehold land in light of adverse possession.
    - Agreement between four parties – the two landholders and the two Ministers. Would also require endorsement of the Land Monitor.
    - Landholder ‘A’ surrenders new course of river to the Crown.
    - GinC permanently reserves new course and revokes reservation of old course.
    - GinG grants old course of river to landholder ‘B.’
    - Landholder ‘B’ pays the Crown the value of the old course; the Crown pays landholder ‘A’ the value of the new course.

- **Case 3 Different Landholders each side – Crown-Initiated**
    - Secretary for DSE acquires new course from landholder 'A' (either by negotiation or compulsory acquisition).
    - Crown pays 'A' the value of the land. No corresponding revenue will be received from 'B' for many years, if ever.
    - Secretary surrenders old course to the Crown.
    - GinG permanently reserves new course and revokes permanent reservation of old course.
    - Crown offers old course to landholder 'B' – who is under no obligation to purchase, and has no incentive to purchase. As landlocked land entirely within B's boundaries, it cannot be offered to any other purchaser.
    - Pending B's eventual purchase of the old course, the Crown either manages the land or allows B to continue to occupy it.
- **Case 4 More than Two Landholders**

  In more complex cases (like the Lerderderg at Bacchus Marsh – see Appendix 9.6.2) where there may be many affected landholders, the scenarios outlined above would become exponentially more complex.

The Role of Parliament

The revocation of a permanent Crown reserve requires a new, site-specific Act of Parliament. Each session of parliament sees the passage of a Bill for this purpose.

This may have had some justification in the past, but in an age when most land-related decisions are made by executive government acting under the provisions of some generic statute, it is questionable whether site-specific legislation of this nature is necessary, and whether it constitutes good use of the parliament's time.

> Hansard (22 April 1999)
> **Minister Tehan** Clause 4 of the bill deals with a 195 square metre portion of water frontage land that is reserved for public purposes adjoining Middle Creek on the Wodonga-Beechworth Road at Leneva. The land has been occupied for residential purposes since 1905. The current residence on the site straddles the boundary of the adjoining freehold land.
> Revocation will enable the land to be sold to the adjoining landowner who wishes to consolidate the ownership of the land on which his house is situated. A portion of public purposes reserve approximately 10 metres wide is to be retained between the area subject to the bill and the creek to ensure that public access is maintained.

Land (Reservations and other Matters) Act 1999
Act No. 27/1999

PART 2—REVOCATION OF RESERVATIONS

3. ***Revocation of reservation—Spargo Creek land***

The Order in Council specified in item 1 of Schedule 1 is **revoked**.

4. ***Revocation of reservation—Leneva land***

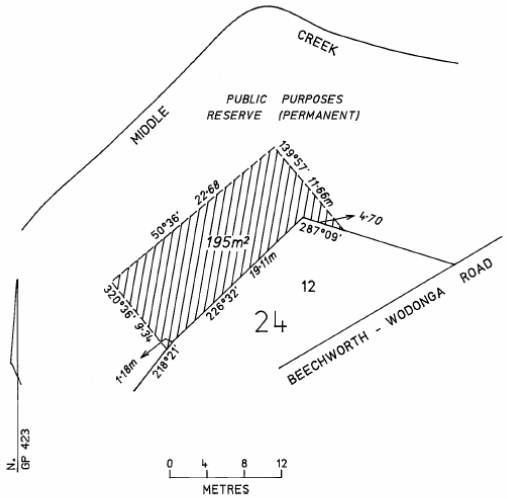
The Order in Council specified in item 2 of Schedule 1 is **revoked** to the extent that it applies to the land shown hatched on the plan in Schedule 2.

5. ***Revocation of reservation—Leongatha South land (Mechanics' Institute)***

Land (Reservations and other Matters) Act 1999
Act No. 27/1999

SCHEDULE 2

PLAN OF LENEVA LAND



3.4.4 Planning Riparian Reconfigurations

A simple, voluntary land purchase or sale involving only two parties may not need to be preceded by any public process – but more complex transactions will. These could include transactions:-

- involving multiple parties (for instance, reconfiguration of the Lerderderg at Bacchus Marsh – see Appendix 9.6.2)
- requiring compulsory acquisition (for instance, the riparian linear reserves at Greensborough, Abbotsford and elsewhere – see Appendix 9.6.1)
- involving some change of Crown land status (for instance, the sale of reserved Crown land)

Planning Scheme Amendments

Victoria's principal process for considering the broad-scale use and development of land in the longer-term is the Planning Scheme Amendment (PSA), made under the Planning and Environment Act 1989. It is a process involving several elements which may have merit if applied to the reconfiguration of riparian land:-

- A two-level policy framework, reflecting both State and Local policy concerns
- Statewide consistency through a standard set of provisions (the Victorian Planning Provisions, or VPPs)

- Process management by a 'Planning Authority' (often the municipality, but sometimes other agencies)
- The balancing of rights and concerns of multiple stakeholders, often with divergent interests
- Public exhibition of proposals and consideration of submissions from affected parties
- Resolution of submissions, where possible, through negotiation; consideration of other submissions by an independent expert panel
- Ultimate responsibility with the Minister for Planning.

The end result of a Planning Scheme Amendment is a revised use of zones, overlays and corresponding schedules in the relevant planning scheme. Two overlays of particular interest here are the Public Acquisition Overlay (PAO) and the Restructure Overlay (RO).

The Public Acquisition Overlay

The Public Acquisition Overlay (PAO) is a tool contained in planning schemes used to identify land required for a public purpose. A PAO signals the intention of a public authority (usually either a Council or a State authority such as VicRoads) to acquire land, and the purpose for which it is to be acquired. However, a PAO does not specify the means or timing of acquisition, and public authorities may choose to acquire the land by developer contribution or negotiation; by purchase when the land comes up for sale; or through compulsory acquisition.

The Restructure Overlay

The Restructure Overlay (RO) as currently defined by the Victorian Planning Provisions (VPPs) is intended only for the reconfiguration of old and inappropriate subdivisions:-

> *To identify old and inappropriate subdivisions which are to be restructured.*
>
> *To preserve and enhance the amenity of the area and reduce the environmental impacts of dwellings and other development.*

The RO would need to be revised and reworded if it were to apply to the reconfiguration of riparian land.

The VPPs may be amended by the Minister for Planning, using a process similar to that for making a Planning Scheme Amendment.

Comparable Reconfigurations

No riparian reconfigurations of the type required at Bacchus Marsh (see Appendix 9.6.2) are known to have been made in Victoria, but there are several interesting parallels. These parallels demonstrate:-

- The efficacy of the planning system as a basis for making

decisions which balance public and private interests

- That results can be achieved by normal market mechanisms, over time, without resort to compulsion
- That affected parties can be adequately compensated for their losses
- The need for active public sector entrepreneurship and investment if progress is to be reasonably expeditious

Dandenongs Subdivisions

In Cockatoo and elsewhere in the Dandenong ranges, old and inappropriate subdivisions are in the process of being reconfigured. Each consists of a mix of private freehold, reserves and roads. Under the Cardinia Planning Scheme they are zoned Low Density Residential Zone (LDRZ) with a Restructure Overlay (RO). A Permit for development will be granted only for lots which have been consolidated in accordance with an agreed restructure plan. Implementation had been progressing at a steady rate under the old Shire of Emerald, which acted as an active player, buying and selling land. The current Shire of Cardinia accords the project a lower priority, and is leaving the restructure to be concluded by market forces.

The 90-mile Beach

Over 50 years the Shire of Wellington and its predecessors have sought to remedy the legacy of an infamous series of 1950s subdivisions on the land between the Gippsland lakes and the 90-mile beach. Some land has been acquired by government for inclusion in the Gippsland Lakes Coastal Park, but the remainder which is to remain as freehold is being consolidated into larger lots through a combination of planning controls including the Restructure Overlay (RO) and Design and Development Overlays (DDOs).

Phillip Island

The Summerland Estate on Phillip Island, laid out in the 1970s, is in the course of being acquired in its entirety for addition to Phillip Island Nature Park (the 'Penguin Parade'). Here the majority of the estate has been zoned Public Park and Resource Zone (PCRZ) under the Bass Coast planning scheme – a zoning which renders the land incapable of being developed for residential use. A small percentage is zoned Residential (R1Z), but with a Public Acquisition Overlay (PAO). The land owners are under no compulsion to sell, but have no real option but to sell to the state in due course. DSE receives an annual budget allocation for purchasing properties as they come on the market. It may take 50 years before the entire estate is in public ownership.

The Planning Authority

If Planning Scheme Amendments are to be applied to the reconfiguration of the riparian cadastre, the need arises to identify an agency to act as Planning Authority.
In most cases the Planning Authority is the municipality, but the Minister for Planning may appoint any other Minister or any public authority as the Planning Authority (for instance, VicRoads is usually made Planning Authority for Arterial Road realignments).

3.4.5 Options

Government Involvement

- Retain the *status quo*. Allow cases to come up, over time, and to be resolved on an *ad hoc* basis, largely by the private sector and market forces Acquisitions may occur in the course of subdivisions, or by ad hoc negotiation. River movement would be resolved only when a serious problem arises. Meanwhile, land usage and works may continue within practical boundaries rather than formal cadastral boundaries;
- Protect Public Interests Only. The Crown could use its acquisition powers to obtain the land it requires, then let market forces deal with the reconfiguration of the residual surrounding freehold. Acquisitions would occur through a strategic program of negotiation or compulsory acquisition (perhaps similar to the Phillip Island acquisitions). Where river movement has occurred, the Crown would acquire the new course of river; and let market forces deal with the reconfiguration of the residual surrounding freehold
- Accept government responsibility for protecting the public interest (i.e. rationalising riparian public land) and managing flow-on effects on adjacent private land (i.e. facilitating the restructure of disjointed freehold). This is similar to the restructure of Kalkallo, in the City of Hume.

New Legislative Tools

- Amend section 12A of the Land Act to allow the Minister to enter into multiple-party exchanges, and to enable the Minister to exchange Crown land for freehold land for any purposes
- Amend section 9 of the CL(R) Act to allow minor excisions and alterations to permanent reserves, by Order in Council, subject to parliamentary disallowance
- Amend section 11 of the CL(R) Act to allow more flexibility where a river has moved outside the permanent reserve.

The Victorian Planning Provisions

- Amend the Restructure Overlay (RO) The purpose of the Restructure Overlay at present reads:

  To identify old and inappropriate subdivisions which are to be restructured.

  To preserve and enhance the amenity of the area and reduce the environmental impacts of dwellings and other development.

  Under this option the RO would be revised to apply to riparian reconfigurations. Amendments to the VPPs are made by the Minister for Planning.

The Planning Authority

- The Municipality. In most situations, the Planning Authority is the relevant council. It will have the resources and skills to manage Planning Scheme Amendments. However, an examination of Planning Schemes indicates that councils have been far from consistent in their treatment of rivers and riparian land.
- The Catchment Management Authority. CMAs may be a candidate for making Planning Scheme Amendments, but the volume of work would not support each CMA acquiring the necessary skills and resources.
- Victorian Environment Assessment Council (VEAC). The body most likely to bring state-wide consistency to riparian planning may be VEAC. It is well-suited to considering multi-stakeholder viewpoints, and bringing a state-wide policy-based perspective to some quite localised set of circumstances. Its findings are well respected in government and the community alike. As a central body it is less likely to be swayed by purely localised constituencies.
- Department of Planning and Community Development. The Department is not really a Planning Authority, but it already acts on behalf of the Minister in cases where he is a Planning Authority himself – as is the case for the Melbourne CBD.

3.4.6 Analysis

Nature of these Options

- Options for the role of government in riparian restructures

  Of the four options in this box, the first is a precursor of the others. The other options are mutually exclusive: adoption of any one negates the other two.

- Options for enhancing the Planning system

  Of the five options in this box, the first is independent of the others. The other options are mutually exclusive: for any one case only one can be adopted

- Options for facilitating Crown land exchanges

  The two options in this box are independent. Neither, either or both could be adopted.

Option	**Advantages Strengths**	**Disadvantages Weaknesses**	**Cost Effort**
Options for the role of government in riparian restructures			
• Quantifying the problem	Will allow more informed choices between other options discussed below	None perceived	Cost: Manageable. Perhaps commencing with a desktop study for three or four pilot rivers Effort: Manageable
• Government Involvement – status quo	No change	No systematic program of acquisition or rationalisation of frontages *Ad hoc* responses to encroachments, river movements etc	Cost: nil – except when a problem arises. Effort: significant effort if and when a problem arises
• Government Involvement – Protect public interest only	Systematic program of acquisition or rationalisation of riparian land	Private landholders to be left to sort out residual freehold issues themselves May lead to excess land being acquired	Costs of acquisitions will be partly offset by sales Effort: significant effort, but only in cases of the government's choice.

			Quantification desirable
• Government Involvement – protect public interest and manage flow-ons	Systematic program of acquisition or rationalisation of riparian land Planned solution of residual freehold issues, to be implemented by market mechanisms Will reduce expectations of govt acquiring excess freehold	May be regarded as intrusive into private freehold market – c.f. Phillip Island, 90-mile beach etc	Costs of acquisitions will be partly offset by sales Effort: significant effort. Quantification desirable
Options for enhancing the Planning System			
• Amend VPPs to expand the scope of the Restructure Overlay	A planning tool to be applied more widely than the existing very limited RO	None perceived	Cost of consultation Effort: Ministerial amendment to VPPs Effort: Manageable
• Council to remain as Planning Authority	Established system State-govt central control	Councils may be too 'close' to the issues Would be difficult for waterways forming municipal boundaries	Cost: Efficient – councils already resourced for strategic planning Effort: Manageable

• Appoint CMAs as Planning Authorities	Would be seen as augmenting CMAs' roles as primary caretaker of riparian condition	No established capacity to undertake PSAs. CMAs may be too 'close' to the issues	Cost: inefficient – insufficient volume of work on a catchment basis Effort: considerable effort and training
• Amend VEAC Act to allow VEAC to accept appointment as Planning Authority	Arm's length from local influences Established system; widely accepted Would build on VEAC's current roles and skills Retains State-govt central control	First-ever VEAC consideration of private land May be regarded as undue centralisation	Cost of legislative amendment VEAC may have to acquire additional strategic planning staff Effort: considerable effort and training
• Make DPCD the Planning Authority	Ministerial PSAs are an accepted feature of the planning system DPCD already has the skills and capacity	May be regarded as undue centralisation	Cost: Efficient – DPCD is already resourced for strategic planning Effort: Manageable
Options for facilitating Crown land exchanges			
• New legislative tools – amend sec 12A Land Act	Will allow multi-party land exchanges	None perceived	Cost of legislative amendment Effort: low

• Amend sections 9 and 11, CL(R) Act to allow revocation of permanent reserves by Governor in Council	Will reduce need for legislation Will allow more flexibility in resolving cadastral issues where rivers have moved Will allow more expeditious dealings with encroachments etc	May be portrayed as diminishing the role of Parliament	Cost of legislative amendment Effort: will require careful drafting and wide consultation

3.4.7 Recommendations

R7 Quantify Land Status problems along Rivers

Conduct a review of the riparian cadastre for four or five pilot reaches to identify and quantify (a) the need for riparian freehold to be brought into public ownership, (b) the extent of problems caused by the movement of rivers and (c) the extent and nature of unauthorised encroachments.

R8 Amend the Restructure Overlay (RO) in the VPPs

Amend the Victorian Planning Provisions (VPPs) by revising the existing Restructure Overlay (RO) to make it suitable for use in the reconfiguration of riparian land, especially where rivers have changed course.

R9 Broaden Land Exchange Tools

Amend section 11 of the *Crown Land (Reserves) Act* 1978 to authorise a non-Parliamentary process for the revocation of permanent riparian reserves.
Amend section 12A of the *Land Act* 1958 to allow exchanges of riparian land in a wider range of circumstances.

Priority

The first recommendation (quantification of the problem) is seen as having a relatively high priority. It will inform decisions about adopting many of the other options, and the priority to be given to those options.

Recommendations relating to the Restructure Overlay and Land Exchange tools could be implemented at any time, if the opportunity arises (e.g. because of a general review of the VPPs, or revision of the Land Acts), but this is not seen as having high priority – unless the 'quantification' exercise indicates otherwise.

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4 Riparian Land Protection, Management and Works

4.1 Overview of this Chapter

Riparian Land Protection, Management and Works

Statutory Protections

Several existing Acts provide heads of power which could be brought to bear on the protection and enhancement of riparian land values. These include:-

- The Planning & Environment Act
- The Conservation Forests and Lands Act
- The Water Act Part 10
- The Environment Protection Act
- The Catchment and Land Protection Act
- The Land Act
- The Crown Land (Reserves) Act

This is a situation where multiple tools should be available to different riparian agencies, to be employed as and when circumstances arise. By and large, these are heads of power already in existence – what is needed in many cases is not the amendment of primary legislation, but the use of that primary legislation to make subordinate instruments.

It is recommended that:-

- all riparian Crown land be rezoned to Public Park and Recreation Zone (PPRZ) under the relevant planning scheme, unless it is already zoned Public Conservation and Resource Zone (PCRZ); and that all land (both Crown and freehold) within 20 metres of a declared waterway be included in the Environmental Sensitivity Overlay (ESO)
- a new Riparian Management Code be written under the Conservation Forests and Lands Act, and subsequently recognised by or incorporated into various other statutory provisions
- all riparian Crown land be deemed to be 'designated land' for the purposes of Part 10 of the Water Act, and that by-laws be made relating to its use and development
- allowing stock into waterways be made a 'scheduled activity' for the purpose

of the Environment Protection Act

- Special Area Plans be made under the Catchment and Land Protection Act specifying how and by whom degraded stretches of priority rivers are to be rehabilitated
- all unreserved riparian Crown land be reserved under the Crown Land (Reserves) Act, and that new regulations be made under the Land Act and/or the Crown Land (Reserves) Act (depending on whether frontage provisions are transferred from the former to the latter) regulating a range of public activities and behaviours.

Management: Stock Control and Fencing

- The management of stock on riparian land is widely regarded as the most pressing issue facing riparian agencies charged with protecting natural resource systems.
- There are at least half a dozen heads of power under which one might expect to find tools for regulating stock access to waterways. These include the Impounding of Livestock Act, the Fences Act, the Environment Protection Act, the Land Act and Crown Land (Reserves) Act, the Water Act and the Catchment and Land Protection Act. Each one, however, needs some enhancement before it can effectively serve this purpose. A range of options for legislative amendment is explored, and six recommendations are made which, if adopted, would provide a range of tools available to be deployed in suitable circumstances.

Management: Stock and Domestic Water Rights

- The problem of stock on riparian land is exacerbated by misunderstandings about an abutting owner's rights to take water free of charge – a right which some hold to be jeopardised by the construction of a fence. Whether this is a correct interpretation of section 8 of the Water Act is a moot point.
- It is recommended that policy be clarified on the question of who has rights to take stock and domestic water, and in what circumstances; that it be confirmed that such rights, where they exist, are not related to the presence or absence of a fence; and that a right to take water does not constitute a right to allow stock into the water. If any doubt remains that the Water Act reflects this policy, then the Act should be amended accordingly.

Works: Current CMA Landholder Agreements

- There is little if any consistency between the various CMAs' documents establishing agreements with landholders to undertake works, and then to maintain those works. Issues of concern include the legal validity of the documents, the survival of any agreement if the property changes hands, and duplications or inconsistencies between these contracts and Crown frontage

licences.

- It is recommended that all 10 suites of agreements be redrafted to meet a minimum set of legal and administrative standards; that the CMAs agree amongst themselves on a consistent set of technical standards.

Management & Works: New Forms of Agreement

- A continuing program of CMA-funded works on riparian land would benefit from a new form of legal agreement. It should be 'status-neutral' (that is, be applicable to both Crown and freehold land); it should 'run with the land' (that is, survive any change of land ownership); and it should simplify rather than duplicate or add to other statutory consents.
- It is recommended that the CF&L Act be amended to allow the Secretary (or CMAs as the Secretary's delegates) to enter into 'Riparian Agreements' which, in addition to being status-neutral and running with the land, could offer other attractive benefits for landholders:- they could offer tax and rate relief (as is already the case for Trust for Nature covenants), and they could incorporate the requirements of other statutory consents.
- Under this 'one stop shop' option, a Riparian Agreement could incorporate all the requirements of a Crown frontage licence, and therefore eliminate the need for the landholder concerned to hold such a licence. Likewise, it could eliminate the need for a separate water diversion licence.
- One legal difficulty encountered by many current works agreements relates to fence-lines: often the best alignment for a fence is not the legal title boundary. It is recommended that the CF&L Act be amended to allow the negotiation of 'Give and Take' fence-lines which will enable a fence to be constructed on a practical boundary, allow each side of the fence to be administered as if the fence were on the actual title boundary, and yet ensure that the legal ownership and land status remain unaffected.

4.2 Statutory Protections

4.2.1 Planning and Environment Act

Protection currently provided

Every part of the State with the sole exception of French Island is covered by a Planning Scheme made under the Planning and Environment Act 1989. Planning Schemes govern uses and developments. Developments include works and subdivisions.

Schemes are based on a system of zones (which deal with land uses) and overlays (which generally deal with works), specified in the

Victorian Planning Provisions (VPPs). Every river and every frontage is the subject of one zone - plus zero, one or many overlays.

No zone in the VPPs is specifically riparian – although certain zones may be used in riparian situations. These include:-

- UFZ Urban Floodway Zone
- PPRZ Public Park and Recreation Zone
- PCRZ Public Conservation and Resource Zone
- PUZ Public Use Zone.

Likewise, no overlay is specifically riparian – although some are often used in riparian situations. These may include

- LSIO Land Subject to Inundation Overlay
- VPO Vegetation Protection Overlay
- ESO Environmental Significance Overlay

A notable feature of Planning Schemes is the possibility of recognising technical standards through the use of 'Incorporated Documents' – such as the Framework for Native Vegetation, and the Code of Forest Practice.

A review of randomly-selected planning schemes reveals unexplained inconsistencies in the zones and overlays applied to riparian land by different municipalities:-

- The Shire of Glenelg Planning Scheme gives riparian land the same zoning as the non-riparian land either side of it, but makes extensive use of the Rural Floodway Overlay (RFO) on a topographic basis, and the Environmental Sensitivity Overlay (ESO) on a cadastral basis.
- The Shire of Loddon Planning Scheme zones riparian Crown land as PCRZ, but riparian freehold has the same zoning as the adjoining non-riparian freehold, usually Farming Zone (FZ). Floodprone areas have an LSIO or FO overlay. Where remnant vegetation exists there is a VPO, but but there is no ESO.
- Shire of Whittlesea Planning Scheme zones an arbitrary 40m wide strip of riparian land (both Crown and freehold) along the Merri Creek as Urban Floodway Zone (UFZ), overlaid by an arbitrary 150m wide strip under the Environment Sensitivity Overlay (ESO).
- Shire of Wellington Planning Scheme zones riparian Crown land as PCRZ within its cadastral boundaries, with no overlay;

although nearby waterways on freehold land are zoned Farming Zone (FZ) with an ESO overlay based on topographic boundaries.

Although Planning Schemes are widely-used tools for shaping the direction of development, they have limitations:

- a planning scheme cannot cause the removal or cessation of pre-existing non-conforming uses
- the planning system is reactive, not pro-active: it responds to proposals arising from private landholders, it cannot initiate proposals
- On Crown land, planning controls are weak in comparison to tenure; a planning permit is useless without a lease, licence, or some other authority to be on the land.

- hence the need for further measures under other Acts.

Options for Further Protections

- Rezone all riparian Crown land to Public Park and Recreation Zone (PPRZ). Sub-options include:-
    - Making this amendment only for riparian Crown land adjacent to high priority river reaches
    - Making this amendment by normal processes – exhibition, submissions, panel etc
    - Making a Ministerial amendment
- Apply the existing Environmental Sensitivity Overlay (ESO), perhaps with some refinements, to all land within, say, 100 metres of a waterway. Sub-options include:
    - Making this amendment only for riparian Crown land adjacent to high priority river reaches
    - Introducing this into planning schemes by normal Planning Scheme Amendment
    - Introducing it by Ministerial amendment
- Amend the Victoria Planning Provisions by inclusion of a new Riparian Overlay, governing new uses and works within, say, 100 metres of a waterway.
- Recognise a new ‘Code of Riparian Practice’ (see CF&L Act options, below) as an Incorporated Document for the purposes of all Planning Schemes

4.2.2 The Conservation Forests and Lands Act

Protection currently provided

This is a powerful Act which, in effect, enables executive intervention into the operation of other Acts. The other Acts concerned are listed in a schedule, and include the Land Act, the Crown Land (Reserves) Act, the Catchment and Land Protection Act – but not the Water Act.

Part 5 of the Act allows the introduction of Codes of Practice. Two such codes already exist – the Code of Forest Practice and the Code for Fire Protection on Public Land. Codes are made through a process involving exhibition, public submissions, and scrutiny by Parliament. Their provisions can be enforced if they are cross-referenced by a 'relevant law' or a regulation made under a relevant law. The Code of Forest Practice is thus referenced by the Planning Schemes as an Incorporated Document

Codes can be made only for relevant laws listed in the Schedule (not for relevant laws identified by regulation) so use of a Code relating to waterway management would first require an amendment to the CF&L Act adding Part 10 of the Water Act to the Schedule.

Part 9 of the CF&L Act includes powers for the enforcement not only of the CF&L Act itself, but of 'relevant laws.' It includes powers for authorised officers, police assistance, the use of Penalty Infringement Notices (PINs) instead of Court summonses, and the recovery of costs and damages in addition to any penalty.

Options for New Powers under the CF&L Act

Amend the CF&L Act to allow the Secretary (or any agency to whom the Secretary is able to delegate) to:-

- Enter into Status-Neutral Riparian Agreements – see section 4.6.3
- Enter into 'Give-and-Take' fenceline Agreements - see section 4.6.3

Option: Link the CF&L Act to the Water Act

Codes can be made only for relevant laws listed in the Schedule (not for relevant laws identified by regulation) so use of a Code relating to waterway management would first require an amendment to the CF&L Act adding Part 10 of the Water Act to the Schedule.

Options for applying these powers to Riparian Land

The CF&L Act could be better used, as follows:-

- Make Part 10 of the Water Act a 'relevant law' for the purposes of the CF&L Act, thus opening up opportunities to apply the other provisions of the Act to the governance of waterways, such as:
    - Power to make 'section 69' Agreements (see section 4.5.5)
    - Power to link Water Act by-laws to the proposed Code of Riparian Practice
    - Power to enforce By-Laws using Penalty Infringement Notices (PINs)
    - Power to recover legal costs of prosecutions
    - Power to enter into 'Give and Take' fenceline Agreements and status-neutral 'Riparian Agreement' – as proposed elsewhere in this report.
- Develop a Code of Riparian Practice (similar to the Code of Forest Practice) under Part 5 of the CF&L Act, and then -
    - Link it to Planning Schemes (by making it an Incorporated Document) governing the granting of planning permits required by the proposed riparian ESO
    - Link it to the Water Act by-laws, so that works, uses and activities conforming to the Code get automatic approval
    - Link it to the Environment Protection Act, so that any grazing other than in accordance with the Code would be treated as a 'scheduled activity'
    - Use it as a standard referenced by Crown land licences, local laws, etc
- Enforcement: where penalty regimes under other Acts are weak, make better use of the powers available under Part 9 of the CF&L Act – including the section 98 which allows the recovery of costs and expenses of prosecution.

4.2.3 The Water Act 1989

Protection currently provided

This Act recognises various types of land:-

- Land under the Authority's management and control. Here bylaws may be made under section 160 relating to the land's "management, protection and use."
- Designated waterways – each CMA has declared most major waterways as designated waterways.
- Designated land – the nine non-metropolitan CMAs have not declared any land as designated land; for Melbourne Water, section 188A of the Water Act causes all land within 20 metres of a designated waterway to be designated land.

On designated waterways and designated land, by-laws may be made under section 219. This section is quite extensive, but fails to make any explicit reference to the protection of biodiversity values.

Under this head of power, each CMA has made a "Waterways Protection By-law" often referred to as the "Works on Waterways" by-law. These are uniform across the State. Notable features of the by-law are:-

- It relates to designated waterways and designated land, although there is none of the latter
- It prohibits any obstruction or interference, erosion or damage, cutting down of trees or other vegetation, and the taking of soil, gravel etc without a permit
- In the case of causing erosion or damage, the by-law extends from 'designated waterways' to 'the surrounds of a designated waterway'
- In the case of causing obstruction or interference, cutting down of trees or other vegetation, and the taking of soil, gravel etc, the by-law does not extend to 'the surrounds'
- The activities specifically prohibited are limited to the deposition of rubbish and causing pollution
- It exempts the planting of vegetation, most works associated with taking water, and most post and wire fencing.

Options for Further Protections

- Amend sec 219 to explicitly authorise by-laws for the protection of biodiversity values
- Declare all land within 20m of a designated waterway to be designated land under section 188. This could be done either by Parliament (as for section 188A) or by the process set out in the Act

- Make new Water Act by-laws regulating activities and uses (as distinct from works) on designated land and designated waterways
- Link by-laws to the Code of Riparian Practice proposed to be made under the CF&L Act. Works, uses and activities within the provisions of the Code would be exempt from the by-laws.

4.2.4 Environment Protection Act [20]

Protection currently provided

The EP Act creates a legislative framework for the protection of the environment in Victoria, based on a set of principles, all of which have relevance for riparian land:-

- Triple bottom line outcomes
- Conservation of biological diversity and ecological integrity
- The use of valuation, pricing and incentive mechanisms
- Shared responsibility between government, industry and community
- A wastes hierarchy, with an emphasis on avoidance
- Integrated environmental management
- Enforcement
- Accountability

The Act is administered by the EPA, which (in accordance with the enforcement principle written into in the Act) has extensive expertise in detection, enforcement and prosecution.

The operation of the Act focuses on 'Scheduled premises.' These are places specified by regulation from which pollution could occur, or where activities are conducted with the potential to harm the environment. Some potentially riparian-related premises are scheduled – including intensive husbandry, piggeries, etc.

The Act provides not only for scheduled premises, but also for scheduled activities. It would be possible to proclaim riparian grazing as a scheduled activity, but this has not occurred.

For pollution caused outside scheduled premises, it is possible for the EPA to issue Pollution Abatement Notices (PANs). These are often challenged in the courts and so require specialist resources if they are to be effective.

Under the Act, formal policies may be proclaimed and have the power of law. One such policy is the *State Environment Protection Policy, Waters of Victoria* –first made in 1988, and next due for review in 2013.

The SEPP tends to deal with point discharges and intensive activities, and has only indirect bearing on dispersed riparian activities. Under clause 39 of the SEPP, animal wastes must not be dumped in watercourses – but this is a reference to abattoir waste rather than stock effluent.

Options for Further Protections

- Proclaim new regulations under the Environment Protection Act specifying riparian grazing as a 'scheduled activity'
- Link these regulations to the Code of Riparian Practice proposed to be made under the CF&L Act. Riparian grazing within the provisions of the Code would be exempt from the regulations.

4.2.5 Catchment and Land Protection Act

Protection currently provided

The Catchment and Land Protection Act (CaLP Act) is the responsibility of the Minister for Environment and Climate Change, and is hence administered by DSE, although much of its enforcement is delegated to DPI. The CaLP Act offers several avenues through which statutory protection might be available for riparian land.

Landholders' Duties

Firstly, the Act deals with weeds and pest animals and their control. Landowners must 'take all reasonable steps' to manage certain weeds and pest animals on their own land and on certain abutting roadsides. Under the Act there is no requirement to manage weeds and pests on abutting Crown frontages – although in the case of a frontage held under licence, this responsibility is conferred under the licence itself.

Secretary's Duties

The CaLP Act (section 21) imposes duties on the Secretary for DSE in relation to State Prohibited Weeds and Regionally Prohibited Weeds. The Secretary must 'take all reasonable steps' to eradicate the former from all land in the State, and the latter from certain roadsides. There is no specific reference to water frontages.

This 'duty' imposed on the Secretary is highly qualified, and cannot in itself be regarded as an effective tool for weed control. The phrase 'all reasonable steps' implies that exercise of the duty may be constrained by resources – an interpretation reinforced by Part XII of the *Wrongs Act* 1958, which provides rules limiting the extent of a Public Authority's statutory duties.

Special Area Plans

The second avenue by which the CaLP might serve to protect riparian land is through Special Area Plans. These are very powerful instruments which go significantly further than planning schemes made under the Planning and Environment Act. Whereas a planning scheme is purely reactive (it responds to a land owner's proposals), a SAP may be pro-active, and cause some change of use or works to occur. Because of this power to intrude into private property, a SAP must include costings of implementation, and a plan for funding the proposed interventions. In Victoria, SAPs have not been used for this purpose, although they been made for 46 water supply catchments, and the NCCMA is preparing one in relation to farm dams in the catchment of Lake Eppalock.

Land Use Conditions and Land Management Notices

If there is a Special Area Plan, the Secretary may serve a Land Use Conditions notice on the land owner. Land owner is defined to include holders of Crown frontage licences, and public authorities managing riparian Crown land, but does not include a landholder whose property abuts unlicensed Crown frontage.

Land Management Notices are equally powerful enforcement mechanisms, but do not require a Special Area Plan. As with Land Use Conditions, the definition of landowner makes them ineffective for use in relation to unlicensed Crown frontages.

Payments for Ecosystem Services

A further matter for consideration in a wider framework is the idea of Payments for Ecosystem Services. This concept has been the subject of various papers by DSE and the VCMC. It proposes that landholders have an environmental duty of care, and that market-like mechanisms may be appropriate to purchase landholder inputs over and above that base level. If the theory finds favour with policy makers, then it will most certainly have relevance for riparian management. For instance, weed control on freehold land might be seen as within the occupier's duty of care, but weed control on an abutting Crown frontage could be seen as a ecosystem service for which the taxpayer should recompense the landholder.

Options for Further Protections

- Make Special Area Plans for priority stretches of rivers where current uses and works are severely impeding biodiversity and river health outcomes.
- Extend the scope of Land Use Conditions and Land Management Notices to include abutting frontages
- Extend the Secretary's duty to include weeds and pest control on Crown frontages
- Extend the landowner's duty to include weed and pest control on abutting frontages
- Consider amending the Catchment and Land Protection Act to allow CMAs to make Payments for Ecosystem Services to landholders who make contributions to environmental outcomes over and above their duty of care.

4.2.6 The Land Acts

Protection currently provided

The Land Act provides no protection for Crown land, in the sense being discussed here. It could be said that the Land Act protects the land from illegal occupation, in order for it to be disposed of by the Crown as freehold or leasehold.

The Land Act allows a measure of protection by providing discretion to the Minister on whether a lease or licence will issue, and the terms and conditions of any lease or licence. The protection is thus in the exercise of the Minister's discretion, rather than in the statute.

The terms of a standard section 130 licence also allow exercise of discretion by the Secretary for DSE, through the insertion of 'secretary's directions' relating to:-

- *grazing or management of the licensed land (including fencing), or the number and type of stock which may be depastured on the licensed land;*
- *frequency, timing and method of cultivation;*
- *water supply and other improvements;*
- *reclamation of eroded areas and land degradation; or*
- *retention or clearance of native vegetation.*

These powers are seldom used – exceptions including 'conservation licences' and the East Gippsland Snowy River agreements.

Land Act Regulations

In many comparable areas of law, the policy and legal principles are contained in primary legislation (that is, Acts of Parliament) while matters of detail are dealt with by regulation, within bounds set by the primary Act.

Many modern Acts include a provision enabling regulations to be made in relation to most, even all, the substantive provisions of the Act. This is not the case with the Land Act 1958. The Land Act allows regulations, but only pertaining to a narrow range of matters. In the case of Crown frontages, regulations may be made only in relation to persons entering licensed frontages for the purpose of recreation (section 401A(1)). The *Land Regulations* 2006 include regulations prohibiting such persons from lighting fires, interfering with stock, removing vegetation and so forth. No regulations exist, nor is there any power to make regulations, governing:-

- compliance with the conditions of licences
- activities on the bed and banks, as distinct from frontages
- activities on unlicensed frontages
- activities indulged in by persons other than those engaged in recreation

Crown Land (Reserves) Act Regulations

The CL(R) Act includes provisions for regulations, but there are several impediments to this power being of much value on riparian land.

- CL(R) Act regulations are not statutory rules, and therefore do not go through the scrutiny and exposure resulting from 10-year revisions and Regulatory Impact Statements
- Regulations are only for reserved Crown land, and much riparian Crown land is still unreserved.
- Regulations are reserve-specific – with each set of reserves applying to some specified reserve or set of reserves
- Penalties are slight, with offences generally incurring a maximum of 2 penalty units.
- There is no power for Penalty Infringement Notices (PINs) unless the regulations have been cross-referenced by the Conservation, Forests and Lands Act.

Options for Further Protections

- Land Act Regulations – expand the head of power for regulations to include unlicensed frontages, activities on the bed and banks, and activities indulged in by persons other than those engaged in recreation.
- Crown Land (Reserves) Act Regulations – Amend the CL(R) Act so that regulations are Statutory Rules.
- Penalties – increase penalties under both the Land Act and the Crown Land (Reserves) Act to meaningful levels. A ten-fold or even hundred-fold increase should be considered, if they are to be brought into line with comparable regulations under other Acts.
- Reserve all unreserved riparian Crown land, and so enable all the provisions of the CL(R) Act to be used on riparian Crown land – including the appointment of Committees of Management

4.2.7 The Heritage Rivers Act

Protection currently provided

This Act applies to 18 specified stretches of river and associated riparian lands, as recommended by the LCC in 1991.

The provisions apply only to 'public land' which includes Crown land and land vested in public authorities

The Act prohibits or strictly limits the impounding of water, water diversions, and timber harvesting in these areas.

Management Plans and regulations may be made for these areas.

Options for Further Protections

- Existing provisions of the Heritage Rivers Act could be better utilised in relation to those rivers already designated under the Act
- Provisions of HR Act could be extended to cover abutting freehold land as well as public land
- More rivers could be recognised as Heritage Rivers and added to the Schedule in the Heritage Act

4.2.8 Analysis

Nature of these Options

The first two options under the CF&L Act are necessary precursors for some other options. For example:-

- Making the Water Act a 'relevant law' under the CF&L Act will facilitate the enforcement of by-laws under the Water Act
- Adopting a Code of Riparian Practice under the CF&L Act will support the operation of an Environmental Sensitivity Overlay (ESO) under the Planning Scheme

The other options (greater protections under various Acts) are not alternatives. None, some or all may be adopted. If some are adopted the case for adopting others may be lessened.

Option	**Advantages** **Strengths**	**Disadvantages** **Weaknesses**	**Cost** **Effort**
Greater protections through or under the CF&L Act			
• Legislate to make Part 10 of the Water Act a 'relevant law'	Will allow Codes of Practice for riparian management Will allow more effective enforcement of bylaws Will enable wider range of dealings in riparian freehold land Will allow CMAs (as delegate of the Secretary) to enter into section 69 Agreements	None perceived	Cost of legislative amendment
• Make a Code of Riparian Practice	Clear statement of what constitutes best practice in riparian management – both on Crown land and freehold	May reveal discrepancies in 'best practice' across regions May lead to expectation that all	Public consultation process to establish what is 'best practice' Formal process

	Will provide a clear, uniform point of reference for Planning Schemes, Local laws, Regulations, Management Agreements, etc Initially, no need to be comprehensive; 10-year renewal cycle offers opportunities for refinement	departures from the Code will be remedied or prosecuted	of adoption Review and renewal at 10-year intervals
Greater protections under the Water Act			
• Declare designated land adjacent to all designated waterways *sub-option: all priority reaches or rivers*	Clear authority for CMAs to exercise powers and functions over riparian land If used only for priority reaches / rivers, would assign them a clear level of importance over other reaches / rivers	May be seen as an intrusion into private land rights May be seen as adding little to powers already available over designated waterways	High cost and effort - if done through the present statutory process Low cost and effort - if done by legislative amendment (as for Melbourne Water)
• Amend section 219 to authorise bylaws for the protection of biodiversity	Will remove any doubt about the ability to make biodiversity bylaws	None perceived	Legislative amendment
• Make new by-laws	Will extend controls over riparian activities, uses and works	Will require more referrals to CMAs for consideration	low cost of extending existing bylaws will add to CMA workload
Greater protections under the Environment Protection Act			
• Proclaim new Regulations	Would be one of few powers over riparian	May be seen as an intrusion into	Cost and effort of introducing

specifying riparian grazing as a Scheduled Activity Link these Regulations to the proposed Code of Riparian Practice	freehold Will recognise the EPA as having a role in river pollution Clear recognition of stock as a pollution source Would give teeth to the proposed Riparian Code	private land rights Will add another player (the EPA) into the matrix of riparian governance Requires adoption of a Code under the CF&L Act	new regulations, RIS etc Enforcement costs and effort will depend on the stringency of the regs. Requires liaison arrangements between CMAs and EPA Will add to EPA workload
Greater protections under the P&E Act			
• Rezone riparian Crown land to PPRZ	Uniform state-wide recognition of riparian Crown land in Planning Schemes Will require potentially damaging uses and developments to get planning permits	Will limit certain pre-existing non-conforming uses	
• Apply ESO to all major waterways • Make CMAs Referral Authorities for riparian ESOs	Uniform state-wide recognition of riparian land (both Crown and freehold) in Planning Schemes Will require potentially damaging uses and developments to get planning permits	CMAs may have to get planning permits for their own works	Cost and effort of CMAs handling greater volume of referrals
Greater protections under the CaLP Act			
• Adopt Special Area Plans for degraded high	Will bring about early rectification of management	Involves exercise of coercive powers, unless multi-party	Cost of implementation will largely fall

priority reaches	problems which may otherwise drag on for years	agreements can be negotiated	to government
Government-focussed options			
• Extend the duty of the Secretary for DSE to weeds on unlicensed frontages	A legislative amendment would serve to highlight weed control in budget negotiations	May tend to absolve abutting landowners and land managers from managing weeds themselves	Cost could be considerable, depending on the classes of weeds concerned
• Existing public-sector land managers to increase their attention to weeds and pest animals on unlicensed Crown frontages	If done properly, will demonstrate government commitment to better riparian management Will serve as an incentive to appoint land managers for all high-priority unlicensed riparian Crown land	Much unlicensed Crown land has no designated manager, other than DSE by default If land management agencies fail to control weeds, will provide a poor example to private sector land managers	Possibly a considerable cost burden on riparian land managers
Landholder-focussed options			
• Transfer responsibility for weeds and pest animals to abutting landholders, for both licensed and unlicensed Crown frontages	Could be regarded as a simple extension of the responsibility already incurred by landholders who hold Crown licences	Low enforceability Standards of management may not be acceptable Will impose a cost burden on landholders	Cost burden will be shifted to abutting landholders
• Adopt a system of Payments for Ecosystem Services	Far more likely to achieve landholder cooperation Should proceed only on basis of positive	May promote expectations of hand-outs May undermine the concept of 'duty of	Cost of payments could be substantial System of making grants

	benefit-to-cost ration	care'	and monitoring compliance
Greater protections under the Crown Land Acts			
• Expand power to make Land Act regulations	Will enable wider range of regulations governing licences and licensed land	None perceived	Cost and effort of making 10-yearly Regulatory Impact Statement
• Make CL(R) Act regulations statutory rules	Statutory rules sunset at 10 years, and so cannot be out of date Statutory rules require exhibition and public consultation	None perceived	Cost and effort of making 10-yearly Regulatory Impact Statements
• Increase penalties	Will bring Crown land regulations into line with other modern penalty regimes	None perceived	One-off Regulatory Impact Statement
Greater protections under the Heritage Rivers Act			
• Better utilise the provisions of the Act in relation to rivers already under the Act	Better management of existing heritage rivers Provide a basis for decisions about extending the provisions of the Act	May tend to deflect attention from all the non-heritage rivers	Investigation into the efficacy of the Act as presently applied
• Proclaim more heritage rivers	Additional status for newly-proclaimed rivers	May tend to devalue the original 18 designated rivers	
• Extend usage constraints to	Greater protection for existing heritage	Will be seen as intrusion into	May require compensation

private land abutting heritage rivers	rivers	private property rights	

4.2.9 Recommendations

R10 Allow Riparian Land to be protected through the CF&L Act

- Amend Schedule 1 of the Conservation Forests and Lands Act 1987 to make Part 10 of the Water Act 1989 a 'Relevant Law.' (Note – 'relevant laws' may also be identified by regulation – but Codes may be made only in relation to those relevant laws actually included in the Schedule to the Act).

R11 Adopt a Code of Riparian Practice

- Make a Code of Riparian Practice under the CF&L Act (similar to the Native Vegetation Framework and the Code of Forest Practice), and incorporate that Code into various other items of subordinate legislation

R12 Give Riparian land greater recognition in Planning Schemes

- Where riparian Crown land has been simply been given the same zoning as abutting freehold, rezone it to Public Park and Recreation Zone (PPRZ).
- Apply the Environmental Sensitivity Overlay (ESO) to a band (of both Crown and freehold land) 20m wide alongside all major waterways
- Require any new use or development which does not conform to the proposed Code of Riparian Practice to obtain a planning permit
- Make CMAs Referral Authorities for these riparian ESOs

R13 Give Riparian land greater protection under the Water Act

- By legislative amendment, cause all land within 20 metres of all high priority designated waterways to be designated land. At a later date, extend this to land abutting all designated waterways.
- Amend sec 219 of the Water Act to explicitly authorise by-laws for the protection of environmental values
- Make new by-laws governing uses and activities on designated land and waterways
- Incorporate the proposed Code of Riparian Practice so that works, uses and activities within the provisions of the Code are exempt from the by-laws

R14 Give Riparian land greater protection under the Environment Protection Act

- Proclaim new Regulations specifying riparian grazing as a Scheduled Activity

- Link these Regulations to the proposed Code of Riparian Practice

R15 Give riparian land greater protection under the Catchment and Land Protection Act

- Consider amending the CaLP Act to recognise payment for ecosystem services
- Make Special Area Plans for degraded reaches of priority rivers

R16 Give riparian land greater protection under the Crown Land Acts

- Make new Regulations under the Land Act and/or the Crown Land (Reserves) Act governing activities by all persons other than licensees, not just recreational users

R17 Review the efficacy of the Heritage Rivers Act

- A study should be conducted into how well the Heritage Rivers Act is fulfilling its objectives. In particular:
  - Whether the powers available through the Act are in fact being utilised
  - Whether rivers designated as Heritage Rivers enjoy a better standard of protection than they would otherwise have
  - Whether the provisions of the Act should be implemented, enforced, or extended
  - Whether further rivers should be brought under the Act

Priorities

- Making the Water Act a 'relevant law' for the purposes of the CF&L Act is essential if any of the powers under the CF&L Act are to be made available to support CMAs in their role as 'Waterway Authorities' under Part 10 of the Water Act
- Making a Code of Riparian Practice is seen as highly desirable because it can then be used to provide clarity and consistency in the framing of other instruments, including Crown frontage licences, Planning Schemes, by-laws under the Water Act and the Environment Protection Act, and the proposed Riparian Agreements.
- Recommendations relating to protection under Planning Schemes, the Water Act, the Environment Protection Act, the Catchment & Land Protection Act, and the Land Acts are independent but complementary. It is recommended that they all be adopted, even though this would to some extent be a 'belt and braces' strategy. Multiple parallel mechanisms would be mutually reinforcing, empower multiple agencies, and send parallel messages about riparian values.

- Review of the Heritage Rivers Act is low priority

4.3 Stock Control and Fencing

4.3.1 Description of the Topic

The VRHS identifies poor stock management as one of the most pressing issues in relation to riparian land. Consequently, many sections of this report relate to measures which will support the removal or better management of stock.

This section, however, looks at various laws which touch directly on stock management on riparian land, and tests these powers against four situations:-

- Freehold internal waterways
- Crown bed and banks
- Unlicensed Crown frontages
- Licensed Crown frontages

This analysis leads to a set of options for improved stock control measures, and corresponding recommendations

Related Sections

Section 4.5 proposes a new form of voluntary Riparian Agreements between government and landholders, which would govern various matters including grazing and fencing

Section 4.4 considers 'Stock and Domestic' water rights under the Water Act 1989

Section 4.6 proposes 'give and take' fenclines

Section 7.2.7 deals with enforcement

Section 4.2.5 considers controls through making of Special Area Plans under CaLP Act

4.3.2 Current Legal Controls

There are at least half a dozen heads of power under which one might expect to find powers for regulating stock access to waterways. However, as the following analysis illustrates, each one needs some revision or extension before it becomes an effective regulatory tool.

The Land Act

The *Land Act* 1958 (section 403) requires an abutting owner who is 'in occupation' of a Crown frontage to take out a WF licence. However:-

- It is unclear whether allowing stock to wander constitutes an 'occupation' of the frontage
- The provision applies only to frontages, not to bed and banks
- The unstated implication is that if the owner fails or refuses to take out a licence, then he/she must construct a fence – but this is a tenuous connection and virtually unenforceable
- A view held in some quarters is that if an abutting owner is 'in occupation' then the Crown is obliged to grant him/her a licence. This interpretation, if correct, would remove the Crown's discretion to deal with Crown land
- Section 386 of the Land Act expressly permits a landholder with a 'section 385' boundary (see section 4.3.3) to graze the bed and banks
- The Land Act 1958 allows regulations to be made in relation to Crown frontages – but only for licensed frontages, not for the bed and banks, and only in relation to recreational usage.

The Water Act

The Water Act 1989 empowers CMAs and Melbourne Water to make bylaws in relation to 'designated waterways' and 'designated land,' however:-

- no riparian land is designated land, with the exception of land abutting Melbourne Water's designated waterways
- no bylaws have been made relating to stock access to such areas.

Environment Protection Act

The *Environment Protection Act* 1970 stands at one end of a chain of provisions which could prove an effective control over stock on riparian land, but which at the present time has some missing links.

Section 16 of the Act allows the Governor in Council to make an Order proclaiming state environment protection policy (SEPP). One such Order is the State Environment Protection Policy (Waters of Victoria) (SEPP (WoV)) gazetted on 4 June 2003.

The point at which the SEPP comes closest to the issues of concern here is Clause 39, which reads:-

> ***39. Animal wastes***
>
> *Animal wastes must not be dumped into surface waters and the runoff of animal wastes to surface waters needs to be minimised. To enable this … the Department of Primary Industries, the Department of Sustainability and*

Environment, Parks Victoria and catchment management authorities need to encourage landholders and occupiers of Crown land to restrict stock access to surface waters

The Act also provides for 'scheduled premises' and 'scheduled activities' for which licences may be required, and which may be the subject of enforceable regulations. Although regulations have been made defining and governing scheduled premises, none have been made for scheduled activities.

The *Environment Protection (Scheduled Premises) Regulations* 2007 cover certain primary industries – including intensive animal husbandry, livestock saleyards and fish farms – at which there may be concentrated point discharges. There are no provisions, however, relating to diffuse source pollution such as that associated with grazing stock.

Section 17(1)(d) of the Act allows powers 'for securing the observance of State environment protection policy' to be delegated to any 'protection agency.' The Secretary for DSE, CMAs, and Melbourne Water in its capacity as a Waterway Authority all qualify as 'protection agencies.' This power of delegation has seldom been used – some municipalities have been delegated to enforce noise-related provisions. Of concern to the EPA is the specialist systems required to support an enforcement program, and the level of training required by authorised officers.

The Fences Act

The *Fences Act 1968* requires occupiers of abutting freehold properties to construct dividing fences. However:-

- The Act deals only with dividing fences between occupied properties, not between a freehold property and a Crown water frontage
- There is no obligation to fence a Crown boundary
- A landowner abutting Crown land must pay 100% of the cost of the Crown boundary fence.

Over recent years, the fencing of Crown boundaries has been the subject of considerable debate. Government has taken the consistent position that the Crown should not be under any obligation to contribute to the costs.

The Impounding of Livestock Act

The *Impounding of Livestock Act* 1994 empowers 'authorised officers' to impound trespassing livestock. However:-

- The Act does not make it an offence to allow livestock to trespass
- The Act's definition of trespass ('wandering without effective control or being at large') may not encompass stock entering a waterway adjacent to their normal pasture
- There are few 'authorised officers' to enforce this Act

- The person or authority impounding the livestock incurs expenses which may not be recouped.

The Crown Land (Reserves) Act

The Crown Land (Reserves) Act 1978 allows regulations to be made for reserved Crown land, however:-

- not all riparian Crown land is reserved
- the penalty regime is weak
- there is no direct provision for Penalty Infringement Notices (PINs) and therefore all prosecutions must be by court summons.

4.3.3 Current Legal Controls - their Application to Waterways

Each of these powers, with suitable reforms, could be used in relation to certain classes of waterway, as follows:

Freehold (Internal) Waterways

For a waterway entirely within a freehold property, the only laws which could deal with stock access are:-

- The Environment Protection Act 1970. This would require an amendment to the SEPP(WoV) and regulations making riparian grazing a 'scheduled activity'
- Special Area Plans under the Catchment and Land Protection Act 1994 (see section 4.2.5)
- By-laws under the Water Act 1989 (new by-law required). This would apply where the freehold internal waterway is a 'designated waterway' under the Water Act 1989.

Crown land - Bed and Banks

Crown water frontage licences are for the frontage only – not the bed and banks. Since there is seldom an effective barrier between frontage and banks, stock access to a frontage (whether legal or illegal) results also in stock access to the bed and banks.

Section 385 of the Land Act (which originates in the Water Act 1905) causes centreline-of-the-river titles to be revoked insofar as they apply to the bed and banks – which thus become Crown land. Section 386, however, goes on to allow the landholder rights to stock and domestic water, and rights to graze the bed and banks without a licence.

These situations could be remedied by

- The repeal of section 386 of the Land Act, and either -

- Amending the Land Act to clarify that licensing provisions apply to frontages only, that grazing of bed and banks is illegal, and that this can be enforced through regulations, or -
- Making a regulation under the Crown Land (Reserves) Act 1978 (but the bed and banks must first be reserved).

Crown frontage – unlicensed

On unlicensed Crown frontages, stock access is an offence – but the offence is failing to obtain a licence, rather than allowing stock to wander. Here, control could be possible through:-

- Making a regulation under the Crown Land (Reserves) Act 1978 (but the frontage must first be reserved, if it is not already reserved)
- Making a regulation under the Land Act 1958 (legislative amendment required),
- Amending the Fences Act 1968 to require a landholder to fence Crown boundaries
- Amending the Impounding of Stock Act 1994 to make it an offence to allow stock to wander onto Crown land.

Crown frontage – licensed

Stock access on licensed frontages should be dealt with through conditions of the licence and their enforcement. On a licensed frontage, it would be legally difficult to enforce stock management conditions through some avenue other than the licence itself and the Act under which the licence is authorised.

If a Code of Riparian Practice had been adopted under the CF&L Act, as recommended elsewhere, the licence document would require compliance with the Code.

Summary

In order for these various heads of power to be effective, certain action needs to be taken – as summarised here, and outlined in more detail in the options below.

	Internal waterways	*Crown bed and banks*	*Crown frontage – unlicensed*
Land Act	Not applicable	Legislation required	Legislation required
EPA - SEPP	Possible – needs amended 'scheduled	Possible – needs amended 'scheduled	Possible – needs amended 'scheduled

	activities' under EP Act	activities' under EP Act	activities' under EP Act
Water Act bylaws	Possible; needs new by-law	Possible; needs new by-law	Possible; needs new by-law
Fences Act	Not applicable	Legislation required	Legislation required
Impounding of Stock Act	Not applicable	Legislation required	Legislation required
Crown Land (Reserves) Act	Not applicable	Possible; needs bed & banks to be reserved; and new regulation	Possible; needs frontage to be reserved, if not already reserved and new regulation

4.3.4 Options

Amend the Land Act 1958

- Amend section 386 of the Land Act to remove the right to graze the bed and banks without a licence
- Amend the *Land Act* 1958 to explicitly restrict grazing licences to frontages, not the bed and banks
- Amend the *Land Act* 1958 to make it an offence to occupy a Crown frontage (or bed & banks) without a licence
- Amend the *Land Act* 1958 to enable regulations governing the unauthorised use of frontages (and bed & banks).

Strengthen Water Act Powers

- Amend the *Water Act* 1989 to cause all Crown frontages and bed and banks to be 'designated land.'
- Make a new bylaw applying to 'designated land' in all CMAs, making it an offence to allow stock onto such land without authorisation
- Make a new bylaw applying to 'designated waterways' in all CMAs, making it an offence to allow stock in such waterways unless in accordance with the proposed Code

Strengthen systems under the Environment Protection Act 1970

- Amend the *State Environment Protection Policy* (*Waters of Victoria)* to relate more specifically to stock use of riparian land, and stock in waterways
- Proclaim a Regulation under the *Environment Protection Act* 1970 making the use of riparian land by stock a 'scheduled activity' and creating offences for improper or unauthorised usage
- Link the regulation to the Code of Riparian Practice so that grazing within the terms of the Code is not an offence
- Delegate powers of enforcement of the *Environment Protection Act* 1970 to the Secretary of DSE, the CMAs and Melbourne Water

Amend the Impounding of Livestock Act

- Amend the *Impounding of Livestock Act* 1994 to allow impounding of stock found on frontages without authorisation, and to empower enforcement by DSE or CMA officers.

Amend the Fences Act

- Amend the *Fences Act* 1968 to require landholders to fence their boundaries with riparian Crown land.

Strengthen Crown Land (Reserves) Act powers

- Complete the reservation of all unreserved Crown frontages, and all unreserved bed and banks
- Make a new *Crown Land (Reserves) Act* 1978 Regulation (and a new penalty regime) making it an offence to allow stock onto reserved riparian Crown land

4.3.5 Analysis

Nature of these Options

The options in the following box are not mutually exclusive. None, some or all of them may be adopted.

Option	**Advantages** **Strengths**	**Disadvantages** **Weaknesses**	**Cost** **Effort**
• Amend the Land Act to:- o Revoke residual rights on land expropriated	Will reinforce the Crown's ownership of waterways, as established in 1905 Will explicitly restrict grazing to frontages	Legislative amendment required Will be portrayed as intruding onto longstanding private rights. Possible	Cost of legislative amendment Cost of making regulations Cost of dealings with properties and

in 1905 o Explicitly prohibit the grazing of bed and banks o Enable regulations governing the unauthorised use of riparian Crown land	(rather than bed and banks) as intended by the Act Will reinforce the fact that licences are not an automatic right Will facilitate dealings with offenders	demands for compensation By promoting the Crown's ownership of waterways, this will generate demands for better management by the Crown Will require new dealings with owners of 'section 385' properties	landholders not previously affected New Regulations to be put through Regulatory Impact Statement process
• Amend the Water Act to cause all riparian land (both Crown and freehold) 'designated land' • (Sub-option: cause only Crown land to be designated) • Make new Water Act bylaws controlling activities on and use of designated waterways. • Link by-laws to proposed Code of Riparian Practice	Would add a layer of protection to all riparian Crown land – or to all riparian land, both Crown and freehold Would not require the exhibition processes currently required for designated land Would allow the introduction of Water Act by-laws Logical extension of current bylaw governing works on designated waterways	Legislative amendment required Would require adoption of an arbitrary width for designated land Would undo/negate the process currently specified in sec 188 of the Water Act, and thus be seen as a loss of public rights. If applied to freehold land, would challenge / overturn longstanding use of waterways within freehold properties May trigger a need to review which waterways are 'designated'	Cost of legislative amendment Cost of making regulations Cost of setting up and operating an enforcement system
• Make stock in waterways a 'scheduled activity' under the Environment	Sends a strong message to all stakeholders Establishes clear links between poor stock	Amendment required to Waters of Victoria SEPP Systems and training required if	Cost of amending the SEPP Cost of making regulations Cost of setting up

Protection Act – except where in accordance with proposed Code	management and pollution of waterways	enforcement is to be by DSE / CMA staff	and operating an enforcement system
• Amend the Impounding of Livestock Act to cover unauthorised stock on riparian Crown land	Sends a strong message to all stakeholders Provides a tool to be used at a CMA's discretion	Legislative amendment required Added protection only for Crown land Difficult to enforce because it requires physical removal of the stock	Cost of legislative amendment Cost of rounding up and impounding stock
• Amend the Fences Act 1968 to require landholders to fence their boundaries with riparian Crown land	If this was a discretionary power (e.g. to be exercised at the direction of the Secretary for DSE) it would be a powerful 'last resort' tool to	If non-discretionary, this would be an insensitive policy instrument Cost to landholders would be considerable	Would result in claims for government grants
• Make Crown Land (Reserves) Act Regulations – linked to proposed Code of Riparian Practice	Sends a strong message to all stakeholders No legislative amendment required	Requires reservation of unreserved riparian Crown land Added protection only for Crown land	Cost of making regulations Cost of setting up and operating an enforcement system

4.3.6 Recommendations

Authorities should have multiple avenues available to them to deal with this issue, to be employed at their discretion, according to the circumstances. At least some, but preferably all, of the following options should be therefore adopted:-

R18 Extend Land Act protection to the Bed and Banks

Amend the *Land Act* 1958 to

(a) reform section 386 to remove the right to graze Crown land in the bed and banks;
(b) explicitly prohibit grazing of bed and banks;

(c) enable regulations to be made governing the unauthorised use of frontages (and bed & banks)

R19 Make better use of powers under the Water Act

Amend the *Water Act* 1989 to cause all Crown frontages and bed and banks to be 'designated land'

Make new bylaws under the *Water Act* 1989

(a) making it an offence to allow stock onto designated land, unless in accordance with the proposed Code of Riparian Practice and

(b) making it an offence to allow stock into designated waterways unless in accordance with the proposed Code of Riparian Practice

R20 Make Stock access to Waterways a 'Scheduled Activity'

Make a new regulation under the Environment Protection Act making stock access to waterways a 'scheduled activity' unless in accordance with the proposed Code of Riparian Practice

R21 Make better use of powers under the Crown Land (Reserves) Act

Complete the reservation of all unreserved Crown frontages, and all unreserved bed and banks, and make a new *Crown Land (Reserves) Act* 1978 Regulation (and a new penalty regime) making it an offence to allow stock onto reserved riparian Crown land

R22 Consider amending the Impounding of Livestock Act and the Fences Act

An evaluation should be made of the benefits of (a) amending the Fences Acvt 1968 to give the Secretary for DSE powers to require the fencing of freehold riparian boundaries, and (b) amending the *Impounding of Livestock Act* 1994 to allow impounding of stock found on Crown frontages – except where in accordance with the proposed Code of Riparian Practice

Priorities

- Recommendations relating to protection under the Water Act, the Environment Protection Act, the Land Acts, and the Impounding of Livestock Act are independent but complementary. It is recommended that they all be adopted, even though this would to some extent be a 'belt and braces' strategy. Multiple parallel mechanisms would be mutually reinforcing, empower multiple agencies, and send parallel messages about riparian values.
- High priority should be given to adopting a Code of Riparian Practice, since many other recommended measures will rely on it for consistency of approach and technical detail.

4.4 Stock and Domestic Water Rights

4.4.1 Description of the Topic

An abutting landowner's decision to remove stock from waterways may be influenced by uncertainty about rights and obligations in relation to taking water for stock and domestic use.

The Victorian River Health Strategy lists uncontrolled stock access as 'one of the major threats to riparian land,' and commits CMAs to '*develop a protocol for issues which arise as a result of fencing out frontages, including options for cost sharing where licences are required for alternative stock watering sources.*'

This section examines the law on stock and domestic water, section 8 of the *Water Act* 1989, its interpretation, and its reform.

Related Sections

Section 4.3 deals more generally with the fencing out of waterways

Section 4.3.3 deals with 'section 385' watercourses, which are specifically referred to in section 8 of the Water Act

4.4.2 Licences to Take and Use Water

Section 51 of the *Water Act* 1989 requires persons taking water from a waterway to have a licence.

> **51. Licence to take and use water**
>
> (1) A person may apply to the Minister for the issue of a licence to take and use—
>
> (a) water from a waterway (including the River Murray) …

Under current regulations, the cost of water taken for stock and domestic purposes from an unregulated river is $230 per annum, plus $7.80 per Megalitre. Southern Rural Water advises that a typical Stock and Domestic licence is for 2.2 Ml, and therefore the total cost of a typical licence is $247.16 per annum.

Costs are higher for water taken from regulated rivers, but in those cases licences tend to be for irrigation rather than for stock and domestic use.

Private Rights to Take and Use Water

The cost of taking water may be reduced or eliminated if there is a 'private right' to take water. The circumstances where this right exists are specified in section 8 of the *Water Act* 1989.

> **8. Continuation of private rights to water**

> (1) A person has the right to take water, free of charge, for that person's domestic and stock use from a waterway or bore to which that person has access—
>
> (a) by a public road or public reserve; or
>
> (b) because that person occupies the land on which the water flows or occurs; or
>
> (c) in the case of a waterway, because that person occupies land adjacent to it and the bed and banks of the waterway have remained the property of the Crown by virtue of section 385 of the Land Act 1958 or any corresponding previous enactment; or

Policy Basis

These private right provisions may be traced back to two policy bases:

- the common law recognition of a landowner's rights ('riparian rights') to water flowing over property (including water forming the boundary of the property), and
- the right of any citizen, whether a riparian landowner or not, to have access to water for stock and domestic use ('drover's rights').

The two have now merged into what has been seen as a fundamental right. In 2001 a Parliamentary Inquiry[21] into the allocation of water resources found:

> *Finding 4.5*
>
> *Existing domestic and non-intensive stock use has, and, in the Committee's opinion, should continue to have, the highest priority claim on water, subject only to the maintenance of river health.*

4.4.3 Interpretations of Section 8

There appears to be a belief amongst landholders that their 'private right' will be forfeited if a fence is constructed, and that the cost of the fence will be exacerbated by the cost of acquiring a Stock and Domestic licence. The Act refers to having 'access' to the waterway, and the fear is that a fence constitutes loss of 'access.' This may or may not be a correct interpretation: what if the fence has a gate in it?.

Numerous agencies have offered interpretations or explanations of this area of law. These explanations are inconsistent and occasionally confusing:-

VFF Interpretation

The Victorian Farmers' Federation (VFF) places the following interpretation on section 8:-

> *The Water Act requires a landholder to buy a stock and domestic licence … when fencing for environmental reasons*

From that interpretation, the VFF proceeds to express the view that…

> *Landholders feel penalised by having to pay for stock water which was free from unfenced streams*

And to advocate a policy reform…

> *Review the Act to address this concern and encourage landholders to fence off streams* [22]

Melbourne Water Interpretation

Melbourne Water's Stream Frontage Management Agreement states:-

> *"where water is to be pumped from the waterway you must provide evidence of your right to divert water (e.g. Section 8 rights) or a current diversion licence"*

- thus clearly implying that water may be pumped without a diversion licence by landholders who hold a section 8 right.

GBCMA Interpretation

> *In some instances, where the diversion is across a Crown frontage or other alienated land, the extraction of water requires a licence and diversion fee from the rural water authority. This has been considered a barrier to the implementation of programs and a disincentive to construct stock-proof fencing along streams*. (GBCMA, 2002)

DSE Interpretation

An opinion from DSE is that:-

> *People have rights to take water from a waterway for domestic and stock use free of charge and without a licence*
>
> - *if they have access to the waterway by a public road or public reserve – commonly referred to as a drover's right. This right does not entitle people to install pumps and pump water to their property*
> - *if the waterway is on the land that they occupy or if they occupy the land immediately adjacent to the waterway (there is no reserve or other person's land separating(it from) the waterway).*

This is an interpretation which is open to question. If there is a public reserve separating land from a waterway, then there is an argument that the landholder 'has access' to the waterway 'by a public reserve.'

Nor does the Act limit the manner in which people may 'take' water. There is no *prima facie* prohibition on it being taken by pump and pipe. In fact, section 8(3) clearly provides that the right to use the water so taken exists whether that use is in-stream or away from the stream.

Goulburn-Murray Water Interpretation

> *A landowner may have a Private Right to Water under Section 8 of the Water Act 1989, when there is no Crown Land, Road Reserve or Public Purposes Reserve separating their property from the waterway.*
>
> *The Private Right is limited to points where the waterway abuts or transverses their property.* [23]

This interpretation imposes conditions which the words of the Act simply do not convey. The Act makes no reference to the location of the road or reserve by which the person gains access to the waterway.

Victorian Law Foundation Interpretation

The Victorian Law Foundation offers the following advice[24]

> *"If you want to fence a waterway frontage on your property you will have to have a water diversion licence under the Water Act 1989. This is because your new fence may stop other farmers with drovers' rights from watering their stock and, to compensate, you may have to install pumps"*

This is an interpretation which is difficult to understand, let alone reconcile with the Act.

4.4.4 Issues Arising

Stock in the Water

The right to take water from a watercourse inevitably results in stock entering the water – indeed it might be regarded as a right to allow stock into the water. This would probably be an erroneous interpretation – any requirement that stock be removed from the water would not necessarily contravene the existence of private rights to take and use water – although it would have to be taken by some mechanical means.

What is a 'Public Road or Public Reserve?'

Rights accruing to persons who have access to a watercourse 'by road or reserve' were initially recognised for the benefits of landholders with non-riparian properties. The reserves in question were Crown water reserves, often set aside at points where Government roads cross rivers, and intended for the benefit of traveling stock. This issue was canvassed at length by the Deakin Royal Commission of 1884.

The policy position adopted in more recent times is that private rights also accrue to landowners whose property abuts a Crown reserve which in turn abuts a watercourse.

Which Land Benefits?

Uncertainty surrounding the use of riparian land for obtaining stock and domestic water may be further compounded by poor definition of which the land is that benefits from the right. The Act refers to 'the land,' without defining the extent of the

landholding. The previous Water Act (the *Water Act* 1958) specified the land in question to be the relevant Crown Allotment.

In 1996 Goulburn-Murray Water obtained a legal opinion[25] that the wording of section 8 means that:-

> *"…any land, whether it is a number of Crown Allotments, lots or a Plan of Consolidation, occupied by a particular person, that is adjacent to a waterway or through which water flows, has the private rights to water…"*

There are further complications in determining which land benefits – resulting from subdivisions, intersecting roads, and the distinction between occupiers and owners. These complications are all addressed in the legal opinion referred to above.

Inconsistencies in Application

Some Water Authorities have a policy of waiving fees for stock and domestic licences in certain circumstances. The argument is that where a CMA is making grants for fencing, it would be anomalous for a Water Authority to then charge for a water diversion licence.

There can, of course, be no waiver in the case of private rights for which no fee is chargeable in the first place. This holds regardless of which interpretation of the Act may prove to be correct. Conversely, a landholder who was liable to pay a diversion fee on an unfenced property should still be liable once it has been fenced.

Clarification of the circumstances in which a licence fee is (or is not) chargeable will in turn inform the development of a policy on the waiver or discounting of those licence fees.

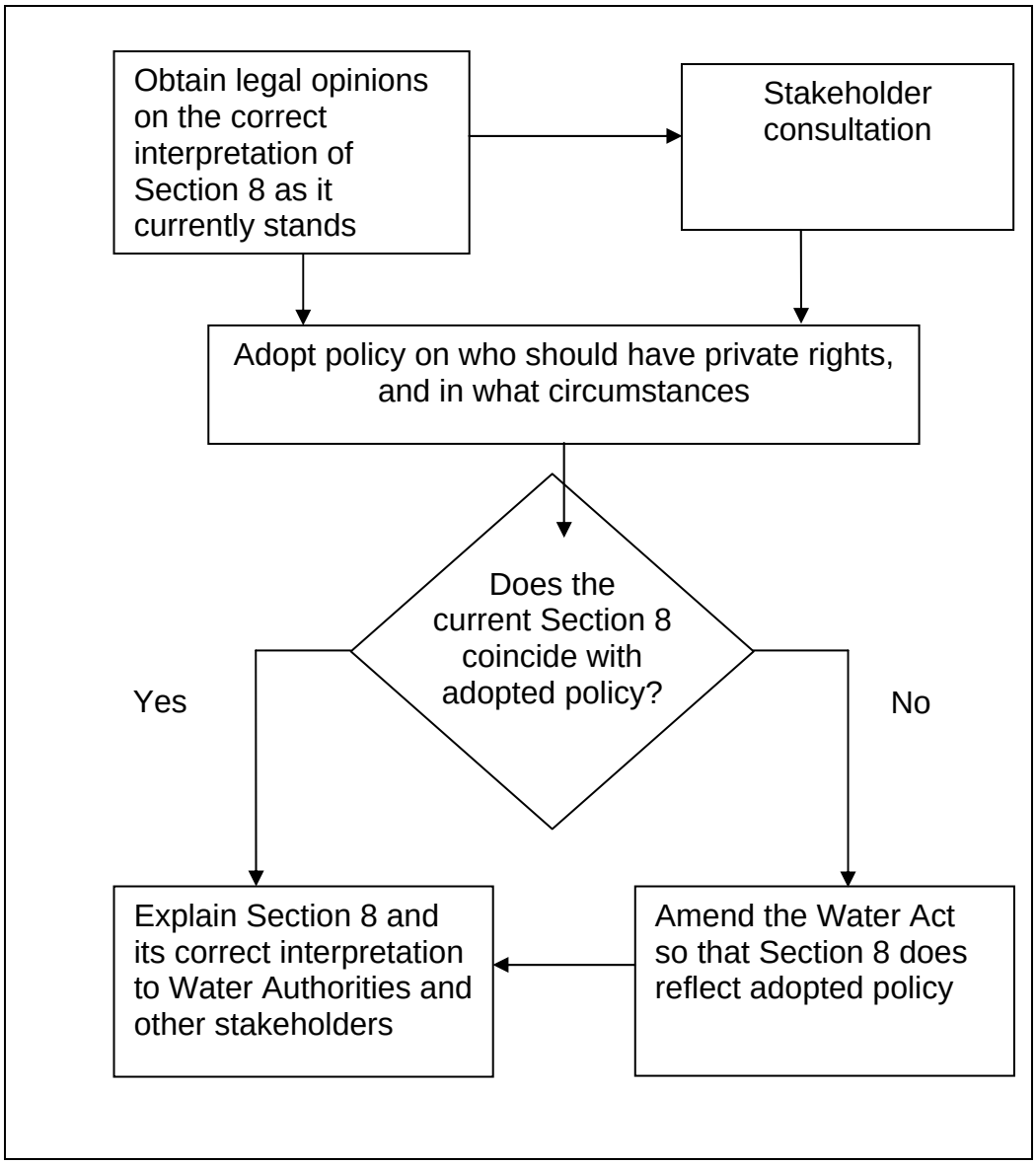
4.4.5 Options

Obtain Legal Opinions

Inconsistencies in the interpretation of the Act could perhaps be resolved by obtaining legal opinions. There is no certainty, however, that legal opinions would be consistent or conclusive. They may, however, assist in providing a useful basis for policy review.

Review and Adopt Policy

Rather than seek clarification of the meaning of section 8 as currently worded – either through legal opinion or court judgments – it would be far preferable to adopt policy on the extent and nature of private rights, and then if necessary reword section 8 to clearly correspond to that adopted policy.



4.4.6 Analysis

Nature of these Options

The following steps are not alternative options, but steps in a recommended process.

Step	Advantages Strengths	Disadvantages Weaknesses	Cost Effort
• Obtain Legal	Will throw light on	Opinions may be	Relatively low

Opinion(s)	the meaning of section 8 as it stands Will provide a useful basis for policy review	inconsistent or even contradictory	cost.
• Review and Adopt Policy	Opportunity for public exposure of the issue and wide stakeholder input Will result in riparian outcomes being supported by legislation which accurately reflects current policy.	Major exercise. Wide consultation Will expose inconsistent or inaccurate interpretations to public scrutiny	Cost of consultation with VFF and other stakeholders
• Reform Section 8 of the Water Act	Re-define who holds rights and which land benefits on basis of modern policy considerations Removal of 19th century provisions relating to kitchen gardens, travelling stock, and the date of Crown Grants.	Would require legislation	Cost of legislative amendment
• Extension program to clarify the nature and extent of Private Rights (whether or not section 8 is re-written)	Will remove uncertainties and misinterpretations Will promote good management practices	None perceived	Cost of extension program

4.4.7 Recommendations

R23 Review private rights to water

- Review policy on:-
  - the circumstances in which private rights to take water from waterways should exist and
  - who should hold those private rights;
- Adopt as a policy principle that the rights, where they exist:-
  - are unrelated to the presence or absence of fencing, and
  - do not constitute a right for stock to enter the waterway.
- The review should be preceded by obtaining legal opinions on the meaning of Section 8 of the *Water Act* 1989 as it stands.

R24 Amend the Water Act to clarify private rights

- Amend section 8 of the *Water Act* 1989 to rectify any gap between adopted policy and the legal interpretation of the current wording.

Priorities

- The highest priority should be given to obtaining sound legal opinion(s) which will serve to illuminate the deficiencies of Section 8 as it stands
- High priority should be given to the review and adoption of policy on the relation between water rights, fencing and stock access to the water. This will ensure that misinterpretations of section 8 of the Water Act do not remain an impediment to fencing programs.

4.5 Works: Current Landholder Agreements

4.5.1 Description of the Topic

This section considers the agreements currently used by Catchment Management Authorities and Melbourne Water, in their capacity as Waterway Authorities.

The section goes on to propose a set of minimum conditions for agreements.

Related Sections

Appendix 9.5 includes tabulations of all 10 CMAs' Agreements against the proposed minimum set of conditions

Section 4.6.3 outlines a proposed new form of status-neutral Riparian Agreement, intended to replace these Agreements

4.5.2 The Investments

On Ground Works

CMAs and Melbourne Water all have major programs of works on riparian land. Some works they carry out themselves, others are carried out by adjacent landholders with funding from, or in partnership with the relevant CMA. Some are on freehold land, and some on licensed Crown land. There are impediments to undertaking works on unlicensed Crown land, for which remedies are recommended in section 7.4.

Constraints on Land Use

Apart from physical works, there may be a need for other forms of investment, such as the purchase of ecosystem services or the imposition of covenants over land use. Indeed the two forms of investment run hand in hand: the physical works will usually be accompanied by some on-going restraint on uses such as grazing.

4.5.3 The Threats

Not only do the works themselves need to be sound, but also the agreements under which they are conducted. Unless the agreements are robust, the works may be jeopardised and the benefits to riparian biodiversity lost.

Legal Challenge

The challenges to which an agreement may be subjected may arise in various circumstances:-

- Legal action initiated by a landholder against a CMA, claiming non-compliance by the CMA
- A defence by a landholder against action initiated by a CMA seeking to remedy some alleged non-compliance by the landholder
- Audit scrutiny, whether internal or external, including both financial and performance audits
- External scrutiny by parties seeking, for whatever reason, to question the overall works program.

Non-Performance

There is a real risk of non-performance by the landholder. This may take the form of:-

- Failure to undertake or to complete the works
- Failure to undertake works in compliance with some condition – perhaps relating to quality, timing, record-keeping etc
- Failure to maintain the works in subsequent years
- Failure to abide by some on-going condition, such as exclusion of grazing etc

Discontinuity of Parties

With any contract, the risk exists of one or other of the parties changing. For an agreement of the type under consideration here, it is possible for the public sector party to change, but the more likely scenario is for the landholder to change. This could be through sale, bequest, or the granting or reversion of a lease. In these circumstances, it is necessary to ensure that the obligations undertaken by the original landholder are passed to the successor.

4.5.4 The Current Agreements

Inconsistency

The principal characteristic of these agreements with landholders is their lack of consistency. Each appears to have been drafted by its particular CMA with little or no reference to other CMAs. More detail of the agreements, including observations on their various features, is provided in Appendix 9.5.

- Often, an individual CMA's standard document has valuable conditions or characteristics which could usefully be replicated by other CMAs
- Some agreements involve the CMA making a payment or payments to the landholder; others set out a division of responsibility for provision of materials and conduct of works, without any money changing hands; and others take the form of landholder permits for the CMA itself to undertake works
- Some seem indifferent to land status, apparently relating to any land - either freehold or Crown. Others require identification of land status. Only a couple show evidence of detailed coordination between the CMA and DSE in relation to works on Crown land frontages.

- In terms of legal enforceability, accountability for compliance, or acceptability to audit, some of these agreements are poorly structured sets of documents well below the standard normally expected for a taxpayer-funded program
- Some Agreements have provision for the provision of evidence that the works have been conducted – some require 'before' photos, and some require 'after' photos. Some ensure compliance by linking the final payment to a satisfactory inspection.

Administrative Soundness

In terms of legal enforceability, accountability for compliance, or acceptability to audit, some of these agreements are poorly structured documents well below the standard normally expected for a taxpayer-funded program.

The following table proposes a minimum set of requirements for CMA landholder agreements:-

Minimum Requirements for Agreement Documentation
Agreements should:- • be signed by both parties, on the same page, and the signatures dated and witnessed • recite the head of power under which they are made • identify both parties by name, address, and BSB number • provide for invoices and receipts to meet the requirements of audit • include a process for the mediation of disputes • consist of a covering contract with clear cross-references to matters of detail in attached schedules and plans • provide a clear schedule of payments and the conditions / milestones for each payment • provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended • provide effective remedies for non-compliance including recovery of monies through the Magistrates Court.

Technical Detail

In addition to lack of uniformity in their format and compliance with administrative standards, the agreements also exhibit a lack of consistency in technical detail.

The most notable inconsistency is on the question of who undertakes the works: some agreements provide for the landholder to undertake works at the CMA's expense; others provide for the CMA or its contractor to undertake the works, others provide for a shared obligation to undertake works.

Likewise, there are inconsistencies in arrangements for payments. Some provide for a single payment in advance from the CMA to the landholder; others for a single payment on completion, and others for a schedule of progress payments.

Other inconsistencies relate to such technical detail as the sourcing of tube-stock for revegetation and the specifications of fences.

Compliance with other legal requirements

Some of the CMA agreements refer to the need for compliance with various other Acts. These references include, for instance:-

- Need for compliance with the Commonwealth Native Title Act
- Need for compliance with the Commonwealth EPBC Act
- Need for protection of heritage and compliance with requirements of Aboriginal heritage legislation
- Need for landholder compliance with obligations in relation to weeds, under the CaLP Act

These provisions offer no guidance on what compliance involves, and no mechanism for monitoring compliance. Rather than serving to ensure compliance, these references seem to be intended to provide a measure of indemnity for the CMA in the event of non-compliance.

Works on Unlicensed Crown Land

CMAs will not enter into agreements with landholders in relation to Crown frontages for which the landholder does not hold a Land Act frontage licence from DSE. This is in order to prevent the appearance of condoning the illegal occupation of the frontage.

Circumstances may exist, however, where the abutting landholder is the most appropriate party to undertake management works on a Crown frontage, even though there is no occupation. This is more likely to be the case if grazing licences are revoked or not renewed.

4.5.5 An Alternative Framework for Agreements

As has been demonstrated on the Snowy River in East Gippsland, scope exists for innovative use of Part 8 of the Conservation Forests and Lands Act 1987, which:-

(a) authorises the Secretary for DSE (a corporate body) to make grants and loans to landholders, and

(b) sets up a system of Land Management Cooperative Agreements, commonly referred to as 'Section 69 Agreements.'

Benefits of Section 69

Section 69 Agreements are agreements between the Secretary for DSE and a landholder. They have several attractive features:-

- may require the landholder to undertake nominated activities, or refrain from undertaking nominated activities
- Specify how grant and loan moneys may be applied, repaid, or forfeited
- They are registrable on title, and are binding on successive owners
- They may lead to remission of rates otherwise payable to a rating authority
- They may provide for public access to the land, in which case the Secretary becomes responsible for public liability, rather than the landholder.

Limitations of section 69…

Section 69(1) specifies that Agreements may be made:-

> *'to give effect to the objects or purposes of a relevant law, in relation to land in the possession of the land owner.'*

A 'relevant law' is a law listed in Schedules to the Act, or regulations made under the Act. The Water Act 1989 is not a relevant law, and therefore section 69 Agreements cannot be made to support a CMA in its exercise of powers as a Waterway Authority.

They are issued by DSE (under authority of the Secretary) rather than the CMA or Melbourne Water. If they were to be administered by the CMA, a delegation could be effected between the Secretary and the CMA under section 11(2)(d), but there is presently no power to delegate to Melbourne Water.

The system is intended for use on freehold land, and does not readily apply to Crown land. The Act certainly defines a landholder to include

a person holding a Crown land licence, but Sec 69 Agreements are limited to land "in the possession of the landholder." Licensed Crown land is not in the possession of the landholder. The Registrar of Titles is empowered to register agreements over freehold land, but cannot (except in very limited circumstances) register interests over Crown land.

4.5.6 Options

In the short to medium term, options include:-

A Minimum set of Administrative Standards

The adoption of a minimum set of legal and formatting standards for all CMA agreements

Uniform Technical Detail

Move towards a uniform suite of agreements by analysing the technical detail of all existing CMA agreements (e.g. provenance and sourcing of vegetation, access for inspections, maintenance of fencing…)

Facilitate Compliance with Related Statutory Requirements

Instead of obliging landholders to ensure their own compliance with the Planning Scheme, Native Title, the EPBC Act, the CaLP Act etc, CMAs could take on this responsibility themselves, and provide the landholder with clear advice on what these statutes mean for the works in question.

Use of Section 69

Confirm and extend the ability to use section 69 agreements (for details see under Recommendation below)

Longer-Term: Riparian Agreements

In the longer term, the option of new-format Riparian Agreements should be considered, as recommended in section 4.6.

4.5.7 Analysis

Nature of these Options

The three options in the table below are not mutually exclusive alternatives. None, some or all of them may be adopted.

Option	Advantages Strengths	Disadvantages Weaknesses	Cost Effort

• Adopt minimum administrative standards for Agreements	Will bring all CMAs up to a basic standard of uniformity Landholders more likely to take regard of conditions	If coordination is over-centralised, may lose local 'ownership' May require new agreements where there is already a level of acceptance of existing agreements	Some central coordination will be necessary Some agreements will need to be re-written
• Develop a uniform set of technical standards for agreements	Will allow uniformity and consistency Will assure legal soundness Will promote cross-CMA dialogue on grants policy	May result in agreement formats which are more complex than some of those presently used May require new agreements where there is already a level of acceptance of existing agreements	Moderate level of technical liaison between CMAs
• Develop mechanisms for ensuring compliance with other statutory requirements	Will ensure compliance with Planning Scheme, CaLP Act, Native Title etc etc Will reduce burden on landholder	May reveal impediments to works programs which had previously been ignored	More workload for CMAs
• Confirm and extend the availability of Section 69, CF&L Act for	Will ensure that sec 69 Agreements are legally sound Will enable	None foreseen	Cost of legislative amendment Cost of making regulation, and

landholder agreements	CMAs to enter into sec 69 Agreements Will ensure that sec 69 agreements will be registered at Land Registry		Regulatory Impact Statement

4.5.8 Recommendations

R25 Adopt minimum administrative standards for CMA-Landholder Agreements

- The nine CMAs and Melbourne Water should review their current documents against the minimum set of standard proposed in section 4.5.4 above.
- Based on these self-reviews, DSE should recommend a uniform set of standards for adoption

R26 Move Towards Technical Uniformity for CMA-Landholder Agreements

- The nine CMAs and Melbourne Water should undertake a review of the technical contents of their current agreements with landholders.
- Based on these self-reviews, DSE should recommend a uniform set of standards for adoption

R27 Facilitate landholder compliance with Related Statutory Requirements

- Instead of obliging landholders to ensure their own compliance with the Planning Scheme, Native Title, the EPBC Act, the CaLP Act etc, CMAs should consider taking on this responsibility themselves, and providing the landholder with clear advice on what these statutes mean for the works in question.

R28 Confirm and Extend the Use of 'Section 69' Agreements

- By regulation under the CF&L Act, proclaim part 10 of the Water Act 1989 to be a 'relevant law' in support of which the Secretary may enter into section 69 Agreements
- Ensure that agreements are made under seal

- Amend section 11 of the CF&L Act to allow the Secretary to delegate powers to Melbourne Water
- Delegate power to enter into section 69 Agreements from the Secretary for DSE to the CEOs of CMAs and the CEO of Melbourne Water
- Confirm with the Registrar of Titles that these section 69 Agreements will be accepted by Land Registry

Priorities

- Reform of existing agreements should be a high priority, in light of the magnitude of the grants program which they support.
- The priority for extending the use of section 69 agreements depends on the likelihood of CMAs wishing to enter into them, and the prospects of introducing the proposed new status-neutral Riparian Agreement. If this is likely to occur in the near future, the need for use of section 69 will be less pressing.

4.6 Management & Works: Alternative Forms of Agreement

4.6.1 Description of the Topic

This section considers directions which may be taken in developing alternative forms of landholder agreement. It looks at various parallel forms of agreement, and proposes four possible characteristics of a new agreement:-

- Status-neutrality
- 'Give and Take' fencelines
- Tax Breaks
- One-Stop-Shop rationalisation

The section concludes by recommending a new form of status-neutral Riparian Agreement.

Related Sections

Section 3.4 considers the reconfiguration of cadastral boundaries

Section 4.3 considers stock control and fencing

4.6.2 Other Forms of Agreement

Apart from 'section 69' agreements (discussed in the previous section), a couple of other options are worth considering here:

Section 173 P&E Act

A widely-used form of agreement is the s.173 Agreement made under the *Planning and Environment Act* 1989. These are agreements made between a municipality and a landholder, often in the course of negotiating a Planning Scheme Amendment or Planning Permit. Although they provide a useful parallel, they are not of immediate application to the situation being considered here, because one party to them must be the municipality.

Section 173 agreements are registered on title by the Land Titles Office, run with title, and are legally enforceable. In recent times, Land Registry has had concerns about the scope, size and content of 173 agreements, and has been obliged to regulate to ensure they are lodged in an acceptable format.

Trust for Nature Covenants

The Trust for Nature is a body corporate established under the *Victorian Conservation Trust Act* 1972.

Section 3A of that Act allows the Trust to enter into covenants with landholders over land -

> *… which the Trust considers to be ecologically significant, of natural interest or beauty, of historic interest or of importance in relation to the conservation of wildlife or native plants*

The Trust's primary interests are therefore in protecting land of relatively high conservation value, rather than in promoting the rehabilitation of degraded land.

A covenant will bind the landholder -

> *… to the development or use of the land or any part thereof or the conservation or care of any bushland trees rock formations buildings or other objects on the land.*

The Registrar of Titles may record the covenant on title, whereupon it runs with the land and is binding on successors in title.

If a Trust for Nature covenant imposes an economic burden on the covenantor, the Trust may initiate a process under which relief may be granted from certain rates and taxes.

Management Agreements (SKM 2000)

In their 2000 State-wide Review of Crown Water Frontages, Sinclair Knight Merz (SKM) proposed a model for status-neutral 'Frontage Management Plans.' More detail is provided in Appendix 9.4.3:-

4.6.3 Options for Innovation

Status-Neutrality

For natural resource management purposes, riparian land is best considered in terms unrelated to land status. Topography, biodiversity, hydrology and landscape are not status dependant. Aboriginal heritage, likewise, may be present on any riparian land, regardless of status.

For the landholder, day-to-day land usage may also be status-neutral. A licensed Crown frontage is often indistinguishable from the adjacent riparian freehold, both in terms of its productive value and the costs of its management.

The law, however, recognises cadastral boundaries rather than geophysical. This has resulted in status-based agreements and instruments, which may involve duplications, inefficiencies, or even contradictions.

Of particular interest here is the intersection between the Crown land licensing system and the CMAs grants agreements. The former relates only to Crown frontages; the latter to any land, whether Crown or freehold. One method of achieving some coordination is to require that if a grant applies to Crown land, then the landholder must hold a Crown land licence. (However, the fact that a landholder does not hold a licence should not become an artificial impediment to the CMA engaging the landholder as its contractor to undertake works on a frontage.)

Some CMA agreements, including the Snowy River agreements discussed in section 4.5.4, have achieved a degree of status neutrality. They apply to both Crown and freehold, but do not negate the need for a separate Crown land licence.

There is no power at present under which a status-neutral single agreement could be made, covering the matters now covered by CMA grant agreements and Crown land licences. Two possible frameworks for such 'Riparian Agreements' are outlined in Appendix 9.2.2.

'Give and Take' Fenceline Agreements

The works for which grants are made are often fences.

There are circumstances in which there is good reason to fence riparian land on an alignment other than the title boundary. The fence in question might be one between adjacent freehold properties, or between freehold and Crown land.

Issues of concern arising from such fences include:-

- Use by one party of the other party's land
- Obligations for maintenance of the fence
- Public risk liability
- Adverse possession

For a freehold-freehold boundary, these issues are as follows:-

Issue	**Details**
Use by one party of the other party's land	Normally, the use of one party's land by another would be authorised by a lease (either written or unwritten) and a corresponding monetary consideration. In the case of a give and take fenceline, where the give was about the same as the take, there would often be no consideration.
Obligations for construction and maintenance of the fence	The *Fences Act* 1968 imposes the primary obligation on occupiers, not owners. In some cases, some part of the obligation may pass to a landlord. The Fences Act uses the term 'dividing fences' between 'adjoining lands' - but does not specify that the fence need be on the title boundary.
Public risk liability	A duty of care to third parties is a duty owed by an occupier (section 14B, *Wrongs Act* 1958). The definition of occupier extends in some circumstances to the landlord. With a give and take fence, each party will be the 'occupier' of the land on their side of the fence, regardless of who is its owner. It is difficult to see how the owner of land occupied by a neighbour could hold a duty of care to users of that land.

Adverse possession	May lead to change of ownership, after 15 years, through adverse possession if the occupation is unauthorised. No adverse possession is possible by an occupying party who acknowledges the superior title of the other party. No adverse possession is possible where the boundary is a watercourse and the parties agree on a line of fence (section 5, *Fences Act* 1968)

For a Crown-freehold boundary, the issues are as follows:-

Issue	**Details**
Use by one party of the other party's land	Use of Crown land by the freehold occupier requires authorisation. Unauthorised grazing is an offence (section 188, *Land Act* 1958). Authorisation may be granted by various means, notably section 130 and section 138 licences. Use of freehold by the Crown. The Crown may certainly take freehold land under a lease or licence (for instance, CF&L Act section 13). A Committee of Management of reserved Crown land has no power to occupy or manage any freehold land. If a freehold owner fails to fence, so that the public at large has ease of access, that access would not amount to an occupation, let alone possession, of the land.
Obligations for construction and maintenance of the fence	The Crown is under no obligation to construct or maintain fences between Crown land and freehold (Section 31, *Fences Act* 1968)
Public risk liability	As with the case of the freehold-freehold fenceline, the duty of care is owed by the

	occupier. On the Crown land side of a riparian fenceline, the exposure may be greater because of public access – which is protected by section 401A, *Land Act* 1958). The Crown land side of the fence may – • Be occupied by the abutting freehold owner, under a licence • Be occupied (possibly *ultra vires*) by some other party, for instance a licensee other than the abutting freehold owner, or a Committee of Management • Be unoccupied. If a third party suffers injury or loss on the Crown land side of the fence, the question arises of whether it was due to any party's negligent failure to observe their duty of care.
Adverse possession	A give-and-take fence on a Crown-freehold boundary cannot normally result in adverse possession on either side of the fence. The Crown land cannot be adversely possessed, even though the occupier may have encroached on it for more than 15 years, because there is no adverse possession against the Crown (section 7, Limitation of Actions Act 1958). If the Crown, or the public at large, have access to the freehold land, this would not amount to occupation, let alone possession. Adverse possession would be possible only if the freehold land on the Crown side of the fenceline came into the possession of a third party – for instance if a third party illegally occupied the whole of the land on the Crown land side of the fenceline for 15 years , they would not be

	able to claim the Crown land, but could claim the freehold.

Tax Breaks

Section 5.3 discusses the economics of frontage tenures. It argues that if landholders are to choose a conservation regime over a grazing regime, then it is necessary to address the gap between the net present benefits of grazing and the net present benefits of conservation. One possible contribution to narrowing this gap is by relieving the landowner of tax and rate burdens.

Just such a mechanism is found in section 3B of the *Victorian Conservation Trust Act* 1972, which allows remission of Land Tax . Trust for Nature advises that this is one of its most effective tools in acquiring covenants over freehold land of high conservation values. It is a tool which, according to the Act, should be used only when the Trust believes that preservation of the land would not otherwise be economically feasible, but the use of this test appears to be fairly flexible.

The 'One Stop Shop'

Trust for Nature covenants offer the possibility not only of relief from State taxes, but relief from other rates. With the consent of a rating agency, or the Minister responsible for that rating agency, the Minister for Environment and Climate Change may absolve a covenantor from the obligation to pay those rates.

This concept of cross-agency agreements could be taken further. In particular, policies and mechanisms could be devised under which an agreement could:-

- Relieve a landholder of the need to obtain a Crown land frontage licence
- Relieve a landholder from the requirement to obtain a stock and domestic water licence
- Permit uses and works which satisfied the requirements of the Aboriginal Heritage Act, without a Cultural Heritage Management Plan
- Permit any revegetation to be credited as offsets for the purpose of the native Vegetation Framework under the Planning and Environment Act

Negotiation of such cross-agency arrangements would not be without difficulty, but if successful would make acceptance of an agreement

much more attractive to the landholder, and facilitate a whole-of-government approach to riparian land management.

A New Riparian Agreement

Many of the issues discussed above could be addressed through a new form of agreement between landholders and the Secretary for DSE. (If delegation powers are also in place, this could in effect be an agreement between the landholder and the CMA or Melbourne Water)

Such an agreement could:

- Apply to both freehold and Crown land
- Require inputs from both the landholder and the Secretary
- Incorporate Give and Take Fenceline Agreements
- Incorporate numerous other legal requirements, such as the requirement to take out a Crown land licence and the requirement to obtain a Water Act diversion licence.
- Offer the possibility of tax and rate relief

There is no current head of power for agreements of the form envisaged here – so legislation would be necessary.

Two alternative legislative amendments are sketched out in Appendix 9.2.2 – one to the Conservation Forests and Lands Act 1984, the other to the Water Act 1989.

The CF&L Act version empowers the Secretary for DSE – who already has powers of delegation, discussed elsewhere in this chapter – and hence references to the Secretary may be read as references to the CMAs.

4.6.4 Analysis

Nature of these Options

The basic decision required here is whether or not to adopt new Status-neutral Riparian Agreements. Features of such an Agreement are seen as sub-options.

In might be possible to introduce some individual components (e.g. Give and Take fencelines) without others.

Option	Advantages Strengths	Disadvantages Weaknesses	Cost Effort

Options for use of existing forms of Agreement			
• Sec 173, Planning and Environment Act	Widely-accepted form of binding agreement Often associated with land development or subdivision Self-auditing via community vigilance	Applies only to freehold land May devalue the subject land Municipality must be a party	Cost of any devaluation borne by developer Low effort, if made in conjunction with Planning Scheme Amendment or Planning Permit
• Section 69, Conservation Forests and Lands Act	Available to CMAs under delegation from Secretary for DSE Often associated with native vegetation offsets	Applies only to freehold land May devalue the subject land Requires periodic audit Not currently available to Melbourne Water	
• Section 3A, Victorian Conservation Trust Act	Available only where there are existing high-quality environmental values A 'high status' agreement, valued by conservation-minded landholders May actually enhance the value of the land	Applies only to freehold land Trust for Nature must be a party May devalue the subject land Requires periodic audit	Costs borne by Trust for Nature Any land devaluation voluntarily borne by landholder Possible loss of land tax to govt
Status-Neutral Riparian Agreements – Options for legislative basis			
• Conservation Forests and Lands Act	Retains ultimate control with DSE Secretary's powers may be delegated to CMAs and others -	Loses direct association with other powers of Waterway Managers	Legislative amendment

	e.g. municipalities, Parks Vic (but not Melbourne Water)		
• Water Act	Direct association with other powers of Waterway Managers	Can only be exercised by Waterway Authorities	Legislative amendment
Status-Neutral Riparian Agreements – Options for component features			
• 'One Stop Shop' compliance with other statutory obligations	Could eliminate the need for separate Crown land licences, Water Act licences, Permits arising from the proposed Environmental Sensitivity Overlay, etc Will serve as a major incentive for landholders to choose to enter into an agreement	Complex to negotiate. Long time-line to develop.	Revenue from subsumed statutory obligations may be lost, or require redistribution Negotiation of whole-of-government policy
• "Give-and-Take" fencelines	Will allow revegetation areas to be defined by reference to biodiversity criteria rather than cadastral criteria Will allow grazed land to be bounded by practical boundaries rather than cadastral boundaries Will provide clear authorisation of what might otherwise be regarded as encroachments	The fenceline may come to be regarded as the true title boundary May serve to legitimise illegal encroachments	Cost and effort of determining true title boundary; on-ground negotiation of agreed fence-line.

	Will relieve landholders of concerns about liability exposure		
• Tax Breaks	Will serve as an incentive for landholders to choose to enter into, and comply with, an agreement	May be seen as an unwarranted subsidy to the rural sector	Cost of Land tax and rates lost to State Revenue Office and rating authorities Negotiation of whole-of-government policy

4.6.5 Recommendations

R29 Introduce Status-Neutral Riparian Agreements

Amend the *Conservation Forests and Lands Act* 1987 to allow the Secretary for DSE (or delegate) to enter into agreements covering both freehold and Crown land. The CF&L Act is preferred to the Water Act because under it, the Secretary's power can be delegated not only to Waterway Authorities, but to other land managers if deemed appropriate.

R30 Enable Delegations to Melbourne Water

Amend section 11 of the *Conservation Forests and Lands Act* 1987 to allow the Minister and the Secretary for DSE to delegate to Melbourne Water, in its capacity as an authority under Part 10 of the Water Act

R31 Adopt a 'One Stop Shop' approach

As a feature of the proposed Riparian Agreements, introduce provisions whereby other nominated laws will be deemed to have been complied with. Use this provision to eliminate the need for separate Crown land licences, stock and domestic watering permits, planning permits arising from the proposed Environmental Sensitivity Overlay, etc.

R32 Introduce "Give-and-Take" Fenceline Agreements

Amend the *Conservation Forests and Lands Act* 1987 to provide for Agreements between the Secretary for DSE and landholders of

freehold land abutting riparian Crown land, under which fences can be built on practical alignments.

R33 Allow Tax Breaks for Riparian Works

Amend the *Conservation Forests and Lands Act* 1987 to enable the Secretary to offer tax and rate relief in the same manner as is now available through the *Victorian Conservation Trust Act* 1972.

Priorities

This will be a complex set of recommendations to implement, involving considerable inter-agency negotiation. As such, it should not be given a priority which interferes with other reforms. It might be appropriate for it to be introduced when the recommended program of Crown licence review is well advanced.

5 Crown Water Frontages

5.1 Overview of this Chapter

RIPARIAN CROWN LAND

There are some 30,000 kilometres of Crown frontages alongside rivers in Victoria[26] . Of this, some 22,000 km is abutted by freehold land; the other 8000 kilometres of riparian Crown land is State Forest, National Park etc. Of the Crown land abutted by freehold, a substantial proportion is subject of Crown water frontage ('WF') licences.

Crown Water Frontage Licences

A substantial proportion of riparian Crown land is licensed to abutting owners, mainly for grazing. There are almost 10,000 licences, nearly all issued for 5-year terms – the next renewal being due in October 2009.

If biodiversity values are to be adequately protected, several deficiencies in the licensing system need to be remedied. There is no explicit provision requiring an abutting owner without a licence to construct a fence; there is a history of issuing licences only to the abutting owner; the controls extend only to frontages, not to the bed and banks, and some abutting owners have a statutory right to graze the bed and banks without any licence.

Elsewhere in the report it is recommended that these licences be phased out in favour of status-neutral Riparian Agreements. Meanwhile, it is recommended that various minor amendments be made to the Land Act and the Water Act to clarify the law or allow more flexibility in its application.

One complication that impedes inter-agency cooperation is a view that the Information Privacy Act 2000 prevents DSE from providing data about Crown licences to CMAs. A simple method of rectifying this problem is recommended.

Economics of Crown Frontages

Economic theory suggests that landholders will choose to manage riparian land for biodiversity rather than for agriculture, if the net benefits of conservation are seen to outweigh the net benefits of agriculture. The parameters that influence this choice are identified and evaluated. Of particular interest is
(a) the rate on which Crown frontage rentals are set, which currently appears to entail a high level of implicit subsidy, and
(b) no allowance being made for the saving of fencing and watering costs which would have to be borne if there were no Crown licence.

A simple model is proposed for predicting how landholder behaviour would respond to changes in the various parameters, particularly the removal of the implied subsidy. The model can also be used to speculate about the total revenue stream from frontage

licences if rents were to increase.

It is recommended that government undertake an independent review of frontage economics, in order to sustain a better informed dialogue with stakeholders. Contingent on the outcome of such a review, Crown rentals should be increased to the true market value.

It is also recommended that CMAs do not seek to retain this revenue, because it will be a diminishing income stream. Rather, funding for riparian works should be funded from budget appropriations as a public good.

Freehold Titles and Crown Frontages

An important opportunity to review and revise Crown licences is presently being lost. Parcels of freehold land and abutting licensed Crown frontages are often viewed as component parts of a single rural property unit, yet the current licensing system fails to recognise any connection between the licenced Crown land and the 'parent' freehold property. As a result, incoming landowners may be unaware that part of 'their' new property is Crown land, and DSE may be unaware that its tenant has changed.

A number of options for rectifying this situation are explored, and it is recommended that certain enhancements to DSE's internal data systems be implemented, whereby inquiries at Land Registry preliminary to the sale or subdivision of freehold land trigger notifications to other areas of DSE alerting them that the Crown frontage may also be about to change hands. DSE and the relevant CMA may then use this as an opportunity to review and/or renegotiate the Crown licence.

Crown Frontages – the 2009 Renewal

The 5-yearly renewal of Crown licences, which is to occur in October 2009, presents a significant opportunity to advance the cause of good riparian management.

Any reform of riparian policy will require the eventual review of all Crown frontage licences. On review, some may continue unchanged; others may be reissued subject to new terms and conditions; some may be reassigned to other tenants; yet others will be cancelled. As there are some 10,000 licensed frontages across the State, this program of review may take as long as ten years. It is assumed for this purpose that the CMAs will conduct the on-ground inspections and consultations with landholders; DSE will remain as formal landlord and deal with the licensed land as the CMAs recommend.

A three stage strategy is proposed for implementing this review. Before October 2009, the highest priority cases should be reviewed, and some licensees given notice of major change or non-renewal at 2009. At 2009, licences should be renewed, but for a conditional term: "*5 years, or until the sale or subdivision of the abutting freehold, or until the negotiation of a CMA grant – whichever event occurs first*." All reviewed licences should be for the purpose of 'protection of the riparian environment,' rather than the current purpose, which in most cases is grazing.

After 2009, the review will continue, on a strategic basis: if a parent freehold property is sold or subdivided, the opportunity should be taken to review the frontage licence; if the landholder accepts a grant, that is also an opportunity for review. At the following 5-yearly renewal (2014) there should be a much reduced residual number of unreviewed frontage licences. The longer-term objective of the review will be for all continuing licensed frontages to move onto the new status-neutral Riparian Agreements. For an intermediate period, two systems will be operating in parallel.

Unlicensed Crown Land

The management of unlicensed riparian Crown land is considered in Chapter 7 - Roles and Responsibilities

5.2 Crown Water Frontage Licences

5.2.1 Description of the Topic

This section reviews the system of Crown frontage licences which prevails along most major waterways in the State. It examines the deficiencies of the present system, and explores options for its improvement.

Related Sections

Elsewhere in the report (section 4.6), it is recommended that the Crown frontage licences be phased out in favour of status-neutral Riparian Agreements, but the improvements recommended in this section should nevertheless be made, pending that more major reform.

Extent of Licensed Land

Some 30,000 kilometres of rivers in Victoria is Crown land[27] . Of this, some 22,000 km is abutted by freehold land; the remaining 8000 km is State Forest, National Park.

A substantial proportion of the land abutted by freehold is subject of Crown water frontage licences. The following data is provided by DSE:

CMA	No of licences	Area in ha
North Central	1624	12330
Corangamite	564	2350
North East	1564	8755
Wimmera	531	5700

Port Phillip	815	2265
Mallee	90	2455
Glenelg Hopkins	630	4290
Goulburn Broken	1489	8480
East Gippsland	783	4935
West Gippsland	1570	5770
Total	**9660**	**57330**

5.2.2 The Current Licensing System

These licences are authorised under the *Land Act* 1958. Part XIII is the principal part of the Act dealing with unused roads and water frontages, but must be read in conjunction with two sections in Part II: section 130, which allows licences for agricultural purposes, and section 138 which allows licences for non-agricultural purposes.

Sections 130 and 138 are amongst the very few provisions of the Land Act available for use on reserved Crown land, which must otherwise be dealt with under the *Crown Land (Reserves) Act* 1978. Elsewhere in this report it is recommended that they be transferred to the Crown Land (Reserves) Act, where they more logically belong.

The Land Available to be Licensed

A Water Frontage is defined by the Land Act as follows:

> **"water frontage"** means Crown land (including land temporarily or permanently reserved)—
>
> (a) which has a frontage to the sea or a watercourse within the meaning of Part XII; and
>
> (b) which is not under a lease, licence or residence area right; and
>
> (c) which is not reserved as a water reserve along any public road under the **Crown Land (Reserves) Act 1978**; and
>
> (d) which is not vested in trustees or in a municipal council or placed under the control of a public authority or in respect of which a committee of management has been appointed under the **Crown Land (Reserves) Act 1978**.

In one respect, this definition cannot be taken at face value: it excludes from the defined land any land which is under a licence – and yet the substantive sections of the Act explicitly provide for the licensing of water frontages. This contradiction must be regarded as a drafting error, requiring recourse to section 35 of the *Interpretation of Legislation Act* 1984, which points to the definition being set aside in favour of the substantive sections.

Under this definition a water frontage is land with a frontage to a watercourse, but does not include the watercourse itself, nor its bed and banks (see section 3.2.5 above). Thus licences run between the abutting freehold and the edge of the land normally covered by water; they do not and can not include the bed and banks.

The definition applies whether the land is reserved or unreserved. For many licensed frontages the entire area will be reserved; for others the land closer to the waterway will be reserved but the land further from it will be unreserved; for yet others the entire frontage will be unreserved.

The Crown's Right to Choose its Tenant

The Land Act is silent on the question of who may be the licensee of a Crown frontage, but DSE practice has been to award the licence to the abutting owner. This practice is reinforced by two considerations – (a) practical access to the frontage is often available only to the abutting owner, and (b) under section 403 of the Land Act an abutting owner is obliged to obtain a licence if he/she 'occupies' the land, which DSE deems to be the case wherever a grazing paddock is unfenced.

Despite these two considerations, there is no restriction in law on the licence being granted to some other party. As the usage of frontages evolves from grazing to conservation, this raises opportunities for the selection of tenants who may be better placed or more inclined to manage the frontage for conservation purposes – including landowners other than the abutting landowner, and local environmental or Landcare groups.

A Licence is not a Lease

Licences are an authority to use the land, rather than authority to occupy it. Unlike a lease, a licence does not convey an interest – that is, it does not confer any part of the ownership of the property on the tenant, nor any rights to exclusive occupation.

This is reinforced by Clause 1 of DSE's standard licence document:

> *1 Grant*
>
> *The rights conferred by this Licence are non-exclusive, do not create or confer upon the Licensee any tenancy or any estate or interest in or over the licensed land or any part of it, and do not comprise or include any rights other than those granted or to which the Licensee is otherwise entitled by law.*

Nevertheless, many landholders describe their tenure as a 'lease,' and treat it as if it grants exclusive possession. This is understandable: if a frontage is not fenced from

the freehold, then public access to the frontage can readily become trespass on the freehold – and corresponding threats to the landholder's stock and privacy.

Licensing – at the Crown's Discretion

It is a fundamental characteristic of Crown land law that the Minister has the discretion to issue a tenure, but is under no obligation to do so.

Section 403 of the Land Act provides that where a frontage is unfenced, the abutting owner is obliged to obtain a licence. This section, as currently worded, could be misread as implying that where a frontage is unfenced, the occupier must in fact be granted a licence – that is, that the Minister's discretion has been overturned:-

> **403. Duty to obtain licence to use water frontage**
> *Where private land abutting on a water frontage is not fenced off from the water frontage the occupier of that private land shall obtain a licence under Division 8 of Part I or section 138 of this Act to enter and use the whole of the water frontage to the extent to which his land abuts thereon.*

This possible misinterpretation is compounded by section 404, which deals with failure to comply with section 403 in terms which emphasis the duty to obtain a licence, rather than the duty to construct a fence:-

> **404. Liability to pay occupation fees after notice**
> *(1) Where by this Part a duty is imposed upon any person to obtain a licence under Division 8 of Part I or section 138 of this Act to enter and use an unused road or a water frontage, he shall after receiving from the Secretary written notice of his duty so to do…*

The unwritten corollary of section 403 is that if an abutting owner fails to obtain a licence, then the boundary must be fenced off.

In the case of non-compliance, the sanctions provided by the Act are a fine of $2 per day, or the demolition of fences across the frontage. The former may be an effective deterrent against longer-term offences ($730 per annum), but has never been imposed. The latter is a counter-productive response to an unfenced frontage – resulting, if imposed, in a further reduction in the fencing, allowing stock to wander further along the frontage, and perhaps into neighbouring freehold.

The Obligations Imposed

The obligations imposed on a licensee fall into various categories –

- those imposed by the Land Act itself,
- those imposed by the licence document, and
- those imposed by other legislation.

The Land Act (section 401A) provides that any person may enter and remain on a licensed frontage for recreational use, and that the licensee must provide means of access along the frontage for that purpose. The Land Regulations 2006 place certain

restrictions on persons using the frontage for recreation, but do not and can not diminish public rights and licensees' obligations specified by the Act.

The licence document itself (reproduced as Appendix 9.6.3) provides firstly, a set of positive obligations, and secondly, a set of negative restrictions on the licensee. Notable amongst these is clause 2.9, which obliges compliance with Secretary's directions:

> ***2.9 Compliance with Directions***
> *2.9.1 At the Licensee's cost forthwith comply with any written direction given by the Secretary during the term as to the:-*
> *2.9.1.1 grazing or management of the licensed land (including fencing), or the number and type of stock which may be depastured on the licensed land;*
> *2.9.1.2 frequency, timing and method of cultivation;*
> *2.9.1.3 water supply and other improvements;*
> *2.9.1.4 reclamation of eroded areas and land degradation; or*
> *2.9.1.5 retention or clearance of native vegetation.*

Use of Licence Conditions

These clause 2.9 powers are seldom used, but have been used in the Snowy River agreements (see section 4.5.4).

One problem with them is a reluctance to change the conditions of a licence mid-term. If such conditions are to be imposed, it is preferable to reach agreement on them at the commencement of a five-year term – for instance, at the 2009 renewal.

This raises an important option for consideration prior to 2009 – the inclusion of site-specific conditions in individual licences relating to fencing, stocking, and environmental management. If site-specific conditions are included, the generic powers in clause 2.9 should also remain.

Obligations under Other Acts

Other Acts also impose obligations on licensees:-

- Under the Catchment and Land Protection Act 1994 the term 'land owner' is defined to include the occupier, under a lease, licence or other right, of Crown land. Consequently, the licensee is obliged to manage weeds and pest animals on licensed Crown land, just as if it were freehold. This obligation is reinforced as a specific condition in the licence document.
- Under the Local Government Act 1989, all occupied land is rateable. Section 157 (5) explicitly applies to occupied water frontages:

  > *A person who has or should have a licence under the Land Act 1958 in respect of any unused roads or water frontages is liable to pay the rates and charges on that land as if it is rateable land.*

- The Wrongs Act 1958 (Part IIA) partly codifies the common law duty of care which an occupier of property owes to other persons. Here it should be noted that the common law recognises that in the case of premises held under lease or licence, this duty of care may fall either on the landlord or the tenant, depending on the circumstances. DSE's standard licence document requires a licensee to indemnify the Crown against any claims arising out of the licensee's own negligence, but implicitly accepts the consequences of claims arising from the Crown's own negligence.

The Rentals Paid

All Water Frontage licences incur a rental. For an analysis of the economics involved, see section 5.3 below.

The rental for a section 130 licence (i.e. a licence for agricultural purposes) is determined by a formula negotiated in 1994 between the Government of the day and the Victorian Farmers Federation.

A nominal rental is firstly derived from a formula based on the carrying capacity of the land and a standard rate per grazed beast. The unit to which various grazing beasts (cows, horses etc) are converted for this purpose is the "dry sheep equivalent." Carrying capacity is the grazed area of the land taken from aerial photos multiplied by a standard dry sheep equivalent per hectare derived from Australian Bureau of Statistics productivity data.

The standard rate charged per dry sheep equivalent is $3.00 per annum. This figure has remained unchanged since 1994. Thus the nominal annual rental for an agricultural licence is:-

> [Rent ($ per annum)] = [grazable area (hectares)] x [carrying capacity (dry sheep equivalent per hectare)] x [$3.00 per annum]

If this calculation results in a nominal annual rental of less than $59, then it is increased to $59.

Licensees may choose to pay annually or for 5-year period. In 2004, 99% chose the 5-year option; only 1% (or 95 licensees) chose the annual option[28]. If the licensee chooses to take out a 5-year licence rather than an annual licence, then the annual rental is multiplied not by 5, but by 3.

> [Rent ($ per 5-years)] = 3 x [Rent ($ per annum)]

When the base agistment rate of $3.00 per d.s.e. is discounted in the ratio 3:5 (because 5-year licences incur only 3 years' rental) the resulting figure is $1.80 per dry sheep equivalent per annum.

At the time, the VFF argued that landholders taking up Crown frontage licences also accepted responsibility for weed control, and the burden of having to allow public access for recreation.

National Competition Policy holds that government should not subsidise one sector of the economy at the expense of another. The State has endorsed this policy, and requires that government fees and charges should not be set so as to give government agencies a market advantage over competitors. There would seem to be a case for arguing that holders of Crown frontage licences are at an advantage in comparison to other members of the farming community who, as well as paying higher agistment rates, are required to provide fencing and off-stream watering. These matters are discussed in more detail in section 5.3, which considers the economics of Crown frontages.

Impediments to Data Sharing

Catchment Management Authorities, as primary caretakers of riparian condition, need access to information about licensees of Crown frontages, but for the past seven years DSE has felt unable to provide it.

This situation arises as an unforseen consequence of the *Information Privacy Act* 2000, which prohibits the unauthorised disclosure of private information held on government databases.

Section 6 of the IP Act provides that where some other Act requires disclosure, then that other Act prevails. One such Act is the *Transfer of Land Act* 1958, which at various points requires the Registrar of Titles to make available information relating to freehold land, including details of its owner. There is no such provision in the *Land Act* 1958.

The Information Privacy Act (Schedule 1, Principal 2) also allows disclosure in certain limited circumstances, such as:-

- *if the purpose (of a secondary disclosure) is connected to the primary purpose for which the information has been collected, and the individual concerned would reasonably expect the information to be disclosed for the secondary purpose*
- *if the individual has consented to the use or disclosure*

The purposes of the Information Privacy Act – together with the fact that information about ownership of freehold land is readily available, tend to suggest that there should be no concerns about the release of information by DSE to the CMAs.

The Five-Year Cycle

The term (or duration) of a Water Frontage licence is limited to the maximum specified by the *Land Act* 1958. In 1994 provisions were inserted into this Act allowing 99-year terms for unused road licences and 35-year terms for water frontage licences. This long-term licensing was intended to reduce the administrative costs of annual renewals, and to allow significantly discounted up-front rental payments.

Since 1994 the Act has allowed 35 year terms for water frontage licences, but this term has never been used. Departmental policy has been to issue licences with 5-year

terms (in 1994, 1999, and 2004), thus keeping open on each occasion the possibility of introducing major reforms within the relatively near future.

Unanticipated consequences of this include:-

- By reducing administrative costs associated with licensing, the Government of the day also reduced the departmental capability of liaising with tenants, monitoring frontages, and enforcing compliance with licence conditions.
- Government agencies are faced with an administrative spike at 5 year intervals. With nearly 10,000 licences to renew, this is not an opportunity to consider individual files and make individualised adjustments to licence conditions.
- The dynamic for policy reform goes through 5-year cycles, with government agencies, the Victorian Farmers Federation and environmental groups all focussing on reform simultaneously, and often too late in the cycle for any meaningful policy development to occur. In this atmosphere, proposals for reform (or, indeed, for retention of the *status quo*) tend to be played out on a state-wide stage. This in turn mitigates against smaller-scale reform – *e.g.* by river reach or by individual licence.
- The 5-year term (and the 35-year term, if it were ever used) means a seriously curtailed liaison between landlord and tenant. Correspondence is reduced to nothing more than rental renewals at 5-year intervals. Of the 8885 invoices issued in 2004, 543 or 6% came back marked 'return to sender.[29]'
- Longer-term licences entrench a culture of proprietorship and an expectation of ongoing and automatic renewals. With unused roads (where the 99-year maximum is indeed used) reports are frequent of licensees believing that they own the land, or at least have secure rights over it.

VEAC: Time for a 'Major Shift'

VEAC's most recent Investigation has been into the River Redgum Forests of the Murray-Goulburn region. VEAC released its proposed recommendations in July 2007.

In relation to public land water frontages, VEAC recommends that existing grazing licences be reviewed with a view to phasing out grazing over five years, and that all cultivation of frontages cease.

The full text of the proposed recommendation is reproduced in Appendix 9.4.5

5.2.3 The Bed and Banks

The licensing system discussed here applies only to 'frontages' as against the 'bed and banks.' The distinction has little relevance in the real world: land managers, landowners, their stock, and recreational users all consider and use riparian land as a whole – disregarding legal distinctions base on an imaginary line between banks and frontage.

The law, however, does draw a distinction. WF licences may be issued only over frontages; landowners in occupation of frontages must take out a licence, but not so landowners in occupation bed and banks. Recreational users must abide by Land Act Regulations if they are on a frontage, but not if they stray onto the bed and banks.

Freehold properties which are the subject of 'section 385' boundaries have no abutting frontage – they abut directly onto the bed and banks. Here. section 386 of the Land Act allows landowners to graze the bed and banks without any licence.

5.2.4 Options for Improved Control of Grazing on Riparian Crown Land

Options relating to the Bed and Banks

- For situations where there is a Crown frontage:
    - Amend the Land Act to prohibit the grazing of Crown land forming the bed and banks of watercourses

  OR

    - Amend the *Land Act* 1958 so that provisions relating to frontages also apply to the bed and banks.

- For situations where there is no Crown frontage:
    - Amend section 386 of the Land Act to revoke the right to graze the bed and banks

  OR
    - Commence a program to acquire the residual rights not resumed in 1905, and for this purpose amend section 130(2)(c) of the Water Act to remove any doubt that section 386 rights can be compulsorily acquired

Options for Clarification of the Law

- Amend the *Land Act* 1958 to
    - remove any possible inference that a licence may be issued only to the abutting owner

- clarify that the duty on an abutting landowner to take out a licence is not a duty on the Minister to issue a licence, and
- explicitly require a landowner who has stock and who does not hold a licence to construct a fence

Options relating to Licence Rentals

- Commission an independent review of frontage rentals. Terms of reference to include:-
  - The costs and benefits to landholders of holding Crown frontage licences;
  - The costs and benefits to government of having Crown frontages managed under licence;
  - The gap between frontage licence rentals and comparable costs for freehold land, and the implications for competition policy
  - The likely impacts on licensee behaviour if rentals were not so heavily subsidised.

Options for Access to Information

- Inform stakeholder organisations that DSE is considering the release of information about licensees to CMAs under Information Privacy Principle IPP 2.1(a) – which allows reasonable disclosure of information for secondary purposes. In the light of responses to this proposal, consider whether to:-
  - proceed under IPP 2.1(a),
  - seek licensees' consent under IPP 2.1(b), or
  - amend the Land Act to allow disclosure as is the case for normal title information.

5.2.5 Analysis

Nature of these Options

- The two options for control over bed and banks where there is a Crown frontage are mutually exclusive alternatives, as are the two options where there is no Crown frontage.
- All the other options are independent of each other: none, some or all of them may be adopted.

Option	Advantages Strengths	Disadvantages Weaknesses	Cost Effort
Controls over the Bed and Banks *(a) Where there is a Crown frontage*			
• Prohibit grazing of bed and banks	Will require all existing licensees to keep stock out of the actual waterway	Will remove Crown's discretion Need for statewide enforcement	Cost of legislative amendment Cost and effort of statewide monitoring and enforcement
OR… • Extend 'frontage' provisions to cover the Bed and Banks	Will allow licences to be issued for the banks as well as the frontage Will allow regulations to apply to the stream as well as the frontage	May lead to expectation that the power will be used to authorise grazing of bed and banks	Cost of legislative amendment As a power rather than an obligation this will impose no new costs Exercise of the power may incur costs
Controls over the Bed and Banks *(b) Where there is no Crown frontage*			
• Amend section 386, Land Act to revoke the right to graze the bed and banks	May lead to removal of some stock from these watercourses Will conclude the resumption commenced in 1905 Will enable total Crown ownership of 'section 385' bed and banks Implementation will be state-wide, and immediate	Almost impossible to monitor and enforce Will be seen as further reduction of private rights (c.f. farm dams) Will lead to expectation of grants for fencing and watering May give rise to demands for legal	Cost of legislative amendment Cost of grants for fencing and watering (if CMAs choose to offer them)

	Does not require compensation	compensation	
OR… • Commence program of acquisition of residual 'section 386' rights; and • amend sec 130(2)(c) of the Water Act to clarify that such rights can be acquired	Will allow the grazing of the bed and banks of 'section 385' waterways to be brought under control, or prohibited, at the discretion of the government	Will only apply on a case-by-case basis; implementation could be piecemeal and slow When used, will require compensation Will lead to expectation of grants for fencing and watering	Cost of legislative amendment Cost of acquisition of residual rights in 'section 385' watercourses
Other Options *Clarification of the Existing Law*			
• Clarify that a licence may be awarded to parties other than the abutting owner	Will facilitate the granting of a licence to Landcare groups, landholders other than the abutting owner etc	None perceived	Cost of legislative amendment
• Clarify a Landowner's Duty to Fence	Will clarify the consequences of non-renewal or cancellation of licences at 2009 or other times Will reduce number of frontages which are unfenced and yet unlicensed Will avoid claims that the Crown must issue a licence where the frontage is unfenced	None perceived	Cost of legislative amendment
Other Options			

Ensure CMA Access to Licence Information			
• Test existing provisions of Information Privacy Act. If deficient or in doubt, legislate accordingly	Essential for working relationships between CMAs and Crown frontage licensees Will ensure that frontage licences are treated the same as freehold titles for information purposes	May be seen as an intrusion into privacy Legislation possibly required (but unlikely)	Consultation with VFF and MAV Possible cost of legislative amendment

5.2.6 Recommendations

R34 Extend controls over Crown frontages to Crown land in the bed and banks

- Where there is a Crown frontage – amend the *Land Act* 1958 to prohibit the grazing of the bed and banks.
- Where there is no Crown frontage – commence a program of strategic acquisition of abutting owners' residual rights in 'section 385' watercourses; and amend the *Water Act* 1989 to clarify that these rights may be compulsorily acquired

R35 Clarify the Crown's rights over Crown land

- Amend the *Land Act* 1958 to clarify that although there is an obligation on an abutting owner to take out a licence over an unfenced frontage there is no corresponding obligation on the Crown to issue such a licence.
- Amend the *Land Act* 1958 to clarify that a Landowner who does not hold a licence has a duty to construct a fence
- Amend the *Land Act* 1958 to remove the contradiction in the definition of frontage

R36 Allow CMAs access to licence information

Invite stakeholder organisations to advise on the release of information about licensees to CMAs under the *Information Privacy Act* 2000. In the light of responses, either:-

- proceed under Information Privacy Principle (IPP) 2.1(a) which allows reasonable disclosure of information for secondary purposes, or
- seek licensees' consent under IPP 2.1(b), or

- amend the *Land Act* 1958 to allow disclosure as is the case for normal title information.

Priorities

- Highest priority here goes to the Land Act amendments clarifying the respective obligations of the Crown and abutting landholders in relation to licensing and fencing. These amendments are highly desirable to avoid any doubts arising from non-renewal or revocation of frontage licences.
- If such amendments are to be made to the Land Act, then the opportunity should be taken to make the other recommended amendments (extending frontage controls to the bed and bank, fixing the definition of frontage, and allowing disclosure of licensee information) although they are of lower priority.
- If the Land Act is amended to allow disclosure of licensee information, then the use of IPP 2.1(a) and/or IPP 2.1(b) will not be necessary.
- The strategic acquisition of 'section 385' watercourses is of lower priority.

5.3 The Economics of Crown Frontage Licences

5.3.1 Description of the Topic

This section:-

- describes the current rent-setting system and the revenue stream arising from it
- considers the economics of Crown frontages, from the perspectives of the landholder/licensee and the land manager.
- considers the private sector costs of grazing land, against which current policy may be compared
- discusses the choices available to landholders in terms of micro-economic theory, and ways in which those choices may be influenced by the land managers' policy
- sketches a model for predicting how rent increases would affect landholder behavior and the total revenue stream

Related Sections

Section 4.6.3 proposes a new status-neutral Riparian Agreement

Section 5.5 considers options for the 2009 review of Crown frontage licences

5.3.2 Background

Rentals for Agricultural Licences

All Water Frontage licences incur a rental. The rental for a section 130 licence (i.e. a licence for agricultural purposes) is determined by a formula negotiated in 1994 between the Government of the day and the Victorian Farmers Federation.

A nominal rental is firstly derived from a formula based on the carrying capacity of the land and a standard rate per grazed beast. The unit to which various grazing beasts (cows, horses etc) are converted for this purpose is the "dry sheep equivalent" (dse). Carrying capacity is the grazed area of the land taken from aerial photos multiplied by a standard dse per hectare derived from site assessment or Australian Bureau of Statistics productivity data.

The rental formula negotiated by the VFF in 1994 on behalf of its members is based on $3.00 per dse per year – a figure which has been unchanged since 1994.

[Rent ($ per annum)] = [grazable area (hectares)] x [carrying capacity (dse per hectare)] x [$3.00 per annum]

If this calculation results in a nominal annual rental of less than $59, then it is increased to $59.

Licensees may choose to pay annually or for a 5-year period. In 2004, 99% chose the 5-year option; only 1% (or 95 licensees) chose the annual option. If the licensee chooses to take out a 5-year licence rather than an annual licence, then the annual rental is multiplied not by 5, but by 3.

[Rent ($ per 5-years)] = 3 x [Rent ($ per annum)]

When the base figure of $3.00 is discounted in the ratio 3:5 (because 5-year licences incur only 3 years' rental) the resulting figure is $1.80 per dse per annum.

The Current Revenue Base

At the 2004 licence renewal, the total amount invoiced was $1,578,610 on 8885 invoices. (There are fewer invoices than licences because some invoices are for multiple licences.) This included some annual licences which, if expressed in terms of their five-year revenue, bring the total revenue up to $1,677, 410 for the five year period.

	Number	**Average invoice**	**Revenue per five-year period**
Annual licences	95	$ 260	$123,500 (being 5 x $24,700 per year)
5-year grazing licences on more than the minimum fee	4634	$ 268	$ 1,242,770
5-year grazing licences on minimum fee	3833	$ 80	$ 306,640
Total for 5-year grazing licences	*8467*	*$ 150*	*$1,273,434*
Total for all grazing	*8562*	*$163*	*$1,396,934*

licences			
5-year Conservation licences	180	$ 25	$ 4500
	143	$1 on demand	$ 0
Total for all licences	*8885*	*$ 177.67*	*$ 1,677,410*

This equates to an annual revenue stream of some $335,000.

A 'Typical' Licensed Frontage.[30]

From the previous figures, it can be deduced that the carrying capacity of the average Crown frontage, excluding those on the minimum fee, is

$268 / 5 / $1.80 = 30 dse. Factoring in the 'minimum fee' frontages, the average carrying capacity drops to about 21 dse.

The current annual rental for this typical frontage is thus 21 x $1.80 = $37.80.

The average carrying capacity of licensed riparian Crown land in Victoria is 5.6 dse per hectare. The average grazed area of Crown frontages is therefore 21 / 5.6 = 3.75 ha or 37500 m2.

If the average frontage is (say) 25m wide, then the average length of frontage is 37500 / 25 = 1500 m or 1.5 km.

5.3.3 Market Comparisons

Any consideration of costs and benefits of alternative rental policies needs to establish norms against which other options are compared.

Grazable Pasture

In the private sector, rates for agistment of stock vary in accordance with several factors, including quality of pasture, transport distances, and the duration of the agistment.

The highest figure observed in the course of this project was 55 cents per dse per week, which for a full year would be $28.60 per dse per annum.

Advice from the industry, however, suggests that a more reasonable industry rate is about $5.00 per dse per annum[31].

On this basis, the 'typical' frontage supporting 21 dry sheep equivalent, would be worth 21 x $5.00 = $105 per annum,

compared to the actual grazing licence rental of 21 x $1.80 = $37.80

Fencing

GBCMA advises that standard fencing costs are between $4.00 and $5.50 per lineal metre[32] ($7 if using contract labour). Wimmera CMA assumes $4.30 per lineal metre for the purpose of their standard works agreement.

On the basis of $4.00 per lineal metre, the capital cost of fencing a 1.5 km frontage would be $6000. Assuming an interest rate of 5% and a depreciation rate of 5% (i.e. an asset life of 20 years) , this equates to $600 per annum.

Watering Points

Cost of off-stream watering depends on type of water container (trough, tank or dam), length of pipe, type of pump and power supply.

Here we assume a capital cost of $4000 per paddock[33]

- which equates to $400 per annum.

Public Access and Weed Control

When the current rental formula was negotiated in 1994, the VFF argued that landholders taking up Crown frontage licences accepted responsibility for weed control, and the burden of having to allow public access for recreation: burdens which should be acknowledged through a discounted rental.

We are unaware of any basis for verifying that these burdens are real, or for quantifying them.

Summary

On the basis of the preceding figures, the true annual market rental for a 'typical' Crown water frontage is:-

Grazing pasture	21 d.s.e @ $5.00	$ 105
Fencing costs forgone	1500m @ $4.00 per m @10% per annum	$ 600
Watering costs forgone	$4000 @ 10% per annum	$ 400
total		$ 1105

The true five-yearly rental would thus be 5 x $1105 = $5525.

If the current policy of offering 5 years' tenure for 3 years' rent is adopted, this figure would reduce to 3 x $1105 = $3315.

The current average five-yearly rental is $ 163.

This analysis therefore suggests that a 20- to 30-fold increase in rentals would be warranted. The magnitude of this increase is so great as to immediately throw doubts on its implementability.

5.3.4 Three Scenarios

Here we look at the economics of three typical scenarios involving a Crown frontage abutting a freehold grazing property:-

- Landholder fences out; holds no licence
- Landholder holds a grazing licence
- Landholder holds a conservation licence

The tables show costs and benefits incurred by the landholder and by the state on behalf of the public. This methodology removes the need to consider externalities, because one party's costs are the other party's benefits.

1 - Landholder Fences Out; Holds no Licence

This is the situation implied by section 403 of the Land Act where an abutting landholder does not occupy the frontage, and so does not require a licence.

The Landholder		The State	
Benefit	Cost	Benefit	Cost
No licence fee Present net value of long-term environmental enhancement to parent property (if re-vegetation benefit exceeds weed and pest detriment)	Cost of fencing Cost of off-stream stock watering Present net value of long-term detriment to parent property (if weed and pest	No administrative cost Present net value of long-term environmental enhancement to the waterway (no stock in water)	Cost of management of frontage (weeds and pests), **or**… Present net value of long-term environmental damage to the waterway (weeds and

	detriment exceeds re-vegetation benefit)		pests)

In this base case, costs and benefits to the landholder are exactly the same as for any non-riparian paddock on the property.

The State:-

- Gains the benefit of environmental improvement to the waterway, and
- incurs *either* the costs of managing the fenced-out frontage, *or* the long-term detriment resulting from its failure to manage the frontage.

2 - Landholder holds a Grazing Licence

In this case, a landholder holds a 5-year WF licence, grazes stock on the frontage, has no fence or off-stream stock watering, and manages weeds and pests in compliance with the licence.

The Landholder		The State	
Benefit	Cost	Benefit	Cost
Grazing land at $5 per dse[1] per annum Avoidance of fencing costs Avoidance of off-stream watering costs	Licence fee at $1.80 per dse per annum Management of weeds and pests Risk from recreational users of the frontage	Revenue from licence	Administration of licence Present net value of long-term environmental damage to the waterway

In comparison to scenario 1, the landholder obtains a net benefit, being:-

- The difference between the true market value of the pasture ($105) and the current rent ($ 37.80)
- The benefit of no fencing costs ($ 600 p.a.)
- The benefit of no off-stream watering costs ($ 400 p.a.)

[1] dse – dry sheep equivalent

A total benefit, in a typical situation, of over $1000 per annum.

This could be regarded as an implied subsidy of $ 1000 per annum from the taxpayer to the landholder – although it could be argued that this figure should be reduced by the other costs incurred by the beneficiary, including cost of weed control and costs associated with public access.

The state obtains a minimal cash benefit (the difference between licence revenue and administrative cost), but bears the long-term cost of degradation to the waterway.

3 - Landholder holds a Conservation Licence

In this alternative, the landholder takes out a 'conservation licence' (rental $1 per annum if demanded) under which the frontage must be fenced out and re-vegetated.

The Landholder		The State	
Benefit	Cost	Benefit	Cost
Present net value of long-term environmental enhancement to parent property Licence fee, effectively $0	Loss of grazing land at $5 per dse per annum Cost of management of licensed land (re-vegetation, weeds and pests) Fencing costs Off-stream watering costs	Revenue from licence (effectively $0) Present net value of long-term environmental enhancement to the waterway	Administration of licence

In comparison to scenario 1, the landholder suffers short-term net loss, being the loss of pasture, plus the cost of managing re-vegetation, weeds and pests.

In comparison to scenario 2, fencing and watering costs will be incurred and will be seen as a disincentive.

5.3.5 Discussion

Valid Comparisons?

In making comparisons between the current pricing of grazing licences and the true market value of those licences, it is important not to include any double-counting.

When a parcel of freehold land was first alienated from the Crown, the price paid by the first settler reflected the market value of the land at the time, with all its attributes, both positive and negative. One of the more significant attributes was the availability of water: land with a creek abuttal was worth more than land without. The enhanced value attributable to the creek abuttal will have been reflected in each successive transfer of the land, and can validly be said to be reflected in the price which the present owner paid for the land. Thus, to now regard unfenced access to the water as an implicit subsidy would be double counting: the Crown has already taken a fair price for that right.

This line of argument certainly applies to any property with an absolute abuttal (including those subject to the 1905 expropriation), but whether it applies to properties with a Crown frontage is a moot point. It could be argued that the presence of a narrow strip of Crown land did not affect the price paid at the time – that the original purchaser paid, and the Crown received, a price which reflected the value of unfenced access to water. It could equally be argued that the retention of the frontage was a deliberate act to retain water access rights in public ownership, rather than allow them to pass with the abutting freehold. The Crown cannot be held responsible if landholders (either the original settler or subsequent purchasers) erroneously factored rights to unfenced water access into their valuation of the property.

Low- or Zero-Value Items

Some of the items included above, when quantified, are seen to be insignificant. They include:

- The cost of incurring a penalty for illegal occupation of a Crown reserve – which in present circumstances is near-zero.
- The cost to the state of managing weeds and pests on an unlicensed frontage – which in present circumstances is near-zero.

The cost of a licence is so low in comparison to the market value that the net benefit cannot be improved much further through discounted rentals. Total elimination of the rental would result in a mere 10% increase in the net benefit.

Discounted Future Benefits and Costs

Any quantification of long term benefits or costs needs to recognise the diminished present value of a future cash flow. This is psychological as much as economic: a landholder may perceive little or no current value in a benefit twenty or thirty years hence. The concept is nevertheless well-understood in the landholder community, which pays 3 years rent for a five-year Crown frontage licence, and 12 years rent for a 99-year unused road licence.

Imperfect Knowledge

It should also be noted that economic analyses assume that the parties are fully aware of the costs and benefits of their decisions, and make rational choices on the basis of that knowledge. In reality this will not be the case: landowners may have a clear appreciation of short-term costs and benefits, but not of the long-term effects on property values of improved amenity and landscape. Likewise, government agencies will have an incomplete view of costs and benefits because of the structures of departmental budgets, and the omission of long-term environmental benefits from current-year financial reports.

Enhanced Property Values

Conservation of the frontage may enhance the value of the parent property. This enhancement may take two forms -

Production benefits to landholders from riparian management activities - eg improvements for stock health, milk production, grass growth, muster control, land values etc. Actual productivity gains are hard to measure but may be deduced from related information on shelterbelts.

Enhancement of property values through improved landscape, lifestyle/amenity[34], and perceived associations with a conservation ethic.

5.3.6 The Landholder's Choices

Economic theory may be of some of value in considering the decisions made by a landholder faced with choices between the scenarios discussed earlier.

For instance, it may be considered desirable for landholders to choose to move from scenario 2 (Landholder occupies the frontage under a grazing licence) to scenario 3 (landholder holds a conservation licence). The landholder will make this choice if the net present benefits of the conservation licence exceed the net present benefits of the grazing licence. This could be expressed as:

$[B_c-C_c] > [B_g-C_g]$, where:-

$\mathbf{B_c}$ is the present benefit of the conservation licence

$\mathbf{C_c}$ is the present cost of the conservation licence

$\mathbf{B_g}$ is the present benefit of the grazing licence

$\mathbf{C_g}$ is the present cost of the grazing licence

If $\mathbf{[B_c\text{-}C_c] < [B_g\text{-}C_g]}$, then the landholder will choose to continue with a grazing licence.

For the land manager to make it attractive for the landholder to choose the conservation licence, then one or more of the four parameters must be varied, as follows:-

increase $\mathbf{B_c}$	increase the rewards of conservation
decrease $\mathbf{C_c}$	decrease the costs of conservation (e.g. subsidise the costs of fencing and off-stream watering)
decrease $\mathbf{B_g}$	decrease the attractiveness of unfenced frontages (e.g. by making stock in waterways a scheduled activity under the EP Act)
Increase $\mathbf{C_g}$	increase the rental to reflect the benefit of relief from fencing and watering costs

What happens if Grants are made?

Making a grant to a landholder may make one alternative more attractive than another.

For an offer of a grant to cause a landowner to change from a grazing licence to a conservation licence, the benefit of the grant **G** must bridge the gap between the net present benefits of the grazing licence and the net present value of the conservation licence:-

$$\mathbf{G > [B_g\text{-}C_g] – [B_c\text{-}C_c]}$$

What happens if Rents Increase?

The parameter with most scope for variation is the rental charged for a grazing licence – presently set without recognition of the market benefits of relief from the costs of fencing and watering.

Economic theory would analyse the effects of a rental increase in terms of its effect on market demand, as follows:-

- At present, 8562 landholders find it attractive to hold grazing licences, for which they pay $1.4 million per five-year period.

- If the rent was increased, fewer landholders would find this option attractive (they may opt for the conservation licence, or to fence out with no licence, or to occupy illegally).
- If the rent increases, fewer landowners would find it attractive to hold a grazing licence. A point would come at which it would be more attractive to pay for fencing and off-stream watering, and/or to purchase agistment on the private market.
- Thus the numbers of licensees would fall from 8562 to zero as rents increased.

This provides the basis of a rudimentary linear model for considering total rental revenue.

Optimising Outcomes through Rental Policy

If licence rentals were the only available mechanism to influence landholders, then policy on the removal of grazing from frontages would be straightforward: simply increase rentals to market or, if necessary, to greater than market. The point will come at which all landholders will find it more attractive to fence out.

There are, however, a range of policy instruments available, of which rental policy is only one, so a policy of prompting landholder action through rental increase alone is not recommended here.

Total Rental Revenue

Total rental from Water Frontage grazing licences is now $1,396,934 (say $1.4 million) for the five-year period, made up of 8562 landholders paying rent averaging $163 per 5-year licence .

The market value of our 'typical' scenario is $1000 p.a. or $5000 per five-year period.

If the typical rent was to increase to $5000, we may assume that the number of licensees would fall to zero. If this is a straight line relationship, then, for the rent to increase from $163 to $r, the number of licences would drop to $N_{r,}$ where

$N_r = 8562 – 8562 \times (r-163)/(5000-163)$

Under these assumptions, the following speculative projections can be offered:-

Typical case 5-year rental	Number of grazing licences	Total revenue (per five years)
$ 163	8562	$1.4 million

$ 500	7900	$ 3.45 million
$ 1000	7000	$ 7.0 million
$ 2000	5250	$ 10.5 million
$ 3000	3400	$ 10.2 million
$ 4000	1700	$ 6.8 million
$ 5000	0	$0

The total revenue ($) when rent is set at $r per dry sheep equivalent is R_r – which the model quantifies as:-

R_r = $1.4 million x (r / 163) x (N_r / 8562)

Under this model, maximum revenue occurs at a rent of $ 2500, at which point 4250 landholders choose to stay on grazing licences, generating a total revenue of $10.625 million per five-year period.

Notably, a very similar model was developed by the State of the Rivers Task Force in 1986.[35]

5.3.7 Revenue Policy

Market Rentals

DSE policy in relation to commercial leases and licences of Crown land is to charge full market rental, set either by competitive tender or independent valuation. The principal exception is 'community use' rental, set at a nominal $104.00 per annum – available for non-profit sporting clubs, community groups etc.

The rentals for Water frontage (WF) and unused road (UR) licences, also depart from general policy. Here there are impediments to making true market comparisons, largely because of the physical isolation of the land. Many Crown frontages are inaccessible, except from the abutting freehold property, and therefore no market exists in the normal sense – if they were to be put out to tender, there would be only one bidder. In these circumstances, it falls to the parties to attempt to estimate market value.

Under the 1993 agreement reached by the Government of the day and the VFF, rents were based on carrying capacity alone, with no recognition of the benefits of reduced fencing costs and reduced watering costs.

Cost Recovery[36]

If rentals would, if calculated on the stocking rate formula, fall below the cost of administration of the licence, they are increased to $59 – which DSE advises corresponds to full cost recovery.

Competition Policy

National Competition Policy holds that government should not subsidise one sector of the economy at the expense of some other sector. In the light of the analysis developed below, there would seem to be a case for arguing that holders of Crown frontage licences are at an advantage in comparison to other members of the farming community who have to provide fencing and watering at market costs.

Revenue Retention

Revenue from Crown water frontage licences is not retained by the land manager, but goes to the Consolidated Fund – as does all revenue generated by Land Act tenures. If the 1994 licences had been for the maximum 35 years, and licensees had been offered an up-front payment option, no further licence revenue would be available until 2029. By limiting the licence term to 5 years, the possibility of capturing some future revenue flow has been left open.

It should be recognised that any reattribution of the revenue to the land manager might promote:-

- A view within central government that frontage land management is, at least partially, self-sufficient: that it is not a program which needs to be funded from budget appropriations
- A view within the land management agency that revenue should be factored in to decisions about the future of riparian grazing – i.e. a reluctance to phase out grazing because of the consequent revenue loss.

In past years, revenue from frontage licences was paid into a trust fund held by the State Rivers and Water Supply Commission. When the trust fund was abolished an equivalent amount was credited annually to the Rural Water Commission, subsequently subsumed into the Department of Water Resources. It could therefore be argued that the revenue stream from frontages is already returned for reinvestment in riparian management through normal budget appropriations.

5.3.8 Options

A Review with Stakeholder Input

This report has been undertaken with no input from landholder stakeholders. In these circumstances any suggestion of a 20- to 30-fold increase in rentals must be treated with extreme caution. A further inquiry including stakeholder inputs could not only test the assumptions made here, but also examine the extent to which rental increases are an appropriate mechanism for achieving riparian policy objectives. This option is a reiteration of the course of action proposed above as the first recommendation in this report.

Use increased Rentals as a Policy Instrument

If, as suggested here, there is a large gap between current and market rentals, then a corresponding increase in rentals can be expected to prompt a dramatic shift in landholder behaviour – in short, many licensees of Crown frontages would choose to fence out.

Grants to fence out and revegetate would become more attractive.

Rely on Policy Instruments other than Rentals

If rents continue to be set below the market value of the benefits provided, then the difference may be regarded as an implied subsidy from the Crown to the landholder. This could arguably be regarded as a gesture of goodwill, an incentive for a good partnership relationship, or as a form of government assistance for the rural community. In these circumstances, policy objectives would have to be achieved by other means, such as payments for ecosystem services

Credit Revenue to the Consolidated Fund

Rentals from all Land Act tenures have traditionally gone to the consolidated fund. Government has never regarded the Crown land function as a self-supporting enterprise, but has funded it from budget appropriations.

Retain Revenue for Reinvestment

Crown land Committees of Management have traditionally derived their operating revenues from on-site activities including rentals. Grants from government sources are usually in support of specific works or programs rather than for day to day management. This formula could also be applied to Crown frontages, with the revenue stream being attributed either to DSE or to the CMAs.

5.3.9 Analysis of Options

Nature of these Options

The first option (an open inquiry) is not offered with any alternatives: it is seen as a 'give or take' proposition

The second and third options (use increased rentals as policy instruments; rely on non-rental policy instrument) are the extreme positions of a range of possible intermediate options

The fourth and fifth options (credit revenue to Treasury; retain revenue) are mutually exclusive alternatives.

Option	**Advantages Strengths**	**Disadvantages Weaknesses**	**Cost Effort**
Options for stakeholder input to rentals policy			
• Open inquiry into frontage rentals	Will provide sound basis for policy decisions Will allow stakeholders to participate	Prospect of rent increases will promote hostile response Not attractive in time of rural hardship	Cost of an inquiry will depend on terms of reference and extent of consultation
Options for use of rentals as policy instrument			
• Use increased rentals as a policy instrument	Will remove distortion in landholder choices Will send clear market signals and promote desirable behaviours Will comply with competition policy Could increase funds available for reinvestment in frontage management (if revenue retained)	Will jeopardise landholder goodwill and cooperation At odds with govt support for rural community in time of rural hardship	Cost of reassessing 10,000 individual licence rentals Negotiation of true market rates
• Rely on policy instruments other than increased	Should promote goodwill from landholder	At odds with competition policy Will not send desired	Cost of revenue increases

rentals	community	market signals or promote desirable behaviours	forgone
Options for application of revenue stream			
• Revenue to the Consolidated Fund	Will not promote a view that riparian management should be self-sufficient	No incentive to maximise compliance Licensees unhappy about their rent leaving their region	This option would require periodic bids to Treasury to gain / retain annual budget appropriations
• Retain Revenue for Reinvestment	Incentive for DSE and CMAs to maximise compliance Licensees may prefer to know their rent is being reapplied to their river Benefits if rent revenues rise	Treasury may argue that revenue is already returned, unidentified, within normal budget appropriations May lead to expectation that management will be self sufficient Problems if rent revenues drop	Short term revenue gain as rents increase, but longer term revenue loss as licences are cancelled or not renewed

5.3.10 Recommendations

R37 Investigate Licence Economics

- In principle, rentals for Crown frontages should be increased to true market value. However, the magnitude of the increase may be so great as to make this an unreasonable proposition. The best way of gaining a better understanding of the issues and their policy implications is to conduct a further investigation, including stakeholder inputs.

  Terms of reference should include:-

  - To consult with the VFF and other stakeholders, and advise on:-
  - The costs and benefits to landholders of holding Crown frontage licences
  - The costs and benefits to government of having Crown frontages managed under licence
  - The gap between frontage licence rentals and the private market, and the implications for competition policy

- The likely impacts on licensee behaviour if the implicit subsidy in rentals were removed
- Circumstances in which rentals policy, rather than payments for ecosystem services, should be used to achieve better riparian outcomes

R38 Increase Rentals to Market

- Contingent on the outcome of the inquiry, rentals should be raised towards their true market value.

R39 Attribute Rentals to the Consolidated Fund

- Revenue from water frontage licences should continue to go to the consolidated fund. Management of Crown frontages should not be seen as self-funding.

Priorities

If rental policy is to be varied in time for the 2009 licence renewals, the open inquiry should be conducted in 2008. Adoption of other recommendations are to some extent contingent on that inquiry, and may occur at a later date.

5.4 Freehold Titles and Crown Frontages

Related Sections

Section 4.6.3 proposes new status-neutral Riparian Agreements which would apply to both Crown and freehold land, and could replace Crown land frontage licences.

5.4.2 The 'Whole Property' Issue

Rural properties being offered for sale are often described as 'including' some abutting Crown water frontage (or unused government road) held under licence by the vendor.

In other cases the association of the freehold property with abutting Crown land may not be mentioned at all – possibly leaving prospective purchasers to infer that they are purchasing all the land within the property's apparent perimeter.

Likewise, lots created in riparian subdivisions may be portrayed or viewed as including or running with all or part of the abutting Crown frontage.

However, Crown licences for both water frontages and unused roads are personal licences, held by the person named on the licence until a formal transfer is effected by the Crown Land Transaction Centre within DSE.

5.4.3 Dealings in Freehold Land

Two processes that frequently apply to riparian freehold are transfer and subdivision.

Transfer of Title

Land is bought and sold under the Transfer of Land Act 1958 (the TOL Act). Even 'Old Law' land not previously under the TOL Act is brought under that Act upon transfer.

Dealings in relation to TOL Act land are recorded at Land Registry, which is part of DSE. Purchasers of land are required to notify Land Registry of the transfer; Land Registry reports that compliance with this requirement is reasonably good, although the accuracy of the data provided is often poor. Change of ownership takes place at settlement, not at the time the Notice of Acquisition is lodged. Thus some time may elapse between a sale and Land Registry becoming aware of it.

Subdivisions

Subdivisions of freehold occur under the *Subdivision Act* 1988 – a process which may create lots, reserves and roads. All the land remains as freehold, with the roads and reserves normally being vested in the municipality.

If a freehold property with an associated Crown frontage licence is subdivided, it may be desirable for the frontage licence also to be subdivided. If a freehold reserve has

been created in the subdivision, it may be appropriate for the licence to be cancelled and the Crown land to be managed by the municipality in conjunction with the freehold reserve.

The Sale of Land Act 1962

Transfers of freehold land, including lots newly-created in subdivisions, are the subject of the *Sale of Land Act* 1962. Section 32 of that Act requires a vendor to provide a purchaser with a 'Statement of Matters Affecting the Land Being Sold.' Details of any associated Crown licence are not identified as an item to be disclosed on a section 32 statement, because they are regarded as not being matters affecting 'the land being sold.'

5.4.4 Repercussions for licensed Crown frontages

Repercussions for Freehold Owners

It would appear essential for sound riparian governance that freehold owners properly understand the extent of their freehold title, the presence of Crown land within what appears to be their property boundary, the nature of their relationship with DSE as landlord, and their obligations as licensee.

Even where vendors and purchasers correctly understand the status of the land, they may believe that the sale of the freehold somehow carries with it the transfer of associated Crown licences. In law, this is not the case.

The Section 32 statement is of no assistance in clarifying the land status issues. It deals only with the land being sold – not the abutting Crown land. It does not serve to draw to the attention of the freehold purchaser the fact that the land is outside the freehold boundaries, nor that a further transaction with DSE is required for it to be brought under the purchaser's control.

Repercussions for DSE and CMAs

It would appear essential that DSE as landlord knows the identity of the occupier of Crown land in order to maintain a proper landlord-tenant relationship.

As acknowledged in the Victorian River Health Strategy, and as recommended elsewhere in this report, the transfer of a licence provides an opportunity for DSE and/or the CMA to renegotiate its terms and conditions, or even to revoke it.

At present, neither a Notice of Acquisition nor a Plan of Subdivision alerts DSE to the fact that the tenant of a water frontage or unused road has effectively changed. These notices go to Land Registry within DSE, but Land Registry is unaware of any connection between the freehold in question and the abutting Crown land, and therefore cannot notify the Transaction Centre.

5.4.5 Options

Several options are available for addressing the deficiencies of the current system - that is, by alerting DSE to the transfer of a freehold property with an associated Crown frontage, and alerting the purchaser of the property to the fact that the river frontage is Crown land.

Enhancing DSE Records Systems

In the course of compiling a Section 32 Vendors Statement, a prospective vendor must obtain a Vendors Statement Certificate from Land Registry. This contact could be used to trigger actions necessary to alert all parties, as follows:

- The 10,000 'parent' properties would be identified by DSE and flagged within the Land Registry database
- Any request for a Vendors Statement Certificate relating to any flagged property would trigger a notification to the relevant DSE regional office that the licensed frontage may be about to change hands
- DSE would then be in a position to request the CMA for advice on whether the licence should be continued, varied or revoked
- DSE would then be in a position, if it wished, to communicate with the vendor, estate agent and/or purchaser and arrange for transfer, renegotiation or revocation of the licence, as appropriate.

If the 'parent title' principle is recognised, modifications will be needed to the DSE database managed by the Transaction Centre in Seymour. This could be done by using Crown Land Manager, the mapping system used to map licences.

It would be necessary to amend LIMS (the Transaction Centre data system) to record this information. Once recorded it would be the responsibility of the Transaction Centre to maintain the information as licence transfers are lodged.

Noting Licences on Parent Title

Torrens titles carry various information relating to the land – including easements, caveats, mortgages and leases. It would seem relatively easy to annotate a title to show that it was associated with a particular Crown licence, and conversely to annotate a licence to show that it benefited a particular freehold property. This is the system recently introduced in NSW.

Before considering this option, consideration should be given to potentially undesirable repercussions: notation on title would give the licence the appearance of being (and possibly legal recognition as) a right appertaining to the freehold land, like the right to enjoy an easement over an abutting property. The possibility of licensing the Crown land to some other party could be made more difficult.

Notation on the parent property title would draw a purchaser's attention to the fact of the existence of the licence, but would not in itself alert DSE (as landlord) or the relevant CMA (as an interested stakeholder) that a transfer was taking place.

Amend The Sale of Land Act

Use of Section 32 of the *Sale of Land Act* 1962 could be a way of alerting property purchasers to the existence of a Crown frontage and their licence obligations. It is not, in itself, a method of alerting DSE or the CMA to a transfer of the freehold.

The inclusion of information about Crown licences is problematical. They are not part of, nor are they legally related to, the land being offered for sale. Nevertheless, an amendment could be drafted requiring notification of any Crown licence held by the vendor over land abutting the land to be sold. Again, this would alert a purchaser, but not DSE or the relevant CMA, of an impending transfer.

The cost associated with this item would be borne by the parties to the freehold transaction, as is the case with other section 32 information. Care would need to be taken to ensure that the requirement did not apply to every sale of land in the state, only to those adjoining a river or stream.

Use Existing Land Registry Services

A Property Transaction Alert Service is offered by Land Registry, which provides a way to keep track on activity on a land title. Users can find out whether a property of interest (for example a property with an associated Water Frontage licence) has been sold or subdivided.

A subscriber receives an email alert of dealings on the nominated property. No other information is provided and a further title search would be required to ascertain the new Registered Proprietor.

This option would alert DSE and /or the CMA to a transaction soon after it occurred, but would not alert the purchaser to the status of the land or the requirements of the licence.

The service comes at a cost, currently $12.19 for 12 months. Given that there are almost 10,000 Water Frontage Licences the cost would be in the order of $120,000 per annum – plus the initial cost of identifying the freehold properties to be tracked.

'Ad Hoc Requests' are cheaper then the Property Transaction Alert Service, but would provide information to DSE some considerable time after a transfer (perhaps 12 months) and would not alert the purchaser to the status of the land or the requirements of the licence.

Shift Responsibility

A further option which has been suggested is a licence clause to the effect that a licence cannot be transferred upon sale or subdivision of the parent property, but automatically terminates. This would, it is argued, cause the licence to be worthless

upon sale of the parent property, and thus provide an incentive to the vendor to arrange for a new licence to issue to the purchaser.

The least attractive option which has been suggested is to threaten strict enforcement of the law against both vendor and purchaser. The departed vendor is still the signatory to the licence, but will not be abiding by its conditions; the purchaser will be in occupation without the authority of the licence. When the situation is discovered, both could be prosecuted and the resulting publicity would serve as notice and deterrent to others.

5.4.6 Analysis

Nature of these Options

The five options in the box below are alternative methods of linking freehold and Crown data. Only one need be adopted.

Option	Advantages Strengths	Disadvantages Weaknesses	Cost Effort
Options for linking Crown licences to 'parent' property			
• Enhance DSE data systems (Link request for Vendor's Property Certificate to DSE licence database)	Timely (pre-transaction) notification to DSE / CMA No burden placed on vendor or purchaser. Process entirely internalised within DSE / CMAs	IT system enhancements required Database establishment and ongoing maintenance	Identification of 10,000 +/- 'parent' properties Cost of system enhancement and maintenance
• Amend Transfer of Land Act to allow noting of Crown licence on freehold Title	Would draw existence of licence to prospective purchaser Clear and unequivocal identification of the Crown tenant Automatic transfer on sale or subdivision	May reinforce false sense of ownership May constrain DSE's discretion to revoke licence, or issue licence to another party Would come to DSE's attention some time after the transfer	Legislative Amendment Identification of 10,000 +/- 'parent' properties Consultation with title holders Amendment of 10,000 titles
• Amend 'section 32' vendor's statement under Sale of Land Act	Would compel a vendor to notify a purchaser of the Crown licence	May reinforce false sense of ownership Could affect dealings on all properties in the State (2million+/-) rather than just the 10,000 +/- with	Legislative Amendment Compliance costs imposed on vendors

		associated Crown licences Would come to DSE's attention some time after the transfer	
• Use established Land Registry services (Transaction Alert Service or Ad hoc Requests)	No burden placed on vendor or purchaser. Process entirely internalised within DSE / CMAs	Would alert DSE/CMA but not purchaser Slow (post-transaction) notification to DSE/CMA – maybe too late to effect changes in licence	Identification of 10,000 +/- 'parent' properties Cost of setting up property alert or ad hoc report system Cost of periodic reports
• Shift responsibility: (Termination of licence on departure of licensee / no transfers / enforcement and Penalties)	May promote a sense of responsibility amongst licensees; may promote better knowledge of licensees' responsibilities	May result in more illegal occupations Would cause an unnecessary shift from a partnership culture to an adversarial culture.	Compliance costs imposed on licensees Cost of re-issue of licences (greater than costs of transfers) Long-term costs of dealing with noon-compliance

A Note about Magnitude

There are almost 10,000 licences in the State – that is, an average of 1000 per CMA region. About 5 percent of 'parent' properties change hands each year, which is an average of 50 per CMA region per year.

The recommended option will thus result in DSE receiving some 500 notifications of transfers each year, and each CMA having to offer advice to DSE about the renewal, renegotiation or revocation of some 50 licences.

A Note about Unused Roads

For historical reasons, legislation and policy have always dealt with licensed Crown water frontages in parallel with licensed unused government roads. Some but not all of the options discussed and recommendations made here in relation to frontages will also apply to unused roads.

5.4.7 Recommendations

R40 Recognise the Crown-freehold relationship

- Acknowledge the relationship between a Crown frontage and its 'parent' property. Ensure, however, that such recognition does not support a false sense of proprietorship by the freehold owner, nor diminish the right of the Crown to revoke the licence or to issue the licence to a person other than the abutting freehold owner.

R41 Enhance DSE records systems

- Enhance DSE Data Systems (in both Land Registry and the Crown Land Management Transaction Centre) to recognise those 10,000+/- 'parent' properties associated with Crown frontages. Of the five options tabulated above for administering a 'parent property' system the first option is preferred because it alerts DSE and the relevant CMA prior to sale or subdivision, does not confer a false sense of ownership, and does not impose any burden on the landholder.
- Establish a system within Land Registry for notifying the DSE regional office when requests are received for Section 32 Vendor's Property Certificates relating to those 'parent' properties

R42 Use the transfer of the 'parent' property as an opportunity to review the Crown licence

- Develop a system of strategic responses by DSE and the relevant CMA to a notification of the impending transfer or subdivision of a parent property, such responses to include:
    - correspondence with the vendor/current licensee
    - identification of the purchaser/prospective licensee
    - deciding whether the Crown licence should be renewed, renegotiated or revoked

R43 Remove impediments to data sharing

- If there is doubt as to whether such use of information might contravene the *Information Privacy Act* 2000, amend the *Land Act* 1958 to remove the doubt.

Priority

The four recommendations above are an inter-related suite. Implementation of all four is seen as highly desirable for the 2009 and post-2009 program of licence review.

5.5 Crown Frontages: the 2009 Renewal

Description of the Topic

This section considers the opportunities presented by the forthcoming 5-yearly renewal of Crown frontage licences in October 2009.

It suggests a suite of options which could be used prior to 2009, at 2009, or after 2009.

It recommends a strategy for prioritising Crown licence reforms, and placing them on a pre-2009, at 2009, and post-2009 reform program.

Related Sections

- Section 5.2 discusses legislative and policy reforms relating to Crown land frontage licences
- Section 5.4 discusses the links between a licensed Crown frontage and its 'parent' freehold title
- Section 4.6 recommends replacing the existing system of Crown frontage licences with a new form of status-neutral 'Riparian Agreement'
- Chapter 7 discusses the possible transfer of various related functions from DSE to CMAs.

The Five-Year Cycle

Since 1994, the *Land Act* 1958 has allowed Crown water frontage licences to be issued for a maximum period of 35 years for agricultural purposes, and 10 years for non-agricultural purposes. Prior to 1994 licences were annual.

Rather than offer 35-year terms, DSE has offered a series of 5-year terms (commencing in 1994, 1999, and 2004). At each renewal the possibility was open of issuing the licences for the maximum 35-year term, but this option was not taken.

Assumption about Agency Roles

For the purpose of this discussion, the section makes the following assumptions about agency roles:-

DSE will remain the effective landlord of licensed Crown land, on behalf of the Minster for Environment and Climate Change

CMAs and Melbourne Water will provide DSE with advice about the renewal or non-renewal of licences, and the terms and conditions of

renewed licences, based on criteria developed in their River Health Strategies.

A full discussion of agency roles is found in Chapter 7.

5.5.2 Change Scenarios

Before considering the manner in which individual Crown licences will be reviewed, it is necessary to consider whether a review will indeed be made on a transitional basis, or on a blanket, state-wide basis.

The former (transitional) scenario is implied by the VRHS[37]:-

- The system of Crown frontage licences will continue, with licences being in general issued to the same tenant, but for new purposes and subject to new conditions
- Changes will be introduced on a prioritised basis, in accordance with Regional River Health Strategies
- Changes will occur over a period of, say, ten years

The second ('Major shift') scenario corresponds to the similarly-entitled proposal in the VEAC's draft redgum recommendations. It would be possible to make some dramatic reforms to the whole system of Crown licences:

- The system of grazing licences could, in effect, be abolished, with no licence being renewed
- Changes could be made on a statewide basis, affecting every licensed frontage
- Changes could occur at an early date (possibly October 2009)

In the course of this project no serious support emerged for the option of statewide termination of Crown frontage licences in the short term. However, if government adopts the VEAC recommendation of licence termination for the Murray redgum frontages, this option might re-emerge as a possibility to be considered elsewhere.

Meanwhile, for the purposes of this paper, it is assumed that change will be transitional.

5.5.3 Prioritisation

Adopting the transitional scenario, it may be expected that, over time, all 10,000 Crown licences in the state will be reviewed. Of these 10,000:-

- Some will be re-issued unchanged (or with generic changes applicable state-wide – e.g. a reformatted licence document)

- Some will be re-issued, but with changed conditions (i.e. changes specific to that particular frontage)
- Some will be re-issued to a different licensee
- Some will be cancelled or simply not renewed

Workload

The workload involved in reviewing 10,000 licences across 10 CMAs, or 1000 licences (on average) per CMA, may be estimated as follows:-

> If the review of each licence involves 1 person-day's work (on average), and if an average CMA devotes two staff, full time, to this task, each CMA would conduct 400 reviews per year; and consequently the 1000 reviews would be conducted in two-and-a-half years.

This is clearly a workload which requires prioritisation. Even if commenced immediately, a program of review would run well beyond the licence renewal date in October 2009.

It is recommended below that a target be set of reviewing every licence in the state, over a 10 year period.

Review Triggers

In the decreasing time-period prior to October 2009, review will be possible for only a small proportion of frontage licences. Suggested priorities might be:-

- Frontages with cultivation licences
- Frontages in the highest priority reaches, including Heritage Rivers, and those identified in regional river health strategies
- Frontages where there is a history of environmental damage
- Frontages in Special Water Supply Catchments, or where there is a threat to potable water [38]
- Frontages where alternative uses have been proposed
- Frontages of riparian properties known to be coming up for sale or subdivision

5.5.4 What Happens Upon Review?

Elements of a review may include:-

- Review of the DSE and CMA files in light of the Regional River Health Strategy, and any existing Management Plan
- inspection and on-site consultation with licensee

- assessment and recording of values and condition
- desktop examination of boundaries
- survey (only if in doubt about boundaries)
- calculation of benefits and costs to licensee of alternative licensing options (using the methodology outlined in section 5.3)
- consideration of grants or other support available from the CMA

Under Existing Policy and Existing Legislation

The object of any review will be for the CMA to recommend to DSE whether:-

- The licence should continue, and if so, whether its term and conditions should be changed
- The licence should be cancelled, and if so how the frontage should be managed.

Under Revised Policy and Existing Legislation

Within existing legislation it would be possible, upon review, to:-

- Re-issue the licence to some party other than the abutting landholder
- Change the licence purpose to 'Protection of the Riparian Environment' (if issued under section 138 of the Land Act), and/or
- Extend the term to up to 10 years (if issued under section 138) or 35 years (if issued under section 130)
- Provide a conditional term of "5 years, or until the sale of parent property, or until the signing of a CMA grant, whichever comes first"

Under Revised Policy and New Legislation

Depending on legislative change (for instance a new status-neutral Riparian Agreement, as recommended in section 4.6) future reviews may be able to recommend:-

- Agreement on location, standards and cost-sharing for fencing, and its on-going management
- Licence purpose to be 'protection of the riparian environment' (presently available only under section 138 of the Land Act) and a term of 35 years (presently available only under section 130).
- Exemptions from other legislative requirements – such as licence to take water, payment of council rates, public risk insurance etc.

- Rent to be replaced by a flexible payment arrangement – which could be either to or from the landholder (see proposed Riparian Agreement- section 4.6).

5.5.5 Licence Term and Purpose

The Current Legal Options

The Land Act as it stands provides two options for issuing frontage licences:

- Section 130, under which licences can be issued for 'agricultural purposes' for a maximum term of 35 years
- Section 138, under which licences can be issued for any purpose other than agriculture, for a maximum term of 10 years.

Current 'Conservation' Licences

DSE has adopted a policy of issuing 'conservation licences' under section 130. If challenged, it would be doubtful that the use of a head of power intended to facilitate agriculture could be justified in circumstances where the objective is the restriction of agriculture.

As long as the term of such licences is 5 years, such a challenge would be easy to deal with – the licence could be revoked and re-issued under section 138.

If, however, use of terms longer than 10 years were to be considered, then such a response would not be available.

Licence Term and Purpose

It is recommended below that the purpose of frontage licences be changed from 'grazing' to 'protection of the riparian environment.'

If this is to happen within existing legislation, then licences should be re-issued under section 138, and the maximum term would therefore be 10 years.

Only following legislative change would it become possible to issue licences for non-agricultural purposes, for the maximum term of 35 years as negotiated in 1994.

5.5.6 Licence Cancellation or Non-Renewal

Cancellation Procedures

In theory, it is possible to cancel a licence, or change its conditions, at very little notice. Section 407(1A) of the Land Act provides for the Minister to terminate a licence after a three-month period of notice.

The licence document itself (clauses 4.1 and 4.2) provides two different termination procedures – one for termination upon default; the other for termination without default. The former requires the licensee to be given a 'reasonable opportunity' to be heard, and the termination to be notified in the Government Gazette. The latter provides for termination at 30 days' notice, and *pro-rata* reimbursement of rental.

Resolution of the differences between the procedures of the Act and those of the licence itself would be one of several matters to be addressed in any mid-term licence termination, other than a termination by mutual consent.

For these reasons it will often be preferable, rather than to cancel a licence mid-term, to allow a it to run its full term and then not renew it.

Nevertheless, there are certain circumstances in which licences should be renegotiated sooner than 2009, or even cancelled forthwith.

Cancellation Rationale

Cancellation of a licence should be seen as a last resort – to be used only where the land is to be managed for some other purpose or after negotiation and warnings have failed. It is a last resort which DSE and CMAs should not resile from using where necessary.

There are very strong links between community support for a policy, participant compliance with that policy, and a governing agency's open enforcement of that policy. Whether the policy relates to the taking of abalone, the wearing of seat belts, or the payment of taxes, an effective policy must be seen to be enforceable and enforced.

Amongst the 10,000 Crown frontage licences in the state, there can be little doubt that some are held by persons who do not value good riparian management and who will not cooperate with government directives. To allow such persons to continue to hold licences would be to undermine any program of riparian management improvement, and to send entirely the wrong message to other licence holders.

5.5.7 Options for Immediate Action

Do nothing

This will be the option adopted for most licences

Immediate Cancellation

Cancellation (as against non-renewal) should be considered only in the most extreme circumstances – indeed it is an option which may never be used. It should at least be kept on the books as an option, in order

to reassure all parties that the review is an exercise to be taken seriously.

Immediate Changes of Conditions

It is possible to use the 'Secretary's Directions' clause during the term of a licence, but it is difficult to imagine this option being used unilaterally. New conditions may be better inserted into a licence as a condition of the licensee accepting a grant or other assistance.

5.5.8 Options Preparatory to 2009

If, in October 2009, some licences are to be varied, others are to remain unchanged, and yet others will not be renewed at all, then strategies need to be in place for dealing with all three scenarios.

Preparation for 2009 – DSE

- DSE should identify all 'parent' freehold properties (see section 5.4) so that they can be cross-referenced in each 2009 licence document
- DSE should prepare new regulations under the Land Act to back up the parent freehold concept

Preparation for 2009 – DSE and CMAs

- An immediate agreement is needed between DSE and the CMAs on interim roles and responsibilities, for the purpose of managing pre-2009 processes
- DSE and CMAs should commence negotiation with stakeholder representatives on the types of terms and conditions which may be inserted into licences in 2009
- DSE and CMAs should jointly identify those classes of frontage for priority reviews in the period leading up to October 2009

Preparation for Non-Renewal

If non-renewal of some licences in 2009 is to be available as a realistic option, then strategies must be developed for:-

- Informing the licence-holder that the licence will not be renewed
- ensuring that the frontage is fenced out upon or soon after the expiry of the current licence
- recording the condition of the frontage at hand-over for future reference

- arranging alternative management

5.5.9 Options at 2009

Blanket Non-Renewal of all Licences

In 2009 it would be theoretically possible to not renew any licence.

Blanket Notice of Forthcoming Non-Renewal or Cancellation

It would also be possible to put every licence-holder on notice that the licence will not be renewed at the end of the following 5-year period (i.e. 2014) or upon sale of the parent property.

Note: the Victorian Environment Assessment Council (VEAC), in its draft report on the River Red Gums Forest Investigation, recommends the termination of all grazing licences in the investigation area within 5 years. Policy regarding grazing licences will be further informed by the VEAC's final recommendations, and government's response.

Non-Renewal of Cultivation Licences

Cultivation is recognised as being generally incompatible with sound riparian management. The Victorian River Health Strategy states that "Cultivation will only be permitted on the recommendation of the CMA."

Note: the Victorian Environment Assessment Council (VEAC), in its draft report on the River Red Gums Forest Investigation, recommends the termination of all cultivation licences in the investigation area (but no mention of 5-year period, as for grazing licences). Policy regarding cultivation licences will be further informed by the VEAC's final recommendations, and government's response.

Renewal of Licences for "Reviewed" Frontages

For those frontages which have already been reviewed before 2009, options will include:

- Non-renewal
- Renewal, subject to term and conditions as previously agreed to

Renewal of Licences for "Yet to be Reviewed" Frontages – but with conditional term

If all frontage licences are to be reviewed over time, but only some can be so reviewed before 2009, then the 2009 renewal should pave the way for a review to occur during the term of the renewed licence.

Events which may trigger a review might include:

- transfer of the parent property
- a grant from the CMA, or payments through a program such as Bush Tender
- introduction of a new status-neutral Riparian Agreement

In these circumstances, the term of the licence document should be:-

> *"five (5) years, or until sale or subdivision of freehold property Volume xxx Folio yyy, or until recommended by the Catchment Management Authority, whichever event occurs first."*

Renewal of Licences for "Yet to be Reviewed" Frontages – but with stricter controls

It would be possible to renew all licences, but include in them a new condition or set of conditions – for instance,

- A condition that grazing is permitted only on a seasonal basis. This would, in effect, be a condition that a fence be constructed on the freehold-Crown boundary
- a condition that although the frontage may be grazed, stock must be excluded from the water. This would, in effect, be a requirement that a fence be constructed on the riverside edge of every frontage.

Re-issue to Another Party

The re-issue of licences to a party other than the abutting landholder could become more complex – involving the removal of the stock and effects of the previous licensee, the construction of new fencing, and making access arrangements for the new licensee.

5.5.10 Analysis

Nature of these Options

- The first two options are alternatives, and relate to overall policy.
- Some options in the 'immediate action' and 'at 2009' groups are applicable on an individual licence basis

Option	Advantages Strengths	Disadvantages Weaknesses	Cost Effort

Options for Overall Policy Approach			
• Transitional scenario: Renew licences with variations Regionally prioritised Medium-term	Will be less controversial Will allow unforseen issues and complications to be addressed Will be more responsive to local issues and considerations Will allow alternative arrangements to be made for unlicensed frontages	Will be slow, possibly too slow May result in unwarranted inconsistencies and localised departures from policy	
• 'Major Shift' scenario: The Statewide non-renewal of all licences	Will get fast results Will force issues to be exposed and therefore addressed	Will be highly controversial Will not be responsive to local considerations Will leave many frontages unmanaged and possibly in poor condition	Cost of alternative on-going management
Options for Immediate Action			
• Cancellation	Will remove major threats	Need for remediation May leave land unmanaged	Cost of remediation Cost of alternative on-going management
• Change of conditions	Will remedy existing problem	May involve grant from CMA	Cost of grant (if CMA chooses to

			make grant)
Options Preparatory to 2009			
• Agreement between DSE and CMAs on roles	Will enable further steps to proceed Will implement VRHS commitment to 'Integrate management of licences with general waterway management'	None perceived	
• Review of priority licences	Will enable modest achievement of some interim results at 2009	None perceived	Cost of field officers' time and negotiation with relevant licence holders
• Identification of all 'parent' freehold titles	Will enable action at time of sale or subdivision	None perceived	Data capture for 10,000 parcels IT System development at Land Registry and Transaction centre
Options at 2009 *For 'reviewed' licences*			
• renewal on same basis as previous licence	Minimum-fuss option	May give impression that no progress is being made	none
• renewal with state-wide variations to term and/or conditions	Will demonstrate tangible progress towards RRHS goals	Blanket changes state-wide may have to be relatively bland	
• renewal with site-specific varied term and/or conditions	Opportunity to introduce link to 'parent' property Will demonstrate	Many licensees will see no change, and therefore continue on a	Cost of grant or other support from CMA

	tangible progress towards RRHS goals	'business as usual' basis	
• renewal to another licensee	Will send clear messages to sub-standard managers	May cause disaffection Licensees other than abutting owner may have problems with access	Cost of fencing and watering for outgoing licensee Effort of negotiating new arrangements
• non- renewal	Opportunity to demonstrate benefits of revegetation Will demonstrate tangible progress towards RRHS goals	Need to put alternative management arrangements in place	
For 'Yet to be Reviewed' licences			
• renew on same basis as previous licence	Minimum fuss option	Would undermine basis of review program	No cost, no effort
• renew licence for term "5 years or until…"	Will allow future action within next 5-year period	Will leave licensees uncertain about their tenure	No cost, deferred effort
• renew but with stricter controls (e.g. seasonal grazing only, or no stock in water)	Will deliver immediate state-wide changes in frontage management	Will make case-by-case management decisions more difficult	Will impose immediate costs on all licensees
Options after 2009			
• Review licences on prioritised basis, or when parent property changes hands	Will introduce change at a point when new owner is taking over property		
• Proceed towards introduction of	Introduce one change at a time	Some landholders will be affected by	

new Status-Neutral Riparian Agreements		two changes – one in the old format, then another in the new format	

5.5.11 A Recommended Strategy

Note: overall, this report recommends a series of complementary strategies for ensuring better outcomes on licensed riparian Crown land. These include:

- Continuing the CMA program of grants for works
- Increasing rentals towards full market value
- Measures to prohibit stock access to the waterway

The recommendations below, however, relate more specifically to the issue of Crown licences, and their terms and conditions.

R44 Review all Crown frontage licences over 10 years

- Every Crown water frontage in the State should be reviewed over a 10-year period
- Each Crown water frontage licence should be tagged as being either "reviewed" or "not yet reviewed"
- The purpose of licences should be changed from 'grazing' to 'protection of the riparian environment'
- The term offered for a reviewed licence should be 10 years. At a later time, subject to legislative change, the term offered may be raised to 35 years, as originally envisaged in 1994
- No compensation should be payable on cancellation or non-renewal. Grants may be offered for restoration, fencing etc, regardless of which party has initiated the non-renewal. Such payments should not be described as compensation.
- Pending any more thorough consideration of agency roles and responsibilities, DSE and the CMAs should confirm that, for the purposes of the 2009 renewals DSE will retain the landlord function, but the CMAs will liaise with licensees on DSE's behalf and advise DSE on matters relating to licence renewal

R45 Identify High Priority Licences

- DSE and CMAs should initiate an accelerated program of identifying the 'high priority' licences to be reviewed at 2009. Criteria to be considered for adoption should include:-

- Cultivation licences
- Licences in the highest priority reaches, including Heritage Rivers and high priority reaches from the regional river health strategies
- Licences where there is a history of environmental damage
- In Special Water Supply Catchments, or where there is a threat to potable water
- Frontages where alternative uses have been proposed
- Frontages of riparian properties known to be coming up for sale or subdivision

Such criteria should be designed so as to identify no more licences than can be reviewed given the level of resources to be committed by DSE and the CMAs

R46 Develop DSE / CMA Joint Procedures

- DSE and CMAs should develop procedures relating to these high-priority licences -
  - to advise licence-holders of the impending review (renegotiation or non-renewal) of their licences
  - to assist the licensee where necessary with fencing and off-stream watering, and
  - to plan for the rehabilitation and on-going management of any land to be fenced out
- CMAs, in consultation with DSE, should develop training courses and standard procedures for reviewing all licences, over a 10-year period
- DSE should ensure that adequate resources are available within Crown Land Management to support the CMAs in any program of licence review
- DSE should identify all 'parent' freehold properties (see section 5.4) so that they can be cross-referenced in each 2009 licence document.

R47 Commence strategic revision of licences in 2009

- Cultivation licences should not be renewed. If a crop is in the ground at the time of licence expiry, the licence should be renewed only until the harvest of that crop. This decision should be made known sufficiently early to allow licensees time for proper

planning. (Note – this may not apply to cultivation a reasonable distance from the waterway – say 20 metres)

- Those high priority licences already reviewed before 2009 should be renewed, subject to the conditions agreed in the review, for a term of 10 years
- *Blanket insertion of a 'seasonal grazing only' or 'no stock in waterways' clause is not recommended, because it will trigger the need for thousands of kilometres of off-title fencing, possibly in locations subsequently found to be unsuitable*

R48 Allow for further licence revisions after 2009

- All other existing licences (those 'yet to be reviewed') should be renewed, but for a conditional term:-

  > *"five (5) years, or until sale or subdivision of freehold property volume xxx folio yyy, or until recommended by the Waterway Manager, whichever event occurs first."*

- DSE and the CMAs should develop procedures for the review of licences triggered by the transfer or subdivision of parent properties. Such procedures should include –
  - reminding the vendor of the parent property (the outgoing licensee) of the requirement to advise the purchaser of the details of the Crown licence
  - contacting the purchaser to arrange for a joint inspection leading to the transfer, renegotiation, or cancellation of the licence, as appropriate
- In due course, a reviewed licence may take the form of a status-neutral Riparian Agreement, as recommended in section 4.6.

Priorities

The program outlined above is of critical importance if any policy of riparian reform is to be taken seriously. To allow Crown licences to simply roll-over for a further five years would be a major set back for riparian reform.

In parallel with the review of licences discussed here, progress should also be made in relation to rentals policy and the prevention of stock access to waterways, as recommended elsewhere in this report.

6 Aboriginal Rights and Values on Riparian Land

6.1 Overview of this Chapter

Riparian land has particular significance for indigenous people. In Victoria, this significance has been recognised in law through the Commonwealth *Native Title Act* 1994 and the State *Aboriginal Heritage Act* 2006.

Aboriginal heritage and Native Title are clearly related issues, especially for riparian land where they may both be present. In law, however, they are unrelated: Aboriginal heritage may exist where there is no Native Title (for instance on freehold land), and conversely Native Title may exist where there is no Aboriginal cultural heritage. This distinction should be borne in mind when approaching this chapter.

Native Title

Native Title exists only on Crown land, having been extinguished on freehold. In many parts of the State, native title is virtually confined to the riparian strip, which is the only remaining Crown land in the landscape.

Under the Native Title Act 1994, actions which may affect native title (including the undertaking of works, the grant of tenures and the making of regulations) must meet strict tests. Without clear compliance with the Act the validity of such acts cannot be assured.

It is recommended that the implementation of riparian policy be validated, and Aboriginal rights be formally recognised, through certain Indigenous Land Use Agreements (ILUAs) made between government and the Aboriginal community.

Aboriginal Heritage

All riparian land in Victoria is designated as an 'Area of Cultural Sensitivity' for the purposes of the Aboriginal Heritage Act 2006. Causing harm to Aboriginal heritage is a criminal offence under this Act, as is undertaking an act likely to harm Aboriginal heritage.

In order to ensure that Aboriginal heritage is recognised and protected, and that riparian land managers are not at risk of committing criminal offences, it is recommended that a system of due diligence be introduced, and that new Regulations be made under the Aboriginal Heritage Act specifically governing the conduct of riparian conservation works.

6.2 Native Title and Riparian Land

6.2.1 Description of the Topic

Related Sections

Section 6.3 deals with Aboriginal Cultural Heritage

6.2.2 What is Native Title ?

The term 'native title' refers to a set of rights held by Aboriginal communities over land, including riparian land. It is recognised in common law, and protected by the Commonwealth Native Title Act 1993.

Native title can only exist on Crown land, having been extinguished on any land which is or ever was freehold. As much riparian land is Crown land, an understanding of native title is essential to the good governance of riparian land.

Native title is held communally, cannot be bought and sold, and passes from one generation to another by continued association with the land. It can be extinguished by consent of the title holders.

Native title must be regarded as existing in all places (whether riparian or not) where it has not been extinguished – including places where the native title owner has been identified; places where claims have not yet been resolved; and places where claims have not been made.

Native title should not be confused with cultural significance, which is separately protected (on land of all statuses, whether riparian or not) under the Victorian *Aboriginal Heritage Act* 2006.

6.2.3 Native Title in Victoria

In Victoria, several native title claims have been made, all involving riparian land, and five have been resolved. [39]

Claims Upheld

Four claims have been resolved in favour of claimant groups. These include three claims made by the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples over land in the Wimmera / Little Desert area, including much of the Wimmera River and its Crown frontages.

The fourth is the claim made by the Gunditjmara People over land in the Portland-Hamilton area - including Lake Condah and its associated waterways.

The Yorta Yorta Claim

One claim has been rejected – the Yorta Yorta claim to the Barmah forest - including extensive frontages to the Murray River and lower Goulburn River. This Federal

Court determination, upheld by the High Court, means not only that the Yorta Yorta claim failed, but that native title has been extinguished within the claim area.

In these circumstances, the state government has entered into the Yorta Yorta Cooperative Agreement which applies to Crown land along the Murray and Lower Goulburn Rivers.

Unclaimed areas and unresolved claims

For most rivers and waterways around the State, either no native title claim has been lodged, or lodged claims have not yet been resolved. In these areas, prudence requires that an assumption should be made that native title exists, and the provisions of the Act should be followed.

Its Relevance to Riparian Land

Because native title has been extinguished on freehold land, it exists only on Crown land. In much of the Victorian landscape, remnant Crown land is found only along the rivers. In certain Local Government Areas (e.g. Shires of Yarriambiak, Moyne, Bass Coast) there is near total correlation between native title and riparian land. Within the City of City of Greater Shepparton there is a near total correlation between riparian land and land subject to the Yorta Yorta Cooperative Agreement.

6.2.4 Future Acts

Under the Native Title Act, actions which may affect native title are known as 'future acts.' A future act is an activity or development on land and/or waters that may affect native title by extinguishing it, or creating interests that are inconsistent with the existence or exercise of native title.

Future acts may proceed if they satisfy the provisions of Division 3 of Part 2 of the Act , in which case they are described as 'valid future acts.'

Many of the riparian-related actions contemplated or recommended in this paper are future acts. The following table examines an indicative range of riparian-related activities, offers an opinion on whether each is a future act, and comments on the reasons or the repercussions.

Riparian Governance as Future Acts

Example of governance action (on Crown land)	Future Act ?	Comment
Issuing a new Crown frontage licence on the Wimmera River	Yes	Needs the consent of the registered native title holders – *i.e.* the body corporate representing the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples

Issuing a new Crown frontage licence on the lower Goulburn River	No	Native Title has been extinguished in the Yorta Yorta claim area – but similar rights have been set up in its place under the Yorta Yorta Cooperative Management Agreement
Issuing a new Crown frontage licence anywhere else in Victoria	Yes	Must comply with requirements of subdivision 24G of the Act – which requires notification of specified Native Title bodies
Changing Crown land status along a river anywhere else in Victoria	Yes	Valid if in accordance with pre-1996 LCC recommendation; or if the new status has no greater impact than the old status. Otherwise, an Indigenous Land Use Agreement (ILUA) may be required.
Appointing a new land manager for riparian land	No	Does not affect native title, so is not a future act and does not need validation
Fencing, revegetation, weed control of riparian land	Possibly	If it is a Future Act, it is validated by section 24LA – Low impact future acts
Making a new regulation relating to riparian land	Possibly	A regulation prevent fishing would curtail native title rights, therefore be a future act, and therefore require consent of the registered native title holders or a new ILUA. A Local Law preventing open fires anywhere in the municipality would also curtail native title rights and therefore be a future act – but it would be validated by section 24MA – which validates acts which pass the freehold test.
Building a public roadway on riparian land	Yes	Validated by section 24KA – provision of facilities and services for the public.
Building a private roadway on riparian	Yes	May be a section 24LA low-impact

land		act; otherwise, may require an ILUA
Adopting a new policy relating to riparian land	No	Does not need validation – although implementation of the policy may be a future act which may need validation
Transferring a riparian-related function from one agency to another	No	Does not affect native title, so is not a future act and does not need validation
Issuing a new tenure over riparian land	Yes	Will definitely need an ILUA
Selling a Crown frontage as freehold	Yes	Will definitely need an ILUA
Selling a closed road near a river as freehold	No	Native title is deemed to have been extinguished on roads, therefore cannot be affected by their sale

6.2.5 Section 385 boundaries

Native title has been extinguished on land which is freehold, or land which was freehold at any time before 1 January 1994, even if it had subsequently reverted to the Crown.

Section 385 of the Land Act 1958 deals with the bed and banks of rivers which were once freehold, but which were resumed by the Crown in 1905. This is land originally alienated to the centreline of rivers, but which the Water Act 1905 deemed to be alienated only as far as the edge of the waterway. It could be argued that, although the bed and banks are now Crown land, they had once been freehold and therefore native title is extinguished. However, the Land Act 1958 (and the Water Act 1905 before it) not only causes such land to be Crown land, but deems that its period as freehold is expunged from the record:

> *"…the bed and banks of the watercourse remain, and must be taken always to have remained, the property of the Crown…"*

It would appear arguable that the legislature has repudiated its right to regard native title as having been extinguished – in other words, that native title may continue to exist.

6.2.6 Options

Several options are available for ensuring that acts relating to riparian land governance are valid. Note that these options relate only to Crown land on which native title has not been extinguished.

Options other than ILUAs

A range of future acts commonly occurring on riparian Crown land may be validated by the provisions of sections 24F to 24N inclusive of Division 3 of Part 2 of the Act.

Examples of relevance to riparian land and therefore to this project include:-

- acts permitting off-farm activities directly connected to primary production activities (for instance, installing a stock watering pump on a waterway)
- acts involving renewals and extensions of existing licences (for instance, renewing a Crown water frontage licence)
- acts involving facilities and services for the public (for instance, building a toilet block or tourist information shelter on a frontage reserve)
- low impact future acts (for instance, building a fence or gate)

These provisions are available in relation to any land, whether it is or is not the subject of an ILUA.

Options in the Form of ILUAs

An Indigenous Land Use Agreement (or ILUA) is a voluntary agreement about the use and management of an area of land or waters, made between one or more native title groups, and others (such as miners, pastoralists, governments). A registered ILUA is legally binding on the people who are party to the agreement, and all native title holders for that area.

There are at present 25 ILUAs in Victoria.

ILUA – Single State-Wide Agreement

An 'Alternative Procedure Agreement' is a type of ILUA suitable for large areas where it is not practicable for all native title holders to be identified. They can only be made where there is no registered native title body corporate (or bodies corporate) for the entire agreement area. However, there must be at least one registered native title body corporate or at least one representative Aboriginal/Torres Strait Islander body ('representative body') for part of the agreement area, (refer to ss 24DA-24DM of the Native Title Act 1993).

ILUAs – Catchment or Small-Area Agreements

A Body Corporate Agreement is a type of ILUA suitable for areas where native title claims have been upheld. They can only be made where there is a registered native title body corporate (or bodies corporate) for the entire agreement area. This means that there must be at least one determination of native title in place in relation to the entire agreement area, (refer to ss 24BA-24BI of the Native Title Act 1993).

An Area Agreement is a type of ILUA suitable for areas where native title claims have not been settled, or have not been made. They can only be made where there is

no registered native title body corporate (or bodies corporate) for the entire agreement area (refer to ss 24CA-24CL of the Native Title Act 1993).

6.2.7 Analysis

Nature of these Options

The first three options are alternatives: only one need be adopted.

The fourth option (relating to section 385 boundaries) is a 'take it or leave it' option.

Option	Advantages Strengths	Disadvantages Weaknesses	Cost Effort
Options for ensuring that actions on Riparian Crown land satisfy the requirements of the Native Title Act			
• Options other than ILUAs (use of sections 24F to 24M)	Available immediately Available for many common and relatively low-impact acts No negotiation involved	Not available for many major-impact acts, such as - status change Cannot provide for extinguishment	No cost Effort: low Essential that decision-makers clearly understand which future acts can be validated under this option and which need an ILUA
• State-wide riparian ILUA (A single Alternative Procedure Agreement)	State-wide coverage – all riparian Crown land in the State Will remove any doubt about the validity of actions, systems and arrangements necessary for the management and governance	No precedents May take several years to finalise Cannot provide for extinguishment May involve monetary or in-kind consideration	Cost of monetary or in-kind consideration as determined by negotiation Effort: Significant effort at state level

	of riparian land Will honour the government's commitment to recognise Aboriginal rights		
• Catchment-based or small-area riparian ILUAs (Body Corporate Agreements and/or Area Agreements)	May provide for extinguishment 'Body Corporate Agreements' are made with a single clearly-defined Aboriginal party 'Area Agreements' could be for a whole CMA area Many existing precedents for Area Agreements – 25 already made in Victoria	May take time to finalise May involve monetary or in-kind consideration Body Corporate Agreements may be made only for the 4 areas where native title holders are recognised Area Agreements may require involvement of multiple parties	Cost of monetary or in-kind consideration as determined by negotiation Effort: Significant effort at CMA or regional level
Options relating to section 385 boundaries			
• Obtain legal opinions on whether NT has been extinguished	Will clarify whether native title exists along many waterways	May lead to new claims	Cost of legal opinion: low Cost of dealing with possible claims: unknown

6.2.8 Recommendations

R49 Negotiate a State-wide riparian Indigenous Land Use Agreement (ILUA)

The recommended option is to initiate a state-wide riparian 'Alternative Procedure Agreement' Indigenous Land Use Agreement (ILUA) to validate the range of riparian-related measures needed for effective riparian governance reform, beyond those which may be validated through the provisions of sections 24F to 24M of the Commonwealth Native Title Act 1993.

R50 If necessary, negotiate riparian Area Agreements and Body Corporate Agreements

If a state-wide Alternative Procedure Agreement proves impractical, initiate riparian 'Body Corporate Agreement' ILUAs at a CMA level for those riparian areas where positive native title determinations have been made.

If a state-wide Alternative Procedure Agreement proves impractical, initiate riparian 'Area Agreement' ILUAs at a CMA level for those riparian areas where no native title determinations have been made.

Prior to the finalisation of riparian ILUAs, government should continue to implement such riparian reforms as can be validated through the provisions of sections 24F to 24M of the Commonwealth Native Title Act 1993.

R51 Investigate native title for section 385 boundaries

DSE should also obtain a legal opinion on whether Native Title exists or has been extinguished on riparian land where freehold title was retrospectively revoked by the Water Act 1905.

Priorities

Priority here depends largely on the likelihood of land managers undertaking actions which may affect native title and which lie outside the provisions of section 24 of the Native Title Act.

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6.3 Aboriginal Heritage and Riparian Land

6.3.1 Protection of Aboriginal Cultural Heritage

What is Aboriginal Heritage ?

Aboriginal cultural values may be either tangible or intangible. Tangible values likely to be associated with riparian land include: scarred trees, midden sites, stone tools and fish traps. Intangible values may include historical sites of which no physical evidence remains (for instance, the Aboriginal school near the junction of the Yarra River and the Merri Creek) and sites of social or spiritual significance.

Its Relevance to Riparian Land

There is no doubt that much riparian land is likely to be of Aboriginal cultural significance. This may be tangible or intangible.

Artifacts may be recognisable to the untrained eye, (middens, scarred trees, and even skeletal remains) but artifact scatters may also be mistaken for random gravel or stones.

The Aboriginal Heritage Act 2006

The present Victorian system for protecting Aboriginal cultural heritage is relatively new. Introduced in 2006, it replaces the Victorian *Archaeological and Aboriginal Relics Preservation Act* 1972 and Part IIA of the Commonwealth *Aboriginal and Torres Strait Island Heritage Protection Act* 1984.

The law consists of two parts:

- The Aboriginal Heritage Act 2006 (the Act) which came into operation on 28 May 2007.
- The Aboriginal Heritage Regulations 2007 (the Regulations), which came into operation on the same day.

Offences

The new law expands the extent of protection, and imposes significantly greater penalties than the previous system.

A person is guilty of an offence if they knowingly, recklessly or negligently harm Aboriginal heritage.

A person is also guilty of an offence if they do an act which is likely to harm Aboriginal cultural heritage (it need not actually do such harm),

and at the time the act was done the person knew that the act was likely to harm Aboriginal cultural heritage.

Monitoring, Enforcement and Penalties

Aboriginal Affairs Victoria has engaged inspectors to monitor and enforce compliance with the Act and the Regulations.

Penalties range up to 1800 and 10,000 penalty units for individuals and corporations respectively (a penalty unit is currently a little over $100).

Statutory Defences

Section 29 of the Act specifies the circumstances in which a person may do an act that harms or is likely to harm Aboriginal cultural heritage without committing an offence: -

- In accordance with a Cultural Heritage Management Plan
- In accordance with a Cultural Heritage Permit
- In the course of preparing a CHMP
- In the course of traditional Aboriginal activities
- Necessary because of an emergency

6.3.2 Cultural Heritage Management Plans

When CHMPs are Mandatory

The Act provides for the mandatory preparation of a Cultural Heritage Management Plan if required by the Regulations or the Minister, or if the activity requires an Environment Effects Statement under the Environment Effects Act 1978.

Regulation 6 provides that a Cultural Heritage Management Plan is required for an activity if:

- all or part of the activity area for the activity is an 'area of cultural heritage sensitivity;' and
- all or part of the activity is a 'high impact activity;' and
- If the activity is not an 'exempt activity.'

Areas of cultural heritage sensitivity are set out under Divisions 3 and 4 of the Regulations, and high impact activities are set out under Division 5 of the Regulations. In addition, Division 2 of the Regulations sets out the activities that are exempt from preparing a Management Plan.

A Cultural Heritage Management Plan may also be prepared voluntarily by any person (section 45).

Preparation of CHMPs

The Sponsor is the person who is seeking to undertake an activity that requires a Management Plan under the Act or, in any other case, the person seeking the preparation of a Management Plan.

The Sponsor must engage a Cultural Heritage Advisor to assist in preparing the Management Plan. A Cultural Heritage Advisor is a person who is appropriately qualified in a discipline directly relevant to the management of Aboriginal cultural heritage (such as anthropology, archaeology or history) or who has extensive experience or knowledge in relation to the management of Aboriginal cultural heritage.

CMAs, Melbourne Water, and the Secretary for DSE may all be sponsors.

CHMPs must be approved by the relevant Registered Aboriginal Party (RAP), or by the Secretary for DPVC.

Scope of a CHMP

The following matters are required to be included in a Cultural Heritage Management Plan

- whether the activity will be conducted in a way that avoids harm to Aboriginal cultural heritage;
- if it does not appear to be possible to conduct the activity in a way that avoids harm to Aboriginal cultural heritage, whether the activity will be conducted in a way that minimises harm to Aboriginal cultural heritage;
- any specific measures required for the management of Aboriginal cultural heritage likely to be affected by the activity, both during and after the activity;
- any contingency plans required in relation to disputes, delays and other obstacles that may affect the conduct of the activity; and
- requirements relating to the custody and management of Aboriginal cultural heritage during the course of the activity.

Recommendations of a CHMP

The Act requires a Management Plan to set out recommendations for measures to be taken before, during and after the activity to manage and protect the Aboriginal cultural heritage identified during the cultural heritage assessment (section 42). Recommendations may relate to:-

- avoiding harm to Aboriginal Cultural Heritage

- the salvage of Aboriginal Cultural Heritage
- the removal and curation of Aboriginal Cultural Heritage

6.3.3 Cultural Heritage Permits

Cultural Heritage Permits (CHPs) are available for a range of activities, mainly relating to known sites and objects of Aboriginal heritage. They are also available, however, for activities that will, or are likely to, harm Aboriginal cultural heritage.

CHPs are issued by the Secretary for DPVC, who must consult with any RAP.

A CHP cannot be used where a CHMP is mandatory.

6.3.4 Implications for Riparian Land

Areas of Cultural Heritage Sensitivity

Certain types of land are prescribed by the Regulations as being 'Areas of Cultural Heritage Sensitivity.' If the land is an 'Area of Cultural Heritage Sensitivity' and a proposed activity is a 'High Impact Activity', and the activity is not an 'Exempt Activity,' then a CHMP is mandatory.

Note: Even if the a CHMP is not mandatory, it is still a criminal offence to knowingly, recklessly or negligently disturb or harm Aboriginal Cultural Heritage.

Areas prescribed by the Regulations include:-

- A Waterway or land within 200 metres of a Waterway is an area of cultural heritage sensitivity, unless it has been subject to significant ground disturbance. For the purposes of the Act 'waterway' means a waterway with a name recognised under the Geographic Place Names Act)
- Prior Waterways, Ancient Lakes and Declared Ramsar wetlands, except for areas that have been subject to significant ground disturbance.
- Parks (the term has the same meaning as in the *National Parks Act* 1975) are areas of cultural heritage sensitivity, except for those areas which have been subject to significant ground disturbance.
- A registered cultural heritage place, including land within 50 metres of it which has not been subject to significant ground disturbance, is an area of cultural heritage sensitivity.

Note: Waterway, Prior Waterway, Ancient Lake, Ramsar Wetland and Park are all defined terms.

Other Riparian Areas of Concern

Riparian land omitted from the prescribed Areas of Cultural Sensitivity, but likely to contain Aboriginal Cultural Heritage, includes:

- Waterways other than those falling within the Act's definition
- Prior waterways other than those falling with in the Act's definition (for instance – all the old courses of the Lerderderg shown in Appendix 9.6.2)
- Disturbed sites with intangible values (e.g. the Merri Creek School site)
- Parks other than those falling with in the Act's definition (e.g. all those parks reserved under the Crown Land (Reserves) Act or the Forests Act rather than the National Parks Act.)

Note: In these areas it is still a criminal offence to knowingly, recklessly or negligently disturb or harm Aboriginal cultural heritage.

High Impact Activities

Activities prescribed by the Regulations include certain 'High Impact Activities.' If an activity is a High Impact Activity and the land is an Area of Cultural Heritage Sensitivity, then a CHMP must be undertaken.

Note: Even if the activity is not a High Impact Activity, it is still a criminal offence to knowingly, recklessly or negligently disturb or harm Aboriginal Cultural Heritage.

Activities prescribed (Regulation 43(1)) include:

- The construction of a building or the construction or carrying out of works if it would result in significant ground disturbance, and it is for a any one of a list of prescribed purposes, several of which are often associated with riparian land:-

  (i) aquaculture;

  (ii) a camping and caravan park;

  (iii) a car park;

  (xiii) intensive animal husbandry;

  (xiv) and (xv) a sports and recreation facility;

(xviii) a pleasure boat facility.

However, the construction of a building or the construction or carrying out of works on land is not a high impact activity if it is for or associated with a purpose for which the land was being lawfully used immediately before the 28 May 2007.

- The use of land for a purpose specified in regulation 43(1) is a high impact activity if a statutory authorisation (meaning a Planning Permit or an Earth Resource Authorisation) is required to use the land for that purpose.
- Construction of certain infrastructure is a high impact activity if the construction would result in significant ground disturbance. This includes, for instance - a bicycle track, a road, and a walking track in a park.
- The subdivision of land into three or more residential lots, each of less than 8 hectares, is a high impact activity.
- Activities requiring earth resource authorisations, and which would result in significant ground disturbance
- The extraction or removal of sand, if it would result in significant ground disturbance – unless it is intended to be used on-farm.
- The construction or alteration of a private dam, other than on a waterway, is a high impact activity if it requires a licence under section 67(1A) of the Water Act 1989.

Exempt Activities

A CHMP is not mandatory in certain circumstances, including minor works such as the construction of fences or freestanding walls.

It must be understood that an exemption is an exemption from the *mandatory* requirement for a CHMP.

Note: This is not an exemption from those provisions of the Act which make it a criminal offence to harm or disturb Aboriginal Cultural Heritage.

Other Riparian Activities of Concern

Riparian activities omitted from the prescribed High Impact Activities, and activities included in the Exempt Activities may still result in disturbance or harm to Aboriginal Cultural Heritage, and therefore be an offence.

Activities of this type may include:

- works related to the list in regulation 43(1) (i.e. aquaculture, caravan park etc) even if they would not result in significant ground disturbance
- carrying out of works associated with a purpose for which the land was being lawfully used immediately before 28 May 2007
- the removal of sand, even for on-farm purposes, and even if there is only minor ground disturbance
- the construction of fences
- revegetation
- the use of land for a purpose requiring a statutory authorisation other than a planning permit or earth resource authorisation.

6.3.5 Risk Management

There is a risk that by undertaking works, CMAs may be committing criminal offences. The risk extends to private landowners undertaking works, perhaps under funding from the CMA. In these circumstances, it is essential that the proposed works or activities are the subject of robust defences.

Statutory Defences

The Act provides two defences of relevance:-

- Cultural Heritage Management Plans (CHMPs)

One risk management strategy is therefore to obtain a CHMP for all works, not only those for which a CHMP is mandatory.

- Cultural Heritage Permits

Another risk management strategy would be to obtain a Cultural Heritage Permit (CHP) in circumstances where a Cultural Heritage Management Plan (CHMP) is not mandatory, but where some activity is *likely to* harm Aboriginal cultural heritage.

Non-Statutory Defences

Two further lines of defence are:-

- A due diligence study, which concludes that the proposed works will not harm, or are not likely to harm, Aboriginal heritage, together with appropriate on-site quality assurance and protocols
- A due diligence study which concludes that the proposed works will harm, or are likely to harm, Aboriginal heritage, followed by a CHMP or CHP as appropriate.

6.3.6 Options

CMAs: undertake CHMPs only when Mandatory

This is the avenue implied by several other recent analyses of the Aboriginal Heritage Act and Regulations. It is an option which cannot be recommended here, because it:-

- Exposes proponents of works in non-mandatory circumstances to the risk of committing criminal offences, and
- Fails to adequately protect Aboriginal heritage.

CMAs: Full Compliance, plus Due Diligence

- Under this options, CMAs would:-
  - Fully comply with their statutory obligations (i.e. obtain CHMPs where they are mandated by the Act) and
  - Undertake due diligence studies in all other cases, in accordance with standards and procedures to be developed in conjunction with AAV.
- Elements of a due diligence exercise might be:-
  - Checking the register of known Aboriginal sites at the AAV
  - On-site or desktop assessments by a qualified heritage consultant
  - Training for ground works crews in the recognition of aboriginal heritage
  - Protocols for liaison with the local RAP or Aboriginal community
- The end result of a due-diligence study could be:-
  - That a CHMP is necessary, despite not being mandatory
  - That a CHP should be obtained
  - That works can proceed without a CHMP or CHP because (a) there is little likelihood of harm and (b) adequate protocols are in place to deal with contingencies

Landholders: the Unassisted Approach

The status-quo option is to allow each proponent of new developments and uses to make their own decisions about impacts of the Aboriginal Heritage Act.

Major developers (for instance, those undertaking large-scale subdivisions) could be expected to comply with the Act, as would any

landholder seeking a Planning Permit or a permit under the *Mineral Resources Development Act* 1990 or the *Extractive Industries Development Act* 1995.

Smaller operators, such as landholders undertaking minor earthworks, may not be aware of the implications of the Act or understand the need for compliance.

Landholders: the CMA-Assisted Approach

As an alternative to landholders having to find their own way through this area of law, it may be appropriate for CMAs to offer support and advice – particularly where the landowner's works are CMA-funded, or in support of some CMA-endorsed objective.

Under this option, CMAs could:

- Offer training in the recognition of Aboriginal heritage
- Advise landholders whether CHMPs were mandatory
- Undertake to obtain a CHMP on behalf of the landholder
- Undertake a due-diligence study on the landowner's behalf

Undertake Voluntary CHMPs in all cases

Obtain CHPs or undertake CHMPs for all works, whether required by the Act or not. This would be the safest approach – eliminating the possibility of unforeseen damage to heritage and the commission of criminal offences – but it would also be the most costly and burdensome.

A variation on this option is for CMAs to sponsor CHMPs for larger tracts of riparian land within their catchments – perhaps on a prioritised basis. A priority stretch of river could be the subject of a CHMP, the recommendations of which would guide the CMA's own activities, and could also be written into every Management Agreement and every Works on Waterways permit.

Alternative Regulations

Although a set of regulations has already been proclaimed, the possibility remains open of further regulations being made for riparian land.

Regulations can not normally overturn or negate the requirements of their parent Act, but Section 194(2)(f) of this Act allows a regulation to provide, in a specified case or class of cases, for the exemption of activities or operations from all or any of the provisions of the Act. Thus it becomes possible to:-

- legitimise some activity which would otherwise be an offence
- reduce or even eliminate the burden of undertaking a full CHMP
- Make a CHMP according to pre-agreed protocols or guidelines, without case-by-case consultation and approval.

The current regulations provide for a CHMP to be preceded by up to three levels of assessment: desktop assessments, simple assessments and complex assessments. The triggers for the non-desktop assessments relate to the likelihood of Aboriginal cultural heritage being present – not to the likelihood of damage being caused by the proposed activities.

Under the Act, it would be possible to construct a set of regulations which allowed CHMPs for low-impact riparian works (such as fencing, revegetation and watering infrastructure) to be based on a catchment-wide 'desktop assessment,' with on-ground assessment still being required on a site-by-site basis, but to a lower level of rigor than prescribed by the current regulations.

The scope for new regulations is set out in section 194(2) – reproduced as Appendix 9.6.4

6.3.7 Analysis

Nature of These Options

The options in the first two parts of the table below are alternatives. Adoption of one renders the others unnecessary.

Option	Advantages Strengths	Disadvantages Weaknesses	Cost Effort
Options for CMAs' own works			
• Undertake CHMPs only when mandated by legislation	Simplicity	In non-mandatory circumstances – • will expose proponents of works to criminal charges • will not protect all Aboriginal heritage	Cheap – until criminal charges are brought or remedial action required.

• Undertake Due Diligence studies, followed (if indicated) by CHMPs or CHPs	High level of safety from committing criminal acts High level of protection for Aboriginal heritage	None perceived	Manageable level of cost Appropriate effort commensurate with protection of heritage
• Obtain CHPs or undertake CHMPs for all works, whether required by the Act or not	Guarantee of protection from committing criminal acts Best protection for Aboriginal heritage	Unduly bureaucratic and over-cautious May impede or delay important works programs	High cost Considerable effort
Options for other land-holders			
• Unassisted compliance by individual proponents	Absolves DSE and CMAs from the burden of compliance Ensures that complying landholders have a direct understanding of their obligations	Compliance by multiple proponents would result in inefficiencies and inconsistencies Non compliance may be widespread A further obligation on landholders who would prefer to reduce their compliance burden	Compliance costs would be raised by duplications and inefficiencies Non-compliance costs (in the form of damage to cultural heritage) Repercussions of widespread criminal offences
• CMA- assisted compliance	Efficiency and consistency Higher levels of compliance Reduction in burden on individual proponents and landholders	May tend to absolve landholders from responsibility for their obligations Could be exploited by property developers hoping to shift cost burden onto CMAs	New call on CMA resources Unknown extent of likely cost burden on CMAs

Longer-term option…			
• Make new Regulations	Could support a balance between catchment-wide investigations to be conducted by the CMA and site-specific investigations involving the individual landholder A significant reduction in red tape Could link into the proposed status neutral Riparian Agreements	May be perceived as a weakening of the provisions of the legislation	Cost of framing new regulations – including and cost of RIS. Cost of consultation with Aboriginal and landholder stakeholders

6.3.8 Recommendations

R52 Ensure full compliance by CMAs with their statutory obligations under the AH Act

Conduct catchment-wide 'desktop assessments' of all riparian land, to the standards set by Part 3 of the *Aboriginal Heritage Regulations* 2007, in order to facilitate CHMPs, should they be required, and in order to help ensure compliance with the *Aboriginal Heritage Act* 2006 by landholders and public authorities alike.

R53 Ensure the exercise of due diligence by CMAs in other cases

For circumstances where the Act does not require a CHMP, the CMAs should develop robust due-diligence standards and procedures to guide their own decisions and those of private landholders who may seek advice.

R54 Assist ordinary landholders to comply with the AH Act

In the case of graziers and other landholders undertaking riparian works (with or without CMA grant funding) the CMAs should offer assistance and advice on compliance with the Act, and due-diligence studies in circumstances where the Act is silent. (This recommendation does not extend to developers and government agencies, who should be expected to manage their own compliance and due diligence.)

R55 Make new Riparian Regulations under the Aboriginal Heritage Act

In the longer term, DSE should seek to have new regulations made under the *Aboriginal Heritage Act* 2006 for low-impact riparian works and activities which aim to conserve riparian values and restore riparian condition. Such regulations to provide that, subject to appropriate safeguards, it is not an offence to disturb Aboriginal cultural heritage in the course of fencing, revegetation and measures to remove stock from riparian areas.

Priorities

Since the Act is in place, and has been since May 2007, the first recommendation is already being complied with; adoption of the second is essential, and the third should be given high priority for implementation. The fourth could be put aside pending the accumulation of experience in the workings of the current Regulations.

7 Roles and Responsibilities of Riparian Agencies

7.1 Overview of this Chapter

This chapter responds to Task 4 of the Project Brief.

Various authorities and agencies have roles in relation to riparian land, as do communities and individual landholders. Some of these roles involve actual land management; others may be better described as control, monitoring, support or coordination.

Central to this analysis are the CMAs, which government has identified as 'caretakers of riparian condition,' although details of this role have not been spelled out. The Victorian River Health Strategy indicated that CMAs will themselves become managers of Crown frontages[40]; but an alternative view is that CMAs will become monitors, coordinators and facilitators of other land managers. This chapter charts a course between these two views.

The chapter considers current deficiencies in riparian roles and responsibilities, which take two broad forms:

- Geographic gaps in land management, particularly for unlicensed linear Crown land
- Functional and coordination gaps, particularly between DSE and the CMAs

In addressing these gaps, the following principles have been adopted

- Agencies should be recognised as having a core business; any additional roles should be complementary to that core business and corporate culture
- Priority for filling geographic gaps should be set in accordance with the priorities identified in the Regional River Health Strategies (RRHSs)
- Any extension of an agency's roles or area of responsibility must be separately resourced

The biggest geographic gap is management responsibility for linear unlicensed riparian Crown land. This is of particular significance when it aligns with areas of high priority under the relevant RRHS. For high-priority riparian Crown land it is recommended that:-

- Parks Victoria, Municipal Councils, and community-based Committees of Management be appointed as land managers, wherever appropriate
- CMAs be engaged to undertake management functions on behalf of DSE for high priority riparian land which cannot be placed under these agencies

For low-priority riparian Crown land, it is recommended that:-

- Existing delegated managers continue
- Further appointments be made as opportunities arise

- DSE builds its own capacity as default manager.

Functional gaps and inefficiencies should be addressed by improved high-level coordination, and cooperation and liaison between the CMAs and DSE.

In the longer term, a range of possibilities emerges for building CMAs' roles as caretaker of riparian condition. These may be regarded either as a set of 'pick and choose' options or, preferably, as an evolutionary process of strategic incrementalism.

Outside public sector agencies, there is also an expanding role for the community – not only as individual landholders, but also as volunteers and delegated managers.

7.2 Current Roles and Responsibilities

7.2.1 Description of the Topic

This section reviews the current roles, responsibilities and powers of government agencies involved in riparian management, and sets the scene for the following section, which explores the scope for improvements, basically within the current institutional framework

Related Sections

Section 7.3 considers roles and responsibilities in an immediate to shorter-term time frame

Section 7.4 considers further roles for the CMAs in the longer term

Section 7.5 looks in more detail at the role of community groups in relation to riparian management

7.2.2 Background to Current Arrangements

Several previous studies have considered riparian roles and responsibilities. Themes running through these studies include (a) the need for inter-agency coordination and (b) the presence of unfilled gaps in riparian management. Government policy has responded by identifying CMAs as 'caretakers of riparian condition.' – but the details of this role have not been enunciated.

The 1997 Review of Catchment Management

In June 1996 the government commissioned a Review of Catchment Management Structures in Victoria[41].

The 1997 report provided the basis of the 1998 restructure of Catchment and Land Protection Boards into Catchment Management Authorities.

The Review considered two options:-

- An Integrated Advisory Option, in which advisory services would be consolidated, but the new body would have no role in managing regional resources or deliver services
- A Community-based Service Delivery Option, in which the advisory roles would be extended by inclusion of waterway management roles, expanded to include floodplain management, coordination of rural drainage, Crown frontage management and management of Heritage Rivers outside National Parks.

The Review recommended adoption of the Service Delivery Option. The recommendation was accepted by government, and the CMAs were subsequently formed.

Major benefits predicted included:-

- Enhanced community involvement
- Integration of planning and service delivery
- Filling existing resource management gaps including functions not adequately undertaken, notably Crown frontage management.
- Streamlining bureaucracy

The service delivery option 'could include field extension, provision of advice, coordination, works, referral and enforcement where relevant.'

Basic Principles

The basic principles proposed by the 1997 study, although addressed to catchments as a whole, apply equally to riparian land:-

- Community Empowerment –

  'service delivery which maximises local involvement and ownership'

- Integrated Management –

  'integrated delivery of services in interrelated issues … e.g. one stop shop approach'

  'capacity to regulate activities with potential to adversely impact on catchment conditions'

  'effective monitoring and review of the management and conditions of catchments and service delivery outcomes'

- Minimising Bureaucracy –

'Minimise need for on-going coordination'

'Maximise devolution of service delivery'

'Minimise overlaps in service delivery'

Resource Management Gaps

The 1997 Review team reported that:-

> *"A large number of submissions … commented on several natural resource management areas which are either currently not managed or not managed well. These include … management of Crown stream frontages. This is, in general, because management of these areas requires the coordination of a number of groups and/or authorities. Currently, for each of these functions, there is considerable confusion over roles and responsibilities, no statewide policy, a lack of ownership and resultant poor management. There is a need for one group to take responsibility for the issue and to coordinate the activities of other relevant groups."*

In response, DSE (or DNRE, as it then was) should

> *"develop detailed policies, guidelines for management and effective transfer mechanisms for… the management of Crown frontages. These would then be incorporated … in Service Contracts between the government and the CMA."*

The 2000 SKM Report[42]

Sinclair Knight Merz (SKM), in its 2000 'Summary of Regional Crown Water Frontage Review Projects' proposed an improved system for managing Crown frontages and stream frontages more generally. It recommended:-

- Responsibility for Crown frontage management should be vested in CMAs.
- CMAs would form community-based Committees of Management for stream systems
- The CMAs would retain fees raised from licences
- A system of status-neutral Frontage Management Agreements would be introduced
- CMAs would be funded to manage unlicensed Crown frontages, and undertake rehabilitation works
- Additional resources would be provided to CMAs for monitoring, enforcement, extension, education etc

The Victorian River Health Strategy

The Victorian River Health Strategy (2002) addressed the issue of a management framework for riparian land.

Key themes of relevance to this project included:-

- The nomination of CMAs as 'caretakers of riparian condition.' This role was not spelled out in any detail, but clearly included the possibility of CMAs becoming managers of Crown frontages.[43]
- The recognition of subsidiarity in institutional arrangements – that is, the assignment of roles and responsibilities to state level, catchment level, or local level according to scale and capacity
- The integration of riparian management requirements into planning systems, and the encouragement of more effective cooperation between local government and the CMAs
- The importance of engaging regional communities in the planning and implementation of river health programs
- The adoption of a partnership approach to dealings between agencies, between government and the community, and between government and landholders.

Stakeholder Views

Officers of several government instrumentalities participated in a workshop during the course of this project (see Appendix 9.7), which considered some of these issues. A wide range of views was expressed, not always consistent, but including the following:-

- Current arrangements would work well, if DSE and CMAs were simply better resourced
- CMAs should not be a manager themselves, but the monitor of other agencies' management
- DSE is best placed to undertake state-wide functions e.g. licence administration

Views of the wider stakeholder community were not sought in the course of this project.

7.2.3 The Department of Sustainability & Environment

The powers and functions of Government Departments derive largely from their role as agents of their Ministers and Secretaries. In this role DSE exercises considerable influence over riparian management.

As Policy Coordinator

Two areas of DSE provide policy support to the Minister for Environment and Climate Change on matters relating to riparian land:-

- The Crown Land Management unit sits within DSE's Public Land Stewardship and Biodiversity Division. Its role is to support, appoint and overview delegated managers of Crown land, rather than to manage CL directly itself. CLM operates at both Head Office and regional levels.
- The Sustainable Water Environment and Innovation Division manages the state's investment and establish frameworks and policies to achieve Government's target for river health. The Division does not have a direct role in the management of riparian land, but can influence through its investment in river health.

As riparian land management gets higher priority, there will be need for better coordination between relevant DSE functional units.

As 'Default' Land Manager

Very little Crown land is actually managed by DSE. Most is managed under delegation, notably by Parks Victoria and Committees of Management including municipalities.

On Crown land for which there is no delegated manager or tenant control resides with the Minister responsible for the Land acts, so DSE is the 'default' manager by virtue of being that Minister's agent. Much riparian Crown land, both reserved and unreserved, falls into this category.

The 'default' management function within DSE falls to the Crown Land Management (CLM) unit, which has both head office and regional staff. CLM has two avenues of resourcing for land management: (a) recurrent budget appropriations, and (b) 'departmental' Committees of Management.

The latter are Committees established under section 14 of the Crown Land (Reserves) Act, but consisting of departmental officers rather than members of the public. These CoMs may be appointed over Crown reserves with a revenue source (e.g. telecommunications towers), and a mandate under section 15(1)(f) of the Act to expend such funds on the better management of Crown land in the region.

As Landlord

The formal landlord for Crown licences is the Minister, but DSE acts as the Minister's agent.

DSE regions determine whether a licence will be issued, to whom, whether it will be under section 130 or 138, what conditions it should contain, what rent is payable, etc.

The DSE Transaction Centre at Seymour is the administrator of data and systems relating to leases and licences of Crown land – including Water Frontage licences.

It performs this statewide function on behalf of all the DSE regions, which until about 2000 administered this function themselves. The consolidation of the function has allowed economies of scale, uniformity of systems, and the development of specialist skills.

The Transaction Centre issues invoices and collects rents, which are not retained by DSE, but credited to Consolidated Revenue.

As Budget Manager

Arguably, DSE's most significant role in relation to riparian land is as budget manager. In this role it obtains funding from State government, makes budget bids for Commonwealth funding (for example, NHT funding), and allocations to CMAs. (Melbourne Water is somewhat different, its revenue coming substantially from the Metropolitan rate).

As Public Risk Underwriter

DSE carries a public risk insurance policy which covers most Crown land and most delegated managers. This arrangement has several benefits over the purchase of insurance cover by individual delegated managers. The policy does not cover tenants, who must obtain their own cover.

Land Registry

Land Registry (known also as the Office of Titles) is the custodian of data relating to freehold land and its ownership. Title data includes no information on topography, and very little on abuttals. Land Registry therefore has no way of distinguishing riparian land from any other.

The Office of the Surveyor General

The Surveyor General within DSE is the State's principal source of survey-related policy and standards including the interpretation of policy and law relating to matters such as the doctrine of accretion. The S-G is the authoritative source of advice on Crown land, and his rulings are invariably accepted as definitive by the courts and the parliament.

Enforcement

DSE includes a specialist enforcement unit, whose traditional focus has been on fisheries and forestry enforcement, but whose services are available to other DSE functional areas. Its specialist expertise includes the collection of evidence and management of legal processes.

The Port Phillip Region of DSE has recently completed a 'Compliance Project' defining this link between the Crown Land Management functional area and the Enforcement functional area[44].

The project is based on the following principles:-

- It is essential to for any regulatory regime to be backed up by enforcement
- The primary strategy is to rectify the offence through extension and liaison
- There should be a direct and decisive route from non-compliance to prosecution
- A strategic approach to choosing which cases to enforce / prosecute – based on risk, cost/benefit, and profile.

The Port Phillip project has drafted a set of flow-charts, standard letters and procedure statements for dealing with offenders. This model may be extended to other DSE regions.

7.2.4 Catchment Management Authorities

CMAs have three sets of roles, all of which are relevant to riparian land:

- Under the Catchment and Land Protection Act 1994, they have certain catchment advisory and planning functions
- Under the Water Act 1989 they take on the role of Waterway Authorities and Floodplain Management Authorities
- Under the Planning and Environment Act 1989 they are referral authorities for the purpose of planning schemes.

CMAs' functions do not entail service delivery - with the exception of the Waterway Authority role.

Roles under the CaLP Act

The State's current CMAs grew from Catchment and Land Protection (CaLP) Boards, which in turn replaced previous bodies which dealt with soil conservation and vermin and noxious weeds.

These functions are listed in section 12(1) of the Catchment and Land Management Act 1994.

Roles under the Water Act

In 1998 CMAs were appointed under the Water Act as 'Authorities with Waterway Districts.' This further role was given to all non-metropolitan CMAs, and to Melbourne Water in the Melbourne Metropolitan area.

In this role, CMAs have additional powers and functions:

- Those available to all Water Authorities under part 7 of the Water Act, and
- Those available to Authorities with Waterway management districts under Part 10 of the Act. These may extend in some circumstances to drainage and floodplain management functions.

CMA functions under the Water Act are confined to 'designated land' and 'designated waterways.'

Roles under the Planning & Environment Act

CMAs are Referral Authorities under the Planning and Environment Act – but only for land covered by the Rural Floodway Zone (RFZ) and the Land Subject to Inundation Overlay (LSIO). This is a small proportion of all riparian land.

Statements of Obligation

Functions are not duties – the difference being that an authority may exercise a function, but must exercise a duty. The gap between functions and duties may be filled by a 'Statement of Obligation.'

Under section 186A of the Water Act, inserted into the Act in 2005, the Minister may issue a Statement of Obligations to a CMA acting as a Waterway Authority. Such statements of Obligation have been made for all CMAs[45].

These Statements require each CMA to act as 'Caretaker of River Health' rather than as 'Caretaker of Riparian Condition.'

CMAs also have Statements of Obligation under the Catchment and Land Protection Act[46].

Melbourne Water's Statement of Obligation is made under the Water Industry Act.[47]

The CMAs and Land Management

Although CMAs have extensive powers and functions, many of which have a clear link to the management of land in the catchment, a CMA cannot be described as the 'land manager.' That role falls to the entity

with control over the land: the freehold owner, DSE, or a Committee of Management as the case may be.

Nevertheless, there are several circumstances in which the roles of CMAs touch very closely on actual land management:-

Through grants programs to land managers, most CMAs are only one step removed from being land managers themselves. Often riparian works are not only conducted with CMA grants, but to CMA specifications and by CMA contractors.

In the case of the Snowy River in East Gippsland, a DSE Project Officer has been assigned the role of liaising between DSE, the East Gippsland CMA and landholders, thus giving the CMA a direct input to the land manager's decision-making. This arrangement has facilitated renegotiation of Crown frontage licences along the Snowy river, and has led to the introduction of a form of tenure-neutral land management agreements (see section 4.6).

Special Case: the Barwon River

Only one CMA has formal land management responsibilities. The Corangamite Catchment Management Authority (CCMA) has had Crown land along the Barwon River vested in it under Schedule 7 (now repealed) of the Water Act 1989.

This unique situation is not the result of any deliberate decision, but is rather a continuation of arrangements entered into by Barwon Water as the CCMA's predecessor.

The case is of little assistance in addressing the question of whether CMAs should be land managers. On the one hand it demonstrates that a CMA can undertake that function effectively; but on the other hand there is nothing to suggest that some other agency (Parks Victoria, the City of Greater Geelong, or a local Committee of Management) could not manage the land equally well.

7.2.5 DSE and CMAs – the Division of Responsibility

Overview Matrix

The following table shows how responsibilities are divided between DSE and the CMAs for various different roles undertaken on three different types of riparian land:-

Role	**Freehold**	**Unlicensed Crown Land**	**Licensed Crown Land**
Overall control	Freehold owner	DSE (as agent of the Minister)	DSE (as agent of the Minister)

Policy and Planning • State level • Regional level • Municipal level	DSE (VRHS, Biodiversity Strategy etc) CMAs (Catchment Strategies and RRHSs) Councils (Planning Schemes)	As for freehold	As for freehold
On-the-ground management • Weeds & pests • Revegetation • Stock control	Landholder (perhaps with CMA funding) Landholder (perhaps with CMA funding) Landholder (perhaps with CMA funding)	DSE (by default) DSE (by default) n.a.	Licence holder (perhaps with CMA funding) Licence holder (perhaps with CMA funding) Licence holder (perhaps with CMA funding)
Monitoring • of frontage condition • of grant compliance • of delegated management • of tenants	CMAs CMAs n.a. n.a.	CMAs n.a. DSE n.a.	CMAs (but only of priority frontages) CMAs n.a. DSE (as landlord)
Extension • re land management practices • re licence issues	CMA n.a.	n.a. n.a.	CMA DSE (CLM)
Enforcement			

• Grants • Licence • Weeds	CMAs n.a. DPI	n.a. n.a. n.a.	CMAs DSE (CLM) DSE (CLM)
Administration • Of grants • Of delegated management • Of tenures	 CMAs n.a. n.a.	 n.a. DSE n.a.	 CMAs n.a. DSE (Transaction Centre)

Gaps and Issues

The main issues emerging from this analysis are: -

- Potential for better coordination of riparian policy across freehold and Crown land
- Lack of any effective management responsibility for Unlicensed Crown land
- Lack of any clear basis for CMA-funded works on unmanaged and unlicensed Crown land
- Potential for conflict / confusion with monitoring and enforcement on licensed Crown land
- Potential for better links between the CMA landholder extension function and the DSE landlord function
- Potential for rationalisation of administration of riparian land – e.g. integrated grant and licence data systems

7.2.6 Delegated Land Managers

The Minister for Environment and Climate Change may appoint delegated managers for reserved Crown land, using powers under the Crown Land (Reserves) Act. No delegated management is available for unreserved Crown land, hence the desirability of reserving all riparian Crown land (see Section 3.2)

Parks Victoria

Parks Victoria (PV) is a statutory authority established under the *Parks Victoria Act* 1998. This Act does not cause any specific land or classes of land to be placed under PV's control, but enables PV to accept a management role on behalf of the State, government agencies,

and other land owners. Under such arrangements, PV has been assigned various roles in relation to waterways and riparian land.

- Under the CL(R) Act, PV has been appointed as Committee of Management for numerous Crown reserves – mostly with conservation- or recreation-related purposes.
- Under a Management Services Agreement with the Secretary for DSE, PV is the manager of all National Parks, State Parks and Regional Parks.
- Under the Marine Act PV is waterway manager for the lower reaches of the Yarra, Maribyrnong and Patterson rivers.
- Under the Water Industry Act Parks Victoria has been delegated authority to issue licences for jetties and moorings
- Under the Port Services Act PV is the Local Port Manager for the downstream reaches of navigable streams flowing into Port Phillip and Western Port.

The type of land usually assigned to Parks Victoria will be land of state or regional significance, where there are high conservation or recreational values.

Comments

No support was expressed through this project for any systemic change to PV's functions, although it was suggested there could be a spatial extension of its responsibilities to more riparian land.

Over time, PV can be expected to take on more riparian land, within the scope of its current roles and responsibilities – for instance, in response to VEAC recommendations.

Councils as Delegated Managers

Municipal Councils cover every part of Victoria with the exception of French Island and the Alpine Resorts. All riparian land is therefore within one municipality or another. Waterways often form municipal boundaries, and the Local Government Act 1989 (section 3(3)) specifies that in these situations the boundary is the centreline of the waterway.

Councils' general powers and functions apply to riparian land as to any land within the municipality: these include the power to levy rates over occupied land, the power to make and enforce local laws, and the power to enforce the provisions of the relevant Planning Scheme.

Municipal councils may manage Crown land under delegation, as Committees of Management under the Crown Land (Reserves) Act.

The Crown land must be reserved, and the appointment may be over one or more reserves, or parts of reserves.

Although there may be some revenue source on the land (caravan park, kiosk etc) the upkeep of the reserve invariably involves a net payment from the council.

This is considered an appropriate arrangement where the land serves municipal purposes, or purposes which the municipality is prepared to support.

Comments

No support was expressed through this project for any systemic change to councils' functions, although it was suggested there could be a spatial extension of their responsibilities to more riparian land.

Over time, councils can be expected to take a planning, management or funding role for more riparian land, under their current suite of powers – for instance, as a result of urbanisation.

Community Committees of Management

Committees of Management for Crown land reserves are a well-established system governed by the *Crown Land (Reserves) Act* 1978. It is a system dating back to the 1800s, when the relevant provisions were found in the Land Acts of the day.

They have been appointed for many reserves near rivers – including reserves for camping, recreation, and watering of traveling stock.

A Committee of Management may consist of:-

- 3 or more persons – these are known as 'local' committees, and are usually incorporated under the CL(R) Act itself.
- Municipal Councils
- Bodies established for public purposes, such as Parks Victoria.

All three types of committee are found in rural and provincial areas, but there are few if any 'local' committees in metropolitan areas.

Committees can manage only reserved Crown land – including whole reserves, parts of reserves, and multiple reserves. The CL(R) Act provides them with powers to issue tenures, charge fees, and enforce regulations.

For further discussion of community-based riparian management, see section 7.5.

7.2.7 Monitoring and Enforcement

The stakeholder Workshop held in the course of this project considered the possibility of CMAs acting as 'monitors' of Crown licences. Feedback from the workshop indicates that this should be placed in the context of riparian monitoring in a wider sense.

All monitoring is for the purpose of informing some subsequent action – usually in the form of remediation of deficiencies identified by the monitoring. Remediation may take the form of policy development, program revision, extension or liaison with offenders, or enforcement through prosecutions.

The following table illustrates the range of monitoring which occurs in relation to activities on riparian land:-

Matter to be Monitored	**Monitoring Agency**	**Purpose of Monitoring**
Monitoring Water Quality	DSE using regional water quality monitoring partnerships	To assess the condition of water quality and identify water quality trends (including threats) and compliance against SEPP and other targets.
Monitoring Riparian Condition (through Index of Stream Condition)	CMAs	To assess the condition of the riparian zone throughout the state To assist in setting priorities for riparian protection and enhancement
Monitoring Tenants	DSE as landlord	To set licence conditions To enforce compliance with licence conditions
Monitoring Delegated Mangers	DSE as Minister's agent	To optimise management arrangements To ensure statutory compliance
Monitoring Grant Compliance	CMA as grant administrator	To ensure quality of works To ensure proper accountability for grant monies
Planning Scheme Compliance	Council as Planning Authority	To ensure compliance with Planning Scheme To initiate remedial actions including prosecutions

All types of monitoring rely on on-ground presence. This may be supported by office-based use of aerial photos and correspondence, but office monitoring without field monitoring will be ineffective.

Duplication of field visits would be highly inefficient. As a field-based activity, monitoring is best undertaken by an agency with field staff.

Prosecution, on the other hand, is a specialist function requiring specialist staff authorised to conduct investigations and undertake court action.

7.3 Optimising Existing Arrangements

7.3.1 Description of the Topic

Building on the picture laid out in section 7.2 above, this section proposes options for improving riparian management, essentially through:-

- working towards the appointment of designated managers for all high priority riparian Crown land
- the strategic management of low priority riparian Crown land
- extending existing agency roles, essentially within their existing charters
- improving cooperation and coordination functions.

Related Sections

Section 7.4 considers further roles for the CMAs in the longer term

Section 7.5 looks in more detail at the role of community groups in relation to riparian management

7.3.2 Options for Management of High-Priority Riparian Land

A recurrent theme running through analyses and commentaries is the lack of effective management for much riparian land. This deficiency is most notable for those linear Crown land frontages not under licence.

To appoint a formal manager for all riparian Crown land in the state is probably an unrealistic target in the shorter term. A more realistic target would be the appointment of a formal manager for all land designated as ‘high priority’ in Regional River Health Strategies.

Various candidates for this management function are available:-

Parks Victoria

Parks Victoria has a well-established capacity for land management. Its core business is management of land of national or state significance - including much riparian land, notably State Parks, Regional Parks, and Nature Reserves with a river frontage. However, the criteria of significance which have caused land to be included in Parks Victoria's portfolio may not be the same criteria as those used for the RRHSs.

In some areas Parks Victoria also has certain river-related functions, such as management of recreational boating.

The addition of some linear Crown reserves to the Parks Victoria portfolio would thus be an extension of that agency's established core business.

Parks Victoria may be appointed as manager through the Crown Land (Reserves) Act, or as *de facto* contractor to the Secretary for DSE under the DSE/PV Service Agreement.

Municipal Councils

Local government also has a well-established capacity for land management. Every council already manages a portfolio of public land, including its own freehold reserves and Crown land for which it is Committee of Management. This land is usually of local or regional significance, and often includes urban land and land of recreational and community use.

The base funding for a council's land management functions is rate revenue – an appropriate source since the beneficiaries are, in general, the local community.

The addition of some linear Crown reserves to a typical Council's portfolio would seem to be an attractive option.

Councils may be appointed as manager of Crown frontages under the Crown Land (Reserves) Act, provided that all the land in question has been reserved.

Community Committees of Management

Community-based Committees of Management have been a central feature of Crown land management for well over 100 years. Most of these 'local' Committees of Management manage only a single discrete reserve – a public hall, a recreation reserve, a camping ground etc – but the basic statutory formula also serves as a basis for community-based management of multiple Crown reserves of state significance. One such community-based Committee of Management

which may serve as a model here is the Great Ocean Road Coast Committee (GORCC).

Given the emerging community enthusiasm for conservation causes, it would appear reasonable to envisage such committees managing riparian land along many major rivers in the state.

The CL(R) Act provides two statutory bases for community-based Committees:-

- Section 14(4)(a) provides for three or more persons to become a CoM, which may then be incorporated under section 14A
- Section 14(4)(e) provides for the appointment of bodies corporate already established for a public purpose under some other Act – such as Community Management Networks (CMNs) or LandCare groups incorporated under the Associations Incorporation Act 1981.

These options are further discussed in section 7.5.

Community Committees may be appointed as manager of Crown frontages under the Crown Land (Reserves) Act, provided that all the land in question has be reserved.

Catchment Management Authorities

CMAs already conduct land management functions, even though they do not control the land in question. They fund works undertaken by other land managers, they often specify those works, and even undertake works themselves using their own staff or contractors. Thus CMAs have the basis of a capacity to become land managers – either on a permanent or temporary basis.

The CMA grants programs are already used to achieve better riparian management in many circumstances, but there are some notable exceptions:-

- Crown land where there is no licensee.
- Crown land where the licensee chooses not to accept a grant
- Freehold riparian land where the landholder chooses not to accept a grant.

Various strategies are available to deal with these circumstances, including (in the first two cases) the appointment of a land manager. Candidates for appointment include the three already discussed (Parks Victoria, the local council, and a community Committee of Management) – but if these are unavailable or unsuitable, it may be expedient for the CMA itself to be given direct management responsibility.

There are two statutory mechanisms under which this may occur:-

- CMAs as Water Authorities may have Crown land vested in them under section 131 of the Water Act
- CMAs may be appointed as Committees of Management under section 14 of the CL(R) Act. (The Barwon River through Geelong is already managed by the Corangamite CMA, appointed under Schedule 7 of the Water Act 1989.)

Critical Works on Unmanaged Riparian Land

There is a third way of authorising CMAs to undertake works on Crown frontages – but without causing them to become the formal land manager.

- Under sec 18B, Crown Land (Reserves) Act, the Secretary for DSE can enter into a 'Management Agreement' with any person for the management of Crown land.

This option has the attraction of allowing the appointment to be limited in its scope. For instance, an 18B agreement could limit the duties and risk exposures of the CMA, and could be for a specified limited duration. A CMA could be authorised to undertake works on the land without incurring the obligations and responsibilities of a formal land manager.

The option also has the attraction of overcoming the present impasse where a CMA wishes to fund an abutting landholder to undertake works, but the landholder does not hold a Crown frontage licence. Under this option, the CMA would be authorised to conduct the works, and whom it engaged as a contractor would be immaterial.

An extension of this option could see CMAs engaged to conduct works on licensed Crown land, even where licensees are not willing to accept a grant and undertake the works themselves.

7.3.3 Options for Management of Low Priority Riparian Land

Despite the focus on high priority riparian land, other riparian land will also need management from time to time. This includes land hitherto held under licence, but where the licence is relinquished or not renewed. In these circumstances, three management options are available:-

Continue Existing Management Arrangements

If there is an existing designated manager (Parks Victoria, the local council, or a community Committee of Management) there may be no reason to upset the *status quo*. Parks Victoria and councils are

appointed for indefinite or unspecified terms, but community based Committees of Management are usually appointed for three-year terms. All should come under periodic review, but it may be anticipated that appointments will just roll over, unless some better arrangement presents itself.

Opportunistic Appointments

Opportunities may arise to review the appointment of existing managers, or to appoint new managers. These opportunities may arise from various causes – including development or subdivision of abutting freehold land, construction of council bike-paths, or the emergence of local volunteer groups keen to be involved in conservation works. In such cases, the opportunity should be taken to consider use of the options outlined above for high priority land.

DSE as Default Manager

For many years to come, it can be expected that there will be riparian land for which no designated manager can be found. The manager will be, by default, DSE. The Crown Land Management (CLM) division within DSE has two strategies for obtaining revenue to support this function:-

- Increase DSE's recurrent budget appropriations to fund high priority riparian management. CLM's capacity for riparian management could be better funded through tied Treasury appropriations, or through DSE's internal allocation of untied appropriations.
- Establish Departmental Committees of Management to raise revenue for riparian management. Under such an arrangement, Committees consisting of three Departmental officers would be appointed over revenue-generating Crown reserves (not necessarily riparian - for instance, sites of telecommunications towers) and instructed under section 15(1)(f) to expend such revenues on Crown land in the region which would otherwise go unmanaged.

7.3.4 Options for Coordination

There is no formal coordinating body for CMAs, as there is for other regionalised land managers. In contrast, Coastal Management Boards are coordinated by the Victorian Coastal Council (VCC), and Alpine Resort Management Boards are coordinated by the Alpine Resorts Coordinating Council (ARCC). The state's 78 councils are represented at state level by the Municipal Association of Victoria (MAV).

Two non-statutory arrangements currently facilitate liaison between CMAs :-

- Monthly meetings of the CMA CEOs
- The Waterway Managers' Forum

The CF&L Act (section 12) contains provisions allowing the establishment of formal councils to advise on the operation of other Acts, even where those other Acts themselves have no such provision. These bodies must be 'for the purposes of the CF&L Act'- a proviso which would be put beyond doubt if Part 10 of the Water Act was scheduled as a 'relevant law' under the CF&L Act.

A Ministerial Riparian Policy Council

State-wide coordination of riparian policy may be enhanced by a Ministerial Committee, established under section 12 of the CF&L Act, and consisting of the Chairpersons of all CMAs and Melbourne Water, or their representatives. Such a Council could meet twice per year and be charged with advising the Minister on the refinement of riparian policy as enunciated by government.

A Riparian Coordination Committee

State-wide coordination of CMAs' riparian programs may be enhanced by a Ministerial Committee, established under section 12 of the CF&L Act, and consisting of the CEOs of the CMAs and Melbourne Water, or their representatives. Such a Committee could meet quarterly, and be charged with advising the Secretary on the introduction of the type of measures recommended in this report.

DSE internal coordination

Several sections within DSE have an interest in riparian policy and riparian management. There may be a need for coordination, particularly between the Crown Land Division (both at the Head Office level and the Regional level) and the Sustainable Water Environment and Innovation Division, amongst others.

The need for coordination will only increase if the recommendations of this report accepted, and in the light of the impending 2009 licence renewal.

An option to be considered is therefore an internal Task Force to:-

- Coordinate the 2009 licence renewal
- Facilitate liaison between relevant DSE units
- Plan extension programs to community, CMAs, and landholders

- Support the proposed Ministerial coordinating committees

7.3.5 Options for Cooperation

Another recurrent theme running through past commentaries, and emerging at the stakeholder workshop conducted in the course of this project, is the need for better intra- and inter-agency cooperation, particularly between the CMAs and DSE.

CMA support for DSE

CMAs may take on advisory roles on behalf of DSE, provided those roles fall within their functions under the CaLP Act, and provided they do not involve the exercise of powers which the CMA does not hold.

DSE as landlord of licensed Crown frontages has very limited capacity for monitoring its tenants or the land they occupy. This seriously impedes capacity to set appropriate licence conditions and to enforce compliance with those conditions, once set.

CMAs' Statements of Obligations require them to "advise the Department on conditions for licences in respect of Crown frontages."

The extent of this advice is not spelled out, nor does DSE have any obligation to accept it. Some CMAs advise that DSE ignores advice; some DSE staff report that advice from the CMAs is unreasonable or legally unsound. These difficulties may well be overcome by the adoption of the liaison model developed in East Gippsland.

DSE support for CMAs

DSE may provide services to CMAs, and take on functions on behalf of CMAs, using its powers as agent of the Minister and the Secretary under various Acts.

Several riparian-related functions should remain centralised within DSE (even if in the longer term they might be transferred to the CMAs). These include:-

- Administration of tenures
- Enforcement and prosecution
- Database management
- Design of processes and documents

Advantages of centralisation include access to sources of specialist expertise, uniformity of approach, and efficiencies of scale.

Disadvantages include lower responsiveness and loss of local autonomy.

DSE-CMA liaison staff

Management outcomes along the Snowy River have been improved through an arrangement between the Crown Land Management section within the DSE Gippsland Region, and the East Gippsland CMA. Under this arrangement, a DSE officer is funded by the CMA, and acts as a liaison between DSE, the CMA, and Crown licence holders.

An attractive option is therefore to extend this model to other DSE regions.

7.3.6 Analysis

Nature of These Options

The options for management of high-priority riparian land by Parks Victoria, Councils, community-based Committees of Management or CMAs may all be adopted, although for any specific tract of land they are mutually exclusive alternatives.

The options of strengthening DSE's capacity as 'default' manager and engaging CMAs to undertake critical works may be seen as complementary, although it would be possible to adopt one without the other.

Options for central coordination are not alternatives: some or all of them may be adopted.

Likewise, the various options for improved DSE / CMA cooperation are not alternatives: some or all of them may be adopted.

Option ***Legislative Basis***	**Advantages** **Strengths**	**Disadvantages** **Weaknesses**	**Cost** **Effort**
Options for Management of High Priority Riparian Land			
• Appoint Parks Victoria as Committee of Management *Sec 14, CL(R) Act*	Established land management capacity Good accountability to central government	No formal links to CMAs or local government	Cost of corresponding increase to PV budget appropriation
• Appoint municipalities as Committees of Management *Sec 14, CL(R) Act*	Established land management capacity Local management of locally significant land	May be seen as cost-shifting from state to local government	Largely ratepayer funded Effort of negotiating CoM appointments
• Appoint	Captures extensive	Volunteer skills and	Highly cost effective

community Committees of Management *Sec 14, CL(R) Act*	community goodwill and commitment to conservation issues	resources may be of uneven quality	Effort of establishing and supporting volunteer groups
• Appoint CMAs as Committees of Management *Sec 14, CL(R) Act*	Gives CMA full range of powers (e.g. to issue tenures and make regulations) Follows an established model (CCMA as manager of the Barwon at Geelong – appointed under Sch 7 of the Water Act)	Burdens CMA with responsibilities (e.g. dealing with tenants and casual users)	Cost of additional land management – *less* income derived from tenures
Option for Critical Works on Unmanaged Riparian Land			
• Engage CMAs under a Management Agreement with the Secretary for DSE *Sec 18B, CL(R) Act*	Allows CMAs to undertake works without becoming the formal land manager Responsibility retained by DSE as 'default' land manager Enables works by an abutting landholder who does not hold a licence	Land is still without a formal manager	Will only be used where benefits exceed costs
Options for Management of Lower Priority Riparian land			
• Make opportunistic management appointments *Sec 14, CL(R) Act*	Progress towards management coverage of all riparian Crown land	May tend to be ad-hoc Could divert attention from high priority reaches	Low cost and effort
• Strengthen DSE's capacity as 'default' manager *Secretary's discretion*	Continuity of existing arrangements	Unlikely to deliver results on the scale required	No cost if funded through Departmental Committees of Management
Options for State-level Coordination			
• Convene a Riparian Council of CMA Chairpersons	Would provide a formal, clear, uniform avenue of communication between Minister and CMAs	May overlap with Victorian Catchment Management	Low cost (say two meetings per year)

Sec 12, CF&L Act		Council (VCMC)	
• Convene a CEOs' Riparian Coordination Committee *Sec 12, CF&L Act*	Would promote efficiencies and consistency of CMA approach to riparian operations		Low cost (say four meetings per year)
• Set up a Riparian Task Force within DSE *Secretary's discretion*	Will ensure maximum benefits at 2009 licence renewal Will assist cross-divisional and cross-regional implementation of riparian reforms	None perceived	Cost and effort of another committee
Options for inter-agency Cooperation			
• CMA on-ground licence monitoring support for DSE *Sec 18B, CL(R)Act or Sec 18 CF&L Act*	Provision of effective link between landlord and tenant Sound basis for decisions about licence renewals / variations in 2009 and beyond	None perceived	Funding of additional CMA site inspections May need development of training and reporting systems
• DSE liaison, administrative and enforcement support for CMAs *Secretary's discretion*	Extension of East Gippsland liaison function to all DSE regions Development of standard systems (e.g. uniform landholder agreements; enforcement and prosecution protocols)	None perceived	Cost of DSE resource Effort of liaison amongst 10 CMAs

7.3.7 Recommendations

R56 Appoint a formal land manager for all high-priority riparian Crown land by 2010

- Appoint Parks Victoria to manage high-priority riparian land of national or state significance
- Appoint municipal councils to manage high-priority riparian land of regional or local significance
- Appoint community-based Committees of Management for riparian land where community resources allow

- Appoint CMAs as Committees of Management for high-priority sites in need of active management, but where the above three options are not appropriate

R57 Engage CMAs (as agents of the Secretary for DSE) to undertake critical works on high-priority riparian land for which the designation of a formal manager is not necessary

- An engagement under section 18B Crown Land (Reserves) Act will allow CMAs to undertake works, even where there is no designated manager, and even where the abutting owner does not have a Crown frontage licence

R58 Strengthen DSE's capacity to respond to critical management issues on Crown land with no designated manager

- The use of 'Departmental' Committees of Management to capture revenue from non-riparian sources should be investigated

R59 Improve central coordination of CMA riparian functions

- Convene a Riparian Policy Council under section 12 of the CF&L Act, consisting of the Chairpersons of all CMAs
- Convene a Riparian Coordination Committee under section 12 of the CF&L Act, consisting of the CEOs of all CMAs

R60 Streamline DSE internal coordination of riparian functions

- Set up an intra-Departmental Riparian Task Force

R61 Engage CMAs to support DSE functions

- CMAs to monitor Crown frontage licences
- CMAs to provide extension services to licensees
- CMAs to advise DSE on licence conditions and compliance

R62 Provide DSE specialist services to CMAs

- DSE to appoint a CMA Liaison Officer in all DSE Regions
- DSE to provide specialist enforcement and prosecution services
- DSE to develop joint, interfaced DSE-CMA data systems

Priorities

Highest priority should be given to actions related to the 2009 licence renewal. These include:

- Establishing a DSE internal Task Force
- Engaging and funding CMAs to monitor licensed frontages on DSE's behalf

Other items are of high priority, but perhaps without the urgency connected with the 2009 renewal.

7.4 Building CMAs' Roles

7.4.1 Description of the Topic

This section considers additional functions which could be conferred on CMAs in the longer term.

It develops options for enhancing CMAs' role as caretaker of riparian condition across private and public land tenures.

The possibility of viewing new functions as a set of 'pick and choose' options is acknowledged, but the recommended approach (we call it 'strategic incrementalism') is to see new functions as evolutionary and sequential.

However they are introduced, these functions are currently not well resourced within DSE, so their transfer must be linked to new recurrent funding. Their incremental introduction will allow, at each stage, the construction of a case for new funding of the next stage.

Related Sections

Section 7.3 discussed options for enhancing or extending CMA functions in the shorter term.

Section 7.5 looks at the scope for enhanced community involvement.

7.4.2 Role Reassignment Mechanisms

Administrative Arrangements and Delegations

There are several ways of transferring roles and responsibilities from one agency to another. For any transfer, there must be two powers: the power to make the transfer of responsibility and the power to accept the transferred responsibility.

The Administrative Arrangements Act 1983 provides a process under which a reference in any Act to a Minister, Department or officer may be taken to be a reference to another Minister, Department or officer.

The Conservation Forests and Lands Act 1984 includes provisions allowing the Minister for Environment and Climate Change, and the Secretary for DSE to delegate powers, functions and duties to a nominated entity or officer.

Service Agreements

The purchaser-provider model which gained some currency in the 1990s served as a basis for the assignment of functions to Parks Victoria.

In accordance with this model, DSE enters into an annual service agreement with Parks Victoria. The Agreement commits funding to PV (from both the Metropolitan Parks levy and State budget sources) and includes requirements for delivery of outputs, service standards and reporting. Because DSE is PV's only client, the service agreement constitutes PV's entire annual business plan.

7.4.3 Strategies for Growth

This section assumes that CMAs are to take on further roles in the course of becoming 'caretakers of riparian condition.' Roles suggested for consideration include:-

- Acting as monitor of Crown licences on behalf of DSE
- Acting as proponent of critical works in high priority riparian land where no more appropriate manager can be identified
- Accepting appointment as Committee of Management for particular sites or reaches
- Acting as landlord of licensed Crown frontages
- Acting as manager of all Crown land not under licence and not under some other designated manager
- Becoming controller of the Land Acts, insofar as they apply to riparian Crown land
- Acting as Referral Authority under the Planning Scheme for works and changes of use on freehold land

The first few of these roles, which might be seen as 'short term' options, were discussed in section 7.3; the remainder are seen as 'longer-term' options are discussed in this section.

These additional roles could be seen as either *ad hoc* options to be adopted independently of each other, or as an evolutionary process.

The Pick and Choose Strategy

It would be possible to adopt any one of the options considered here, without it being seen as a step in an incremental process. Indeed, it would be possible for each CMA to go its own way, and adopt different sets of new roles.

Strategic Incrementalism

An alternative approach to the acquisition of new riparian roles and responsibilities would be through a program of strategic incrementalism. This would be an evolutionary strategy: each step would help illuminate and shape the next.

If carefully designed, each stage would see:-

- tangible output benefits
- development of relevant resources and skills
- experience to support advance to the next stage
- data to support resourcing bids
- no commitment to advance to the next stage

7.4.4 Options for Further Expanding CMA Roles

In section 7.3 it was recommended that CMAs take on a monitoring role on behalf of DSE, and that they undertake critical works for high priority riparian land where no more appropriate manager can be found. The possibility of CMAs being appointed as formal Committees of Management was also canvassed in 7.3, and is reiterated here as an option which continues to be open in the longer term.

Of these options, only the first (Referral Authority) relates to riparian freehold land; all the others relate to riparian Crown land.

Referral Authority under Planning Schemes

If, as recommended elsewhere, land within 20 metres of all major waterways is zoned Environmental Sensitivity Overlay (ESO), then CMAs could be given a corresponding role in relation to matters that require planning permits under the overlay.

This would occur through an amendment to the Clause 66.03 of the Victorian Planning Provisions (VPPs) making the CMAs referral authorities for riparian ESOs.

To prevent all the CMA's own works from having to get a planning permit, the CMAs would be designated as 'Public Land Manager' under of the VPPs by an amendment to clause 72.

Monitor of Frontage Licences

See section 7.3

Undertaking Critical Works

See section 7.3

CoM for High Priority Reaches

The options of appointing other managers (Parks Victoria, Municipal councils, and community-based Committees of Management) remain open in the longer term, and it may be that over time all high priority riparian land has one of these agencies as its designated land manager. Nevertheless, the option remains open of appointing CMAs themselves as Committees of Management.

The workshop conducted in the course of this project raised misgivings about this option. It was suggested that a CMA's role as facilitator and mentor of other land managers would be compromised if it itself was also a land manager.

Landlord of Crown Frontage Licences

Over time, CMAs could move from being an advisor to DSE, in relation to Crown frontage licences, to being the actual delegated landlord on behalf of the Minister. This would establish a clear direct relationship between landholders as tenants and the CMA as caretaker of the riparian environment, and eliminate the need for coordination between CMAs and DSE over licence conditions, reviews, transfers etc.

Manager of all unmanaged Crown land

This option is for CMAs to take over the role now exercised by DSE, in relation to unmanaged riparian Crown land.

The unmanaged Crown frontages of concern here are defined by exception: they include everything except licensed frontages, those already under Committees of Management, and those forming part of larger Crown land parcels such as parks, under Parks Victoria.

There is no designated manager for this land, which means that the default manager is DSE as agent for the Minister.

By transferring responsibility from DSE the CMAs, the approach to this land could be raised from management by default (*i.e*. DSE's current role) to deliberate management by a designated land manager.

Mechanisms for such a transfer are available under the Crown Land (Reserves) Act, the Water Act, and the Conservation Forests and Lands Act.

Controller of the Land Acts, insofar as they apply to riparian Crown land

This is the option which sees CMAs given the maximum control possible over riparian Crown land.

Under this option, CMAs would become the Minister's agent for operation of the Land Act and Crown Land (Reserves) Act, in lieu of DSE. They would take on all roles currently undertaken by DSE, including the appointment of all other CoMs, the granting of all tenures, the making of regulations, and acquisitions and disposals of land.

This option could be effected through Orders under the Administrative Arrangements Act.

7.4.5 Analysis of Options

Nature of these Options

The two strategies for adopting new roles ('pick and choose' or 'strategic incrementalism') are alternatives. One or the other could be adopted. Within each of these overall alternatives there are, of course, many sub-alternatives.

Under the 'pick and choose' strategy, the other options outlined above may be seen as alternatives, some of which may be adopted and others not.

Under strategic incrementalism, they may be seen as sequential and evolutionary – but not necessarily in the sequence in which they are discussed above.

Option ***Legislative basis***	**Advantages** **Strengths**	**Disadvantages** **Weaknesses**	**Cost** **Effort**
Strategies for adopting new roles and responsibilities			
• 'Pick and choose'	Flexibility. Different CMAs may adopt different roles Does not imply any ultimate end-point	Haphazard and *ad hoc*. No sense of direction. Possible inconsistencies across CMAs	n.a.
• 'Strategic incrementalism'	Will provide a sense of direction to long-term policy Will allow each step to be refined in light	May be seen as heading towards some unknown or inappropriate end point	n.a.

	of accumulating experience Will allow evolutionary expansion of CMA resources and capabilities		
Further Roles in relation to Freehold land			
• Give CMAs a greater role under Planning Schemes *Amendment to VPPs*	CMA control (as referral authority) for all riparian works and changes of use requiring a planning permit Will build on CMAs' current role as Referral Authority for LSIO land	Could expose all CMA works to planning permits - unless CMAs are recognised as Public Land Manager	Cost of amendment to VPPs Cost of inserting ESOs into all planning schemes Cost of statutory planning staff to handle referrals
Further Roles in relation to Crown land			
• Appoint CMAs as Committees of Management for specific parcels of riparian Crown land *Sec 14, CL(R) Act*	In places where other designated managers (Parks Vic, Councils, community CoMs) cannot be found, this option could be used to ensure that all high priority riparian land has a designated manager	CMAs would for the first time become statutory land managers. This may be seen as a departure from their traditional roles and functions	Cost of improved management of land brought under CMAs as CoMs
• Appoint CMAs as landlord of all Crown water frontage licences *Admin Arrangements Act or Sec 14 CL(R) Act*	Will implement government policy as set down in VRHS (If frontage provisions have been moved from Land Act) will allow CMAs to retain revenue Will ensure continuity of management if licences are revoked or not renewed		This further appointment should be made only with a further commitment of recurrent funding Need for some skill-base transfer from DSE Will require new reporting arrangements for DSE transaction centre, which will continue to administer licences

• Appoint CMAs as manager of all unmanaged and unlicensed riparian Crown land *Sec 18B CL(R) Act*	Will provide a clear manager for every piece of riparian land Will kill off old idea of 'default' management Will put CMAs in better position to advise DSE on budget needs	May encourage unreasonable expectations about the extent and speed of improved management	This appointment should be made only with a substantial commitment of recurrent funding – over and above DSE's 'default management' budget
• Assign responsibility for CL(R) Act for riparian land *Admin Arrangements Act or legislative amendment*	Will allow CMAs to - appoint and control local and council CoMs on riparian Crown land - recommend regulations - control non-agricultural riparian tenures	Will cause CMAs to be held responsible for the deficiencies of all riparian land	This further appointment should be made only with a further commitment of recurrent funding Legislative amendment

7.4.6 Recommendations

R63 Expand CMA Roles and Responsibilities through Strategic Incrementalism.

The 'strategic incrementalism' option is recommended in preference to the 'pick and choose' option which is seen as being uncoordinated and directionless, and lacking in vision.

The following roles should all be regarded as candidates for consideration in framing a strategy:-

- Engage CMAs to monitor Crown licences and advise DSE
- Engage CMAs for critical works on unmanaged Crown land
- Appoint CMAs as landlord of all licensed Crown frontages
- Engage CMAs to manage all unlicensed Crown land
- Make CMAs Referral Authorities under Planning Schemes

The option of re-assigning responsibility for the Land Acts from DSE to the CMAs is not recommended, because it would probably not deliver any net benefits.

Priority

Engaging the CMAs to monitor Crown frontages is urgent, if any significant advance in riparian management is to be achieved at the 2009 licence renewal

The other options are less urgent.

7.5 Engaging the Community

7.5.1 Description of the Topic

This section considers community or landholder-side contribution to riparian land management, beyond the contributions which may be made by individual landholders.

It recommends that DSE and CMAs jointly auspice three different pilot schemes for landholder-based delegated management of riparian Crown land:-

- Crown Land (Reserves) Act Committees of Management
- CMA subcommittees under the Catchment and Land Protection Act
- Incorporated Associations

Related Sections

Section 7.2.4 outlines various forms of delegated management

Sections 4.5 deal with relationships with landholders acting as individual property owners

7.5.2 The Volunteer Role

Community involvement may occur at various levels:-

- consultation
- voluntary management, under agency control
- paid management, under contract
- a degree of formal control, under delegation

Government policy strongly supports community involvement on various levels. Often this takes the form of an advisory or consultative role[48]:, but it may take the form of actual assignment of management responsibility.

Management Support

The community may be a resource for active land management. 'Friends of' groups have long been associated with many parks; LandCare groups have become a well-established part of the rural community; and Conservation Management Networks (CMNs) are

now emerging as an avenue of community involvement well-suited to riparian land management.

Formal Responsibility

The strongest available relationship involves the formal appointment of a community group as a land manager. This can (and does) occur under the Crown Land (Reserves) Act. The group must be either:-

- three or more individuals, appointed as Committee of Management, and then incorporated under section 14A of the CL(R) Act, or
- a body which is already incorporated "for a public purpose" under the Associations Incorporation Act.

7.5.3 Issues

Competence

Questions of skill levels, application and probity have arisen in relation to community organisations – including Committees of Management of Crown land. An effective system of monitoring and accountability is necessary to ensure that the best results are achieved from voluntary inputs.

Accountability

Community groups may not be willing to come under what they may see as undue bureaucracy. It is necessary to ensure they comply with basic standards of accountability, without dampening their enthusiasm. This can be established by providing administrative support from within a government agency for bookkeeping, records, statutory obligations etc.

Risk Management

The major risks to which community groups may be exposed can be ameliorated by:-

- Incorporation: which shifts most risk exposure from individual members to the body corporate (bodies established under any of the options outlined below will be incorporated)
- Insurance: which can be expensive, but cheaper if bought in bulk – as is the case with DSE's public risk policy for Committees of Management and Conservation Volunteers.

7.5.4 Options

Common to all the options below is the need for administrative support. Community groups often lack the skills or willingness to

take on what they see as administrative overheads. Support could be provided by:-

- DSE or the relevant CMA providing in-house officer time or
- funding the community group to engage its own secretary/bookkeeper, and providing that person with appropriate training.

Committees of Management under the CL(R) Act

There are 1500 'local' Committees of Management across the state – predominantly in rural areas. They manage a diverse assortment of Crown reserves of local significance: public halls, recreation reserves, showgrounds, racecourses, caravan parks, war memorials and so forth.

Traditionally, this formula was applied only to land of local significance, and on a 'one-committee-for–one-reserve' basis. It may, however, be effectively applied outside these traditional limitations, as demonstrated by the Great Ocean Road Coastal Committee (GORCC).

Committees are appointed by the Minister for Environment and Climate Change under section 14 of the Crown Land (Reserves) Act 1978. The Act allows a wide variety of Committee structures.

The Act is silent on how members may be selected for appointment, although were traditionally appointed by a form of election. Modern practice is to call for expressions of interest on a skills basis.

A Committee may retain revenue generated on the reserve (for instance from grazing), and on this basis many Committees are self-sustaining. For an entirely natural reserve, where there is no revenue source, Committees must rely on grants or donated voluntary resources.

"19J" Committees under the CaLP Act

Section 19J was inserted into the Catchment and Land Protection Act 1994 in October 2006, and has not yet been utilised.

A section 19J Committee may be set up to advise the CMA, or to exercise powers delegated to it by the CMA.

Incorporated Associations

The Associations Incorporations Act provides a well-accepted and widely-used formula for the governance of entities as diverse as sporting clubs, historical societies and environmental societies.

If its constitution is correctly structured, such a group could:-

- Apply for grants from State, federal and private sector

- Enter into management contracts with a CMA or with the Secretary for DSE
- Accept appointment as a Crown Land Committee of Management.

Conservation Management Networks

Conservation Management Network is the name given to a model for community-based conservation developed by the CSIRO Division of Wildlife and Ecology and Greening Australia[49]. For our purposes they fall into the category 'Incorporated Associations' discussed above.

The model comprises consortiums of the general community and land managers, facilitated by a government coordinator, and focussed on a network of land parcels (private land or public land or both) with the objective of improving some biodiversity indicator or outcome.

There are currently five CMNs in Victoria, including one for the Broken Boosey Creek system around Nathalia. Some are informal networks housed by the relevant DSE region; others are incorporated bodies established under the Associations Incorporations Act 1991.

7.5.5 Analysis of Options

Nature of these Options

The options in this box are independent. None, some, or all of them may be adopted.

Option ***Legislative basis***	**Advantages** **Strengths**	**Disadvantages** **Weaknesses**	**Cost** **Effort**
• Set up 'Local' CoMs *Crown Land (Reserves) Act* 1978, Section 14A	DSE has control over membership and conditions of appointment Accountable to DSE Volunteer ethic Strong community links	Cannot function outside specified Crown reserve No official connection to CMA	May be self-sustaining from reserve revenue May apply for grants Low-level admin support from DSE
• Set up CMA Committees *Catchment and Land Protection Act* 1994, Section 19J	CMA has control over membership and terms of reference Accountable to CMA May be remunerated	No official connection to DSE May tend to stray from its official charter	Members entitled to be paid fees Administrative support from CMA

	Not necessarily tied to particular areas/parcels of land		
• Engage independently created community associations (e.g. Conservation Management Networks) *Created under the Associations Incorporations Act 1981; appointed under section 14, Crown Land (Reserves) Act*	Autonomous. Strong community links May build on goodwill associated with LandCare and CMAs May be appointed as CoMs for Crown land Not necessarily tied to particular land May enter into management contracts	Primary accountability is to its own membership Government / CMA has no direct control Little control over who may become a member	Facilitator salary from DSE May apply for grants

7.5.6 Recommendations

R64 Actively encourage and auspice community groups for formal involvement in riparian management

DSE and CMAs should actively seek to make better use of the reservoir of community resources and goodwill available for the management of public land, through…

- Establishing local Committees of Management under the Crown Land (Reserves) Act
- Establishing Advisory Committees under section 19J of the CaLP Act
- Giving encouragement and support for community-based Incorporated Associations
- Providing DSE administrative support for Community-based riparian management

R65 Sponsor an independent research study into community involvement

The Secretary for DSE should commission an independent / academic longitudinal study of community involvement in riparian land management, with a view to evaluating the merits of the four community involvement models recommended above

Priorities

There is no particular urgency to appoint community-based riparian managers, but given the growing community concern for conservation issues, and capacity for voluntary involvement, it would be a pity if progress in this direction was deferred.

8 The Reform of Riparian Legislation

8.1 Overview of this Chapter

Primary Legislation

Three options are considered for introducing the numerous legislative reforms recommended in this report.

The option of piecemeal amendments to various Acts, if and when those Acts come up for review, is rejected as being unlikely to deliver results in a timely manner, if at all.

The second, preferred option is the simultaneous and coordinated amendment of a series of existing Acts. This would be effected through a Riparian Land Reform Bill which, when proclaimed, would amend various other Acts, after which it would be rescinded. To help illustrate how this option would work, Appendix 9.2.1 includes a set of drafting instructions for Parliamentary Counsel.

The third option is a separate, stand-alone Riparian Land Management Act (comparable to the Coastal Management Act or the Road Management Act). This has its attractions, but seems to deliver no more than can be achieved by the second option.

Subordinate Legislation

This report recommends the adoption of several pieces of subordinate legislation. These include:-

- A Code of Riparian Land Management Practice, under the CF&L Act
- A revised Restructure Overlay (RO) and a revised Environmental Sensitivity Overlay (ESO) within the Victoria Planning Provisions
- New regulations for riparian Crown land – under the Land Act and/or the Crown Land (Reserves) Act
- Regulations to support the Riparian Agreements and Give and Take fencelines, proposed for inclusion in the CF&L Act
- New by-laws under Part 10 of the Water Act, governing activities on designated land
- Regulations under the Aboriginal Heritage Act, exempting certain low-impact conservation works on riparian land from the requirements of that Act
- Regulations governing stock in waterways, if allowing stock into waterways is made a 'scheduled activity' under the Environment Protection Act.

To introduce each of these items separately would be cumbersome, confusing and costly. Stakeholder groups wanting to understand their meaning and impact would

have great difficulty in comprehending the package as a whole and making useful contributions to its development.

The preferred option is for the proposed Riparian Land Management Bill to contain provisions authorising the coordinated and simultaneous drafting and approval of these items. A process is outlined (in the drafting instructions for the Bill) which would allow an abbreviated and unified process, while satisfying all the essential requirements of modern legislative practice.

8.2 The Introduction of Legislation

8.2.1 Options - Primary Legislation

Three options are identified for introducing the legislative amendments recommended here.

Separate Amendments to Existing Acts

This report recommends amendments to six or eight Acts of the Victorian parliament (the variation in number reflecting the inclusion of some alternative options).

They could be brought in, over time, through the passage of six of eight separate bills, at times when those Acts were to be amended for some other purpose.

Consolidated Amendments to Existing Acts

A Riparian Land Reform Act Act could be drafted which had the effect of making all the necessary amendments to the six or eight other Acts, then being repealed, perhaps at the passage of the following Statutory Law Revision Act.

The passage of such an Act would not necessarily mean the simultaneous introduction of all the amendments: once passed, they could be proclaimed separately, at times to suit the government.

The drafting instructions to Parliamentary Counsel (see below) provide a first attempt at showing how such an might be constructed.

A New Act

The final option is a new, permanent, stand alone, Riparian Land Management Act. It would in some senses be parallel to the Coastal Management Act 1996 and the Road Management Act 2004.

A new Act could include

- Part 10 of the Water Act, transposed from that Act
- The Crown frontage provisions of the Land Act

- Powers to make Riparian Agreements, (envisaged in this report as sitting in the Conservation Forests and Lands Act)
- the whole of the Heritage Rivers Act, as a separate Part

8.2.2 Options - Subordinate Legislation

There are three options for the introduction of the subordinate legislation recommended in this report.

Existing Processes

Each item of subordinate legislation identified above could be drafted and introduced through its own existing statutory process.

Some of the items are inter-dependent and need to be introduced sequentially. For instance, if a Code under the CF&L Act is to be referenced as an incorporated document the VPPs, then firstly the Code must be made and secondly the VPPs amended. This option is therefore likely to require a considerably extended time frame.

A Curtailed Process

Under this option, the items of subordinate legislation would be drafted in-house, with curtailed public processes.

For some items, provisions already exist for introduction with no or minimal process: the Minister for Planning can amend the VPPs and Planning Schemes without going through exhibition and panel hearings; the Minister for Environment and Climate Change can introduce Crown Land (Reserves) Act regulations without any Regulatory Impact Statement.

Other items could not normally be introduced by summary process. These include the proposed Code under the CF&L Act, and the proposed new Aboriginal Heritage Regulations. Nevertheless, it would be possible to use section 4 of the Subordinate Legislation Act, or indeed a provision of the mooted Riparian Land Reform Bill to curtail the processes otherwise required.

A Consolidated Process

The third method is to devise a consolidated process which satisfies all the separate processes but without the duplication. This method seems particularly appropriate if the primary legislation was being enacted by passage of a single consolidated Act.

This need not mean the loss of any process step or denial of opportunity for stakeholder input / review – on the contrary, it could allow a more complete and better-organised opportunity for stakeholder input.

Under this option, the process for making the subordinate legislation would need to be authorised by parliament, as part of the mooted Bill. The drafting instructions to

Parliamentary Counsel (see below) provide a first attempt at showing how this might occur.

8.2.3 Analysis

8.2.4 Nature of these Options

The three options in the first box ('Primary Legislation') are mutually exclusive alternatives: only one of them may be adopted.

The three options in the second box ('Secondary Legislation') are also mutually exclusive alternatives. The third of these options (making secondary legislation through a consolidated process) could only be adopted if authorised by a new Act – i.e. it could not realistically occur under the first option relating to primary legislation (separate amendments to numerous existing Acts).

Primary Legislation

Option	**Advantages Strengths**	**Disadvantages Weaknesses**	**Cost Effort**
• Separate Amendments to existing Acts	Can be considered and introduced over time	Reform will be piecemeal Some existing Acts may not be amended for many years	Low
• A Riparian Land Reform Act, amending several other existing Acts	Would enable integration / coordination of policy across different Acts. Single passage through parliament. Would not add another layer to the law Would still allow for reforms to be proclaimed at the government's discretion	Would still leave riparian land governed under several different Acts	More complex than a series of piecemeal amendments Major consultation and drafting effort – probably equivalent to the Road Management Act 2004 or the Coastal Management Act 1995

• A New Riparian Land Management Act	Would consolidate and modernise all riparian land law	If not done well, would result in a further layer of complexity being added to existing legislation	High. Major consultation and drafting effort – probably equivalent to the Road Management Act 2004 or the Coastal Management Act 1995

Subordinate Legislation

Option	**Advantage Strengths**	**Disadvantages Weaknesses**	**Cost Effort**
• Use existing Separate Processes	Use of familiar and established processes	Inconsistent standards for different matters Confusion for external stakeholders Unlikely to provide coherent holistic analysis of impacts Plenty of opportunity for hostile campaigns by disaffected stakeholders . Sequential processes will extend timelines	Cost of running separate processes Duplications and inefficiencies
• Curtailed or Summary Processes	Certainty of result Quick result. No opportunity for challenge, hostile campaigns etc	No community ownership Would lack the authority provided by due process May be deficient	Reduced cost of public exhibition etc

		through loss of important inputs	
• Consolidated Process	Will ensure consistent standards for different matters Simplification for external stakeholders More likely to provide coherent holistic analysis of impacts Single process will be shorter and more efficient	Will require careful multi-agency process design	Will need to be authorised by legislation (i.e. the Riparian Land Reform Act recommended above)

8.2.5 Recommendations

R66 Primary Legislation – A Riparian Land Reform Act

Government should introduce a Riparian Land Reform Bill for an Act which amends a series of other Acts, and is then repealed.

R67 Subordinate Legislation – A Consolidated Process

The Riparian Land Reform Bill should specify an open, but consolidated process for making the various items of subordinate legislation recommended.

Priority

The government's decision about this matter will determine the priority accorded to all other aspects of the reform of riparian governance.

If the first option is adopted (separate amendments to numerous existing Acts) there would be a likelihood that the amendments would be uncoordinated spread over long periods of time, and any initiative would lack focus. Reform would lose momentum and, in the end, be ineffective.

The same applies to Regulations: piecemeal introduction will be most unlikely to achieve any outcome of value.

If, on the other hand, government chose to introduce a new Riparian Act (either an on-going stand-alone Act or an omnibus reform Act which is then repealed) reform would have a clear focus, send an unambiguous message, and achieve tangible results.

A further advantage of the coordinated approach is that, being centrally driven, it will impose a whole-of-government perspective on reform, and thus overcome the sectoral or agency-based obstacles which would inevitably impede piecemeal legislative reform.

9 Appendices

9.1 Compendium of Recommendations

9.1.1 Recommendations from Chapter 2

R1 Consult with External Stakeholders

Government should continue to actively engage external stakeholder groups (including the Victorian Farmers Federation, the Municipal Association of Victoria, and Environment Victoria / Victoria Naturally) in relation to riparian management issues. Such consultations should include the matters covered in this report, in order to help refine the report's recommendations.

9.1.2 Recommendations from Chapter 3

R2 Reserve all unreserved riparian Crown land

Identify all the major waterways in the State (whether included in or omitted from the 1881 reservation) preparatory to rationalising and modernising the governance regime for riparian Crown land.

By Order in Council under section 4 of the *Crown Land (Reserves) Act* 1978, temporarily reserve all unreserved riparian Crown land within 100m of those major waterways, subject to survey, for the purpose of 'Public purposes (protection of the riparian environment).' This reservation to include:-

- The bed, banks and frontages of rivers omitted from the 1881 reservation
- Parts of frontages outside the width of reservation specified in 1881
- Bed and banks resumed by the Water Act 1905

R3 Change the reserve purpose to 'Public Purposes (Protection of the Riparian Environment)'

Through legislation, change the purpose of the Crown reservations on major waterways from 'public purposes' to 'Public purposes (protection of the riparian environment).' Allow pre-existing uses which do not conform to this purpose to continue, subject to periodic review (for this purpose, follow the precedent set in 1985 by sections 17A and 17C of the *Crown Land (Reserves) Act* 1978).

R4 Move provisions relating to Water Frontages from the Land Act 1958 to the Crown Land (Reserves) Act 1978

By legislation, transfer the provisions relating to Water Frontages from the *Land Act* 1958 to the *Crown Land (Reserves) Act* 1978.

At the same time, resolve the problems resulting from the legislative distinction between frontages and bed & banks, which affect regulations, tenures, and the obligations of abutting owners.

R5 Explore innovative avenues for the acquisition of Freehold Land

DSE and CMAs should recognise the value of protecting riparian values through the strategic acquisition of lesser interests, rather than full freehold title.

R6 Reform archaic areas of Common Law

Government should refer reform of the common law doctrine of Adverse Possession to the Law Reform Commission

Government should refer reform of the common law Doctrine of Accretion to the Law Reform Commission

R7 Quantify Land Status problems along Rivers

Conduct a review of the riparian cadastre for four or five pilot reaches to identify and quantify (a) the need for riparian freehold to be brought into public ownership, (b) the extent of problems caused by the movement of rivers and (c) the extent and nature of unauthorised encroachments.

R8 Amend the Restructure Overlay (RO) in the VPPs

Amend the Victorian Planning Provisions (VPPs) by revising the existing Restructure Overlay (RO) to make it suitable for use in the reconfiguration of riparian land, especially where rivers have changed course.

R9 Broaden Land Exchange Tools

Amend section 11 of the *Crown Land (Reserves) Act* 1978 to authorise a non-Parliamentary process for the revocation of permanent riparian reserves.

Amend section 12A of the *Land Act* 1958 to allow exchanges of riparian land in a wider range of circumstances.

9.1.3 Recommendations from Chapter 4

R10 Allow Riparian Land to be protected through the CF&L Act

Amend Schedule 1 of the *Conservation Forests and Lands Act* 1987 to make Part 10 of the *Water Act* 1989 a 'Relevant Law.' (Note – 'relevant laws' may

also be identified by regulation – but Codes may be made only in relation to those relevant laws actually included in the Schedule to the Act).

R11 Adopt a Code of Riparian Practice

Make a Code of Riparian Practice under the CF&L Act (similar to the Native Vegetation Framework and the Code of Forest Practice), and incorporate that Code into various other items of subordinate legislation

R12 Give Riparian land greater recognition in Planning Schemes

- Where riparian Crown land has been simply been given the same zoning as abutting freehold, rezone it to Public Park and Recreation Zone (PPRZ).
- Apply the Environmental Sensitivity Overlay (ESO) to a band (of both Crown and freehold land) 20m wide alongside all major waterways
- Require any new use or development which does not conform to the proposed Code of Riparian Practice to obtain a planning permit
- Make CMAs Referral Authorities for these riparian ESOs

R13 Give Riparian land greater protection under the Water Act

- By legislative amendment, cause all land within 20 metres of all high priority designated waterways to be designated land. At a later date, extend this to land abutting all designated waterways.
- Amend sec 219 of the Water Act to explicitly authorise by-laws for the protection of environmental values
- Make new by-laws governing uses and activities on designated land and waterways
- Incorporate the proposed Code of Riparian Practice so that works, uses and activities within the provisions of the Code are exempt from the by-laws

R14 Give Riparian land greater protection under the Environment Protection Act

- Proclaim new Regulations specifying riparian grazing as a Scheduled Activity
- Link these Regulations to the proposed Code of Riparian Practice

R15 Give riparian land greater protection under the Catchment and Land Protection Act

Consider amending the CaLP Act to

- recognise payment for ecosystem services
- Make Special Area Plans for degraded reaches of priority rivers

R16 Give riparian land greater protection under the Crown Land Acts

Make new Regulations under the Land Act and/or the Crown Land (Reserves) Act governing activities by persons other than licensees.

R17 Review the efficacy of the Heritage Rivers Act

A study should be conducted into how well the *Heritage Rivers Act* 1995 is fulfilling its objectives. In particular:

- Whether the powers available through the Act are in fact being utilised
- Whether rivers designated as Heritage Rivers enjoy a better standard of protection than they would otherwise have
- Whether the provisions of the Act should be implemented, enforced, or extended
- Whether further rivers should be brought under the Act

R18 Extend Land Act protection to the Bed and Banks

Amend the *Land Act* 1958 to

- reform section 386 to remove the right to graze Crown land in the bed and banks;
- explicitly prohibit grazing of bed and banks;
- enable regulations to be made governing the unauthorised use of frontages (and bed & banks)

R19 Make better use of powers under the Water Act

Amend the *Water Act* 1989 to cause all Crown frontages and bed and banks to be 'designated land'

Make new bylaws under the *Water Act* 1989

- making it an offence to allow stock onto designated land, unless in accordance with the proposed Code of Riparian Practice and
- making it an offence to allow stock into designated waterways unless in accordance with the proposed Code of Riparian Practice

R20 Make Stock access to Waterways a 'Scheduled Activity'

Make a new regulation under the *Environment Protection Act* making stock access to waterways a 'scheduled activity' unless in accordance with the proposed Code of Riparian Practice

R21 Make better use of powers under the Crown Land (Reserves) Act

Complete the reservation of all unreserved Crown frontages, and all unreserved bed and banks, and make a new *Crown Land (Reserves) Act* 1978 Regulation (and a new penalty regime) making it an offence to allow stock onto reserved riparian Crown land

R22 Consider amending the Impounding of Livestock Act and the Fences Act

An evaluation should be made of the benefits of (a) amending the *Fences Act* 1968 to give the Secretary for DSE powers to require the fencing of freehold riparian boundaries, and (b) amending the *Impounding of Livestock Act* 1994 to allow impounding of stock found on Crown frontages – except where in accordance with the proposed Code of Riparian Practice

R23 Review private rights to water

Review policy on:-

- the circumstances in which private rights to take water from waterways should exist and
- who should hold those private rights;

Adopt as a policy principle that the rights, where they exist:-

- are unrelated to the presence or absence of fencing, and
- do not constitute a right for stock to enter the waterway.

The review should be preceded by obtaining legal opinions on the meaning of Section 8 of the *Water Act* 1989 as it stands.

R24 Amend the Water Act to clarify private rights

Amend section 8 of the *Water Act* 1989 to rectify any gap between adopted policy and the legal interpretation of the current wording.

R25 Adopt minimum administrative standards for CMA-Landholder Agreements

The nine CMAs and Melbourne Water should review their current documents against the minimum set of standard proposed in section 4.5.4 above.

Based on these self-reviews, DSE should recommend a uniform set of standards for adoption

R26 Move Towards Technical Uniformity for CMA-Landholder Agreements

The nine CMAs and Melbourne Water should undertake a review of the technical contents of their current agreements with landholders.

Based on these self-reviews, DSE should recommend a uniform set of standards for adoption

R27 Facilitate landholder compliance with Related Statutory Requirements

Instead of obliging landholders to ensure their own compliance with the Planning Scheme, Native Title, the EPBC Act, the CaLP Act etc, CMAs should consider taking on this responsibility themselves, and providing the landholder with clear advice on what these statutes mean for the works in question.

R28 Confirm and Extend the Use of 'Section 69' Agreements

By regulation under the CF&L Act, proclaim part 10 of the *Water Act* 1989 to be a 'relevant law' in support of which the Secretary may enter into section 69 Agreements

Ensure that agreements are made under seal

Amend section 11 of the CF&L Act to allow the Secretary to delegate powers to Melbourne Water

Delegate power to enter into section 69 Agreements from the Secretary for DSE to the CEOs of CMAs and the CEO of Melbourne Water

Confirm with the Registrar of Titles that these section 69 Agreements will be accepted by Land Registry

R29 Introduce Status-Neutral Riparian Agreements

Amend the *Conservation Forests and Lands Act* 1987 to allow the Secretary for DSE (or delegate) to enter into agreements covering both freehold and Crown land. The CF&L Act is preferred to the Water Act because under it, the Secretary's power can be delegated not only to Waterway Authorities, but to other land managers if deemed appropriate.

R30 Enable Delegations to Melbourne Water

Amend section 11 of the *Conservation Forests and Lands Act* 1987 to allow the Minister and the Secretary for DSE to delegate to Melbourne Water, in its capacity as an authority under Part 10 of the Water Act

R31 Adopt a 'One Stop Shop' approach

As a feature of the proposed Riparian Agreements, introduce provisions whereby other nominated laws will be deemed to have been complied with. Use this provision to eliminate the need for separate Crown land licences, stock and domestic watering permits, planning permits arising from the proposed Environmental Sensitivity Overlay, etc.

R32 Introduce "Give-and-Take" Fenceline Agreements

Amend the *Conservation Forests and Lands Act* 1987 to provide for Agreements between the Secretary for DSE and landholders of freehold land abutting riparian Crown land, under which fences can be built on practical alignments.

R33 Allow Tax Breaks for Riparian Works

Amend the *Conservation Forests and Lands Act* 1987 to enable the Secretary to offer tax and rate relief in the same manner as is now available through the *Victorian Conservation Trust Act* 1972.

9.1.4 Recommendations from Chapter 5

R34 Extend controls over Crown frontages to Crown land in the bed and banks

Where there is a Crown frontage – amend the *Land Act* 1958 to prohibit the grazing of the bed and banks.

Where there is no Crown frontage – commence a program of strategic acquisition of abutting owners' residual rights in 'section 385' watercourses; and amend the *Water Act* 1989 to clarify that these rights may be compulsorily acquired

R35 Clarify the Crown's rights over Crown land

Amend the *Land Act* 1958 to clarify that although there is an obligation on an abutting owner to take out a licence over an unfenced frontage there is no corresponding obligation on the Crown to issue such a licence.

Amend the *Land Act* 1958 to clarify that a Landowner who does not hold a licence has a duty to construct a fence

Amend the *Land Act* 1958 to remove the contradiction in the definition of frontage

R36 Allow CMAs access to licence information

Invite stakeholder organisations to advise on the release of information about licensees to CMAs under the *Information Privacy Act* 2000. In the light of responses, either:-

- proceed under Information Privacy Principle (IPP) 2.1(a) which allows reasonable disclosure of information for secondary purposes, or
- seek licensees' consent under IPP 2.1(b), or
- amend the Land Act 1958 to allow disclosure as is the case for normal title information.

R37 Investigate Licence Economics

In principle, rentals for Crown frontages should be increased to true market value. However, the magnitude of the increase may be so great as to make this an unreasonable proposition. The best way of gaining a better understanding of the issues and their policy implications is to conduct a further investigation, including stakeholder inputs.

Terms of reference should include:-

- To consult with the VFF and other stakeholders, and advise on:-
- The costs and benefits to landholders of holding Crown frontage licences
- The costs and benefits to government of having Crown frontages managed under licence
- The gap between frontage licence rentals and the private market, and the implications for competition policy
- The likely impacts on licensee behaviour if the implicit subsidy in rentals were removed
- Circumstances in which rentals policy, rather than payments for ecosystem services, should be used to achieve better riparian outcomes

R38 Increase Rentals to Market

Contingent on the outcome of the inquiry, rentals should be raised towards their true market value.

R39 Attribute Rentals to the Consolidated Fund

Revenue from water frontage licences should continue to go to the consolidated fund. Management of Crown frontages should not be seen as self-funding.

R40 Recognise the Crown-freehold relationship

Acknowledge the relationship between a Crown frontage and its 'parent' property. Ensure, however, that such recognition does not support a false sense of proprietorship by the freehold owner, nor diminish the right of the Crown to revoke the licence or to issue the licence to a person other than the abutting freehold owner.

R41 Enhance DSE records systems

Enhance DSE Data Systems (in both Land Registry and the Crown Land Management Transaction Centre) to recognise those 10,000+/- 'parent' properties associated with Crown frontages. Of the five options tabulated above for administering a 'parent property' system the first option is preferred because it alerts DSE and the relevant CMA prior to sale or subdivision, does

not confer a false sense of ownership, and does not impose any burden on the landholder.

Establish a system within Land Registry for notifying the DSE regional office when requests are received for Section 32 Vendor's Property Certificates relating to those 'parent' properties

R42 Use the transfer of the 'parent' property as an opportunity to review the Crown licence

Develop a system of strategic responses by DSE and the relevant CMA to a notification of the impending transfer or subdivision of a parent property, such responses to include:

- correspondence with the vendor/current licensee
- identification of the purchaser/prospective licensee
- deciding whether the Crown licence should be renewed, renegotiated or revoked

R43 Remove impediments to data sharing

If there is doubt as to whether such use of information might contravene the *Information Privacy Act* 2000, amend the *Land Act* 1958 to remove the doubt.

R44 Review all Crown frontage licences over 10 years

Every Crown water frontage in the State should be reviewed over a 10-year period

Each Crown water frontage licence should be tagged as being either "reviewed" or "not yet reviewed"

The purpose of licences should be changed from 'grazing' to 'protection of the riparian environment'

The term offered for a reviewed licence should be 10 years. At a later time, subject to legislative change, the term offered may be raised to 35 years, as originally envisaged in 1994

No compensation should be payable on cancellation or non-renewal. Grants may be offered for restoration, fencing etc, regardless of which party has initiated the non-renewal. Such payments should not be described as compensation.

Pending any more thorough consideration of agency roles and responsibilities, DSE and the CMAs should confirm that, for the purposes of the 2009 renewals DSE will retain the landlord function, but the CMAs will liaise with licensees on DSE's behalf and advise DSE on matters relating to licence renewal

R45 Identify High Priority Licences

DSE and CMAs should initiate an accelerated program of identifying the 'high priority' licences to be reviewed at 2009. Criteria to be considered for adoption should include:-

- Cultivation licences
- Licences in the highest priority reaches, including Heritage Rivers and high priority reaches from the regional river health strategies
- Licences where there is a history of environmental damage
- In Special Water Supply Catchments, or where there is a threat to potable water
- Frontages where alternative uses have been proposed
- Frontages of riparian properties known to be coming up for sale or subdivision

Such criteria should be designed so as to identify no more licences than can be reviewed given the level of resources to be committed by DSE and the CMAs

R46 Develop DSE / CMA Joint Procedures

DSE and CMAs should develop procedures relating to these high-priority licences -

- to advise licence-holders of the impending review (renegotiation or non-renewal) of their licences
- to assist the licensee where necessary with fencing and off-stream watering, and
- to plan for the rehabilitation and on-going management of any land to be fenced out

CMAs, in consultation with DSE, should develop training courses and standard procedures for reviewing all licences, over a 10-year period

DSE should ensure that adequate resources are available within Crown Land Management to support the CMAs in any program of licence review

DSE should identify all 'parent' freehold properties (see section 5.4) so that they can be cross-referenced in each 2009 licence document.

R47 Commence strategic revision of licences in 2009

Cultivation licences should not be renewed. If a crop is in the ground at the time of licence expiry, the licence should be renewed only until the harvest of that crop. This decision should be made known sufficiently early to allow licensees time for proper planning. (Note – this may not apply to cultivation a reasonable distance from the waterway – say 20 metres)

Those high priority licences already reviewed before 2009 should be renewed, subject to the conditions agreed in the review, for a term of 10 years

R48 Allow for further licence revisions after 2009

All other existing licences (those 'yet to be reviewed') should be renewed, but for a conditional term:-

> *"five (5) years, or until sale or subdivision of freehold property volume xxx folio yyy, or until recommended by the Waterway Manager, whichever event occurs first."*

DSE and the CMAs should develop procedures for the review of licences triggered by the transfer or subdivision of parent properties. Such procedures should include –

- reminding the vendor of the parent property (the outgoing licensee) of the requirement to advise the purchaser of the details of the Crown licence
- contacting the purchaser to arrange for a joint inspection leading to the transfer, renegotiation, or cancellation of the licence, as appropriate

In due course, a reviewed licence may take the form of a status-neutral Riparian Agreement, as recommended in section 4.6.

9.1.5 Recommendations from Chapter 6

R49 Negotiate a State-wide riparian Indigenous Land Use Agreement (ILUA)

The recommended option is to initiate a state-wide riparian 'Alternative Procedure Agreement' Indigenous Land Use Agreement (ILUA) to validate the range of riparian-related measures needed for effective riparian governance reform, beyond those which may be validated through the provisions of sections 24F to 24M of the Commonwealth Native Title Act 1993.

R50 If necessary, negotiate riparian Area Agreements and Body Corporate Agreements

If a state-wide Alternative Procedure Agreement proves impractical, initiate riparian 'Body Corporate Agreement' ILUAs at a CMA level for those riparian areas where positive native title determinations have been made.

If a state-wide Alternative Procedure Agreement proves impractical, initiate riparian 'Area Agreement' ILUAs at a CMA level for those riparian areas where no native title determinations have been made.

Prior to the finalisation of riparian ILUAs, government should continue to implement such riparian reforms as can be validated through the provisions of sections 24F to 24M of the Commonwealth Native Title Act 1993.

R51 Investigate native title for section 385 boundaries

DSE should also obtain a legal opinion on whether Native Title exists or has been extinguished on riparian land where freehold title was retrospectively revoked by the *Water Act* 1905.

R52 Ensure full compliance by CMAs with their statutory obligations under the AH Act

Conduct catchment-wide 'desktop assessments' of all riparian land, to the standards set by Part 3 of the *Aboriginal Heritage Regulations* 2007, in order to facilitate CHMPs, should they be required, and in order to help ensure compliance with the *Aboriginal Heritage Act* 2006 by landholders and public authorities alike.

R53 Ensure the exercise of due diligence by CMAs in other cases

For circumstances where the Act does not require a CHMP, the CMAs should develop robust due-diligence standards and procedures to guide their own decisions and those of private landholders who may seek advice.

R54 Assist ordinary landholders to comply with the AH Act

In the case of graziers and other landholders undertaking riparian works (with or without CMA grant funding) the CMAs should offer assistance and advice on compliance with the Act, and due-diligence studies in circumstances where the Act is silent. (This recommendation does not extend to developers and government agencies, who should be expected to manage their own compliance and due diligence.)

R55 Make new Riparian Regulations under the Aboriginal Heritage Act

In the longer term, DSE should seek to have new regulations made under the *Aboriginal Heritage Act* 2006 for low-impact riparian works and activities which aim to conserve riparian values and restore riparian condition. Such regulations to provide that, subject to appropriate safeguards, it is not an offence to disturb Aboriginal cultural heritage in the course of fencing, revegetation and measures to remove stock from riparian areas.

9.1.6 Recommendations from Chapter 7

R56 Appoint a formal land manager for all high-priority riparian Crown land by 2010

- Appoint Parks Victoria to manage high-priority riparian land of national or state significance
- Appoint municipal councils to manage high-priority riparian land of regional or local significance
- Appoint community-based Committees of Management for riparian land where community resources allow
- Appoint CMAs as Committees of Management for high-priority sites in need of active management, but where the above three options are not appropriate

R57 Engage CMAs (as agents of the Secretary for DSE) to undertake critical works on high-priority riparian land for which the designation of a formal manager is not necessary

An engagement under section 18B *Crown Land (Reserves) Act* will allow CMAs to undertake works, even where there is no designated manager, and even where the abutting owner does not have a Crown frontage licence

R58 Strengthen DSE's capacity to respond to critical management issues on Crown land with no designated manager

The use of 'Departmental' Committees of Management to capture revenue from non-riparian sources should be investigated

R59 Improve central coordination of CMA riparian functions

Convene a Riparian Policy Council under section 12 of the CF&L Act, consisting of the Chairpersons of all CMAs

Convene a Riparian Coordination Committee under section 12 of the CF&L Act, consisting of the CEOs of all CMAs

R60 Streamline DSE internal coordination of riparian functions

Set up an intra-Departmental Riparian Task Force to coordinate and streamline the introduction of these recommendations, particularly those requiring action before the 2009 licence renewals

R61 Engage CMAs to support DSE functions

DSE should formally engage CMAs to:-

- monitor Crown frontage licences
- provide extension services to licensees

- advise DSE on licence conditions and compliance

R62 Provide DSE specialist services to CMAs

DSE should formally undertake to assist CMAs by:-

- appointing a CMA Liaison Officer in all DSE Regions
- providing specialist enforcement and prosecution services
- developing joint, interfaced DSE-CMA data systems

R63 Expand CMA Roles and Responsibilities through Strategic Incrementalism.

The 'strategic incrementalism' option is recommended in preference to the 'pick and choose' option which is seen as being uncoordinated and directionless, and lacking in vision.

The following roles should all be regarded as candidates for consideration in framing a strategy:-

- Engage CMAs to monitor Crown licences and advise DSE
- Engage CMAs for critical works on unmanaged Crown land
- Appoint CMAs as landlord of all licensed Crown frontages
- Engage CMAs to manage all unlicensed Crown land
- Make CMAs Referral Authorities under Planning Schemes

The option of re-assigning responsibility for the Land Acts from DSE to the CMAs is not recommended, because it would probably not deliver any net benefits.

R64 Actively encourage and auspice community groups for formal involvement in riparian management

DSE and CMAs should actively seek to make better use of the reservoir of community resources and goodwill available for the management of public land, through…

- Establishing local Committees of Management under the Crown Land (Reserves) Act
- Establishing Advisory Committees under section 19J of the CaLP Act
- Giving encouragement and support for community-based Incorporated Associations
- Providing DSE administrative support for Community-based riparian management

R65 Sponsor an independent research study into community involvement

The Secretary for DSE should commission an independent / academic longitudinal study of community involvement in riparian land management, with a view to evaluating the merits of the four community involvement models recommended above

9.1.7 Recommendations from Chapter 8

R66 Primary Legislation – A Riparian Land Reform Act

Government should introduce a Riparian Land Reform Act which makes a series of amendments to other existing Acts, and is then repealed.

R67 Subordinate Legislation – A Consolidated Process

The Riparian Land Reform Act should specify an open, but consolidated process for making the various items of subordinate legislation recommended.

* * * * *

9.2 Drafting Instructions

9.2.1 A New Riparian Land Reform Act

The following box takes the form of drafting instructions to Parliamentary Counsel, and illustrates how a the proposed Riparian Land Reform Act might work:-

Riparian Land Reform Act

This Act has the effect of
(a) amending various other Acts, and
(b) authorising associated items of subordinate legislation
after which it may be repealed.

PART 1- - Amendments to the Crown Land (Reserves) Act

Section 4 - to be amended to include the purpose of reservation: 'public purposes (protection of the riparian environment)'

New Part 7 – Provisions relating to Riparian Crown Land

'Waterway' has the same meaning as in the Interpretation of Legislation Act
'Crown Frontage' means Crown land which abuts a waterway, as now defined in the Land Act .
'Riparian Crown land' means all Crown land in waterways and Crown frontages – including land reserved under the CL(R) Act and unreserved Crown land, but excluding land reserved or vested under any other Act; and excluding land which is a road within the meaning of the Land Act.
On the date of proclamation, all riparian Crown land is deemed to be reserved, subject to survey.
If previously unreserved, it is now reserved for Public Purposes (Protection of the Riparian Environment)
If previously reserved for public purposes, it is now reserved for Public Purposes (Protection of the Riparian Environment)
If previously reserved for any other purpose, it continues to be reserved for that other purpose
If previously permanently reserved, it continues to be permanently reserved; otherwise, it is now temporarily reserved.
Any regulations continue until revoked.
Any committee of management continues uninterrupted.

Tenures of Riparian Crown land

The Minister may issue licences for the use of riparian Crown land.
The purpose of a licence must not be detrimental to the purpose of the reserve.
This power is in addition to powers in section 17 to 17D inclusive.
The term of a licence of riparian Crown land may be:-
if the purpose of the licence is 'the protection of the riparian environment' – 35 years,
if the licence is for any other purpose - 5 years
Anybody may use licensed riparian Crown land for recreation, subject to the regulations
It is an offence to occupy riparian Crown land without authorisation
It is an offence to allow stock to enter riparian Crown land without authorisation
The Secretary may declare a fence between a Crown frontage and abutting freehold land to be a dividing fence for the purposes of the Fences Act
Any tenures of Riparian Crown land under the Land Act at the date of proclamation of this Act continue until their reversion or earlier determination.
The Secretary must make information about riparian tenures available to municipalities and Authorities with Waterway Districts under Part 10 of the Water Act.
The GinC may make regulations for the purpose of this Part.

Consequential amendments to Land Act 1958
Part XIII, Land Act – all references to Water Frontages are repealed.
Section 130 and 138, Land Act – all references to Water frontages are repealed

PART 2 – Land bounded by Watercourses

Amendment to CL(R) Act
Where a Crown Allotment is bounded by a watercourse,
The bed and banks are deemed to be Riparian Crown land, temporarily reserved for Public Purposes (Protection of the Riparian Environment)
the freehold boundary is deemed to be the edge of the watercourse

Amendments to Land Act
Sections 385 is repealed, and
Either…
Section 386 is repealed [recommended alternative]
Or…
Amendment to Water Act
Section 130(2)(c) – to be amended to clarify that residual rights in boundary watercourses [being land <u>not</u> actually comprised by measurement in the Crown grant] can be compulsorily acquired

PART 3 - Amendments to CF&L Act

Amendment to Schedule 1 - Part 10 of the Water Act 1989 is a 'relevant law' for the purposes of the CF&L Act

Amendment to Section 11 - The Minister and the Secretary may delegate to any Authority with a Waterway District within the meaning of Part 10 of the Water Act 1989

New Part 8A – Provisions Relating to Riparian Land

Division 1 – Give and Take Fencelines

This Part relates to boundaries between :-
Riparian Crown land as defined in the CL(R) Act, and
Abutting freehold land
The Secretary and the owner of the freehold land may enter into an agreement, to be known as a 'give and take fenceline agreement'
The agreement will specify the location of the fence to be built in the vicinity of the boundary between the Crown frontage and the freehold
Obligations to construct and maintain the fence remain as they would be, under the Fences Act 1968, as if the fence was on the title boundary
Agreements may provide that:-
The landholder is able to occupy any Crown land on the freehold side of the fence, as if it were part of the freehold property
The landholder being indemnified against any risk exposure on any freehold land on the Crown side of the fence
Any Committee of Management appointed under the Crown Land (Reserves) Act 1978 being able to exercise its powers under that Act over any freehold land on the Crown side of the fence, as if it were part of a Crown reserve
Any regulations made for the Crown land, whether under the Land Act 1958 or the Crown Land (Reserves) Act 1978, to apply to any freehold land on the Crown land side of the fence, as if it were part of the Crown frontage
The Minister being able to issue licences under the Land Act 1958 over any freehold land on the Crown land side of the fence, as if it were part of the Crown frontage
Any provisions of the Planning and Environment Act 1987 or the relevant Planning scheme applying to the land on either side of the fenceline, as if it were land on the corresponding side of the true title boundary
Such agreements to be binding on the landowner's successors and to run with title
No adverse possession or easement by prescription being possible as a result of such an agreement.

Division 2 – Riparian Agreements

The Secretary for DSE may enter into Riparian Agreements with landowners

An Agreement must be for purposes of a relevant law
The land to which an Agreement relates may be
a Crown frontage within the meaning of the Crown Land (Reserves) Act, or
freehold land abutting a Crown frontage
The land may be freehold land in the landowner's possession, or Crown land for which the landowner holds (or would be entitled to hold) a Water Frontage licence under the Crown Land (Reserves) Act
An Agreement may specify activities or works
which the landowner must undertake,
which the landowner may undertake with the Secreatry's consent
which the landowner must not undertake.
An Agreement may specify activities or works
which the Secretary must undertake,
which the Secretary may undertake
Section 3B of the Victoria Conservation Trust Act 1972 applies to a Riparian Agreement, as if:-
A reference to a covenant is a reference to an Agreement
A reference to the preservation of land in its natural state is a reference to conservation or restoration of the environmental values of the land
A reference to the Trust is a reference to the Secretary
A reference to the Minister is a reference to the Minister administering this Act
An Agreement may include provisions for Give and Take fencelines, as provided for in this Act

Riparian Agreements - Exemptions from other laws

Either…

A Riparian Agreement may include provisions exempting the holder from the provisions of this or any other Act or any regulations
If a Riparian Agreement includes such exemptions, the exemption must comply with regulations made for the purpose under this Act or that other Act.

Or…

An Agreement relating to Crown land, may provide that the landholder may use that land in accordance with the terms of the Agreement without any further licence under the Crown Land (Reserves) Act
An Agreement may relate to the taking of water for stock and domestic use without any licence under section 51 of the Water Act. If so, the Agreement must comply with regulations made for that purpose under this Act or the Water Act 1989
An Agreement may be deemed to be a Cultural Heritage Management Plan for the purposes of the Aboriginal Heritage Act 2006. If so, it must comply with Regulations made for that purpose under that Act
An Agreement may provide that the land to which it applies is exempt from rates under the Local Government Act. If so, the Agreement must comply

with regulations made for that purpose under this Act or the Local Government Act 1989

Riparian Agreements - General provisions

An Agreement may provide for payments to be made from the Secretary to the landowner, or from the landowner to the Secretary

An Agreement is binding on the landowner's successors in title.

The Registrar of Titles is empowered and required to record any Agreement against the title of the freehold land which is the subject of the Agreement

The landowner's successors in title will be obliged to fulfil the obligations of the Agreement both on the freehold land and the Crown land to which the Agreement relates

Agreements are public documents. Subject to any regulations made for that purpose, the Secretary and the Registrar must make their details available on request

An Agreement may be varied or terminated by mutual consent

In the event of either party defaulting on the terms of an Agreement, the other party may recover any payments made under the Agreement in the Magistrates Court.

Regulations may be made prescribing forms, standards, codes and procedures for the purposes of this Part

PART 4 – Amendments to Water Act

Stock and Domestic Water

Section 8 to be amended as follows:-

The following categories of person have rights to take stock and domestic water free of charge

xxxxxxxxxx

from the following categories of waterways

yyyyyyyyy

A person's right to take water exists regardless of whether there is a fence between their property and the waterway.

A right to take water does not constitute a right to allow stock into the waterway.

Regulations may be made for the purposes of this section.

Designated Land and waterways

Section 188 to be amended: All riparian Crown land within the meaning of the Crown Land (Reserves) Act in or abutting a designated waterway is designated land.

All riparian Crown land abutting the Murray River is designated land.

Section 189 to be amended: an Authority's powers and functions relate to designated waterways and designated land, but it also has power to undertake works and services on other land in the vicinity which, in the opinion of the

Authority, has an influence on a designated waterway

Part 5 – Amendments to Other Acts

Amendment to the Impounding of Livestock Act - - to allow the impounding of stock found without authority on riparian Crown land within the meaning of the Crown Land (Reserves) Act

Amend the Subdivision Act - to provide that where land being subdivided enjoys stock and domestic water rights, as provided for in section 8 of the Water Act, the Plan of Subdivision must be certified by the relevant Water Authority as conforming to the requirements section 11 of the Water Act.

Provisions relating to reconfiguration of riparian Land
Amend section 12A , Land Act - to allow exchanges of Crown land for freehold in circumstances where
the Crown land is permanently reserved, but exchange has become desirable as a result of a river changing course, and/or
the freehold to be acquired is not to be reserved under the Crown Land (Reserves) Act, but is to be the subject of a further sale or exchange.

Amend section 11, Crown Land (Reserves) Act - to be amended to allow the GinC to revoke a permanent Crown reserve where river has moved onto freehold land, provided that arrangements are in place to acquire the freehold land and to reserve it in place of the Crown land

Amend the Victorian Environment Assessment Council Act - to allow VEAC to be appointed as a Planning Authority under the Planning and Environment Act.

Part 6 – Subordinate Legislation

The schedule below specifies draft items of subordinate legislation necessary or expedient for the proper and efficient achievement of the objects of this Act

Column 1 of the schedule specifies the Act under which the item of subordinate legislation would normally be made.

The processes required by this Act shall be deemed to satisfy the processes normally required by each of the Acts in column 1 of the Schedule.

The Minister responsible for this Act, in consultation with the Ministers responsible for each of the Acts specified in column 1, may draft the item of subordinate legislation specified in column 2.

The Minister must prepare a Regulatory Impact Statement evaluating the set of

subordinate legislation as a whole

The Minister must cause all the items of subordinate legislation and the RIS to be put on exhibition for a period of 60 days.

Any person may make submissions in relation to any of the items of subordinate legislation.

The Minister must consider all submissions and may amend any of the items in response.

The Minister must appoint a panel to review the submissions. The panel shall be constituted under Part 8 of the Planning and Environment Act, in which for this purpose:-

references to the Minister shall be read as references to the Minister responsible for this Act, and
references to the Planning Authority shall be read as references to the Secretary for DSE

The Minister must consider the panel's report and may amend any of the items in response.

The items of subordinate legislation proposed to be introduced, together with the Panel Report and the Government's response, shall be tabled before each house of parliament; and shall be subject to disallowance.

Subject to not being disallowed, each item of subordinate legislation may then be adopted, proclaimed, or submitted to the Governor in Council as the case may be, without any further process.

Schedule

Act under which the item would normally be made	Item of subordinate legislation
Conservation Forests and Lands Act	A Code of Riparian Land Management Practice
Planning and Environment Act	A revised Restructure Overlay for use in riparian situations A revised ESO for riparian situations
Crown Land (Reserves) Act	Regulations for riparian Crown land
Conservation Forests and	Regulations for Riparian

Lands Act	Agreements and Give and Take fencelines
Water Act	By laws governing activities on designated land

9.2.2 A New Riparian Agreement

The following box takes the form of drafting instructions to Parliamentary Counsel, and illustrates how the proposed status-neutral riparian agreements could be supported in legislation:-

A New Riparian Agreement *Instructions to Parliamentary Counsel*	
Proposed Amendment to the *Conservation Forests and Lands Act* 1984 **Riparian Agreements** The Secretary for DSE may enter into Riparian Agreements with landowners An Agreement must be for purposes of a relevant law The land to which an Agreement relates may be a Crown frontage within the meaning of the Land Act 1958, or freehold land abutting a Crown frontage The land may be freehold land in the landowner's possession, or Crown land for which the landowner holds (or would be entitled to hold) a Water Frontage licence under the Land Act 1958 An Agreement may specify activities or works which the landowner must undertake, which the landowner may undertake with the Secreatry's consent which the landowner must not undertake. An Agreement may specify activities or works which the Secretary must undertake, which the Secretary may undertake Section 3B of the *Victoria Conservation Trust* Act 1972 applies to a Riparian Agreement, as if:-	**Proposed Amendment to the *Water Act* 1989, Part 10, Division 2** **Riparian Agreements** An Authority with a Waterway Management District may enter into Riparian Agreements with landowners An Agreement must be for purposes consistent with the Authority's functions and Statement of Obligations The land to which any Agreement relates must be designated land or land within a designated waterway, or land in the vicinity of a designated waterway The land may be freehold land in the landowner's possession, or Crown land for which the landowner holds (or would be entitled to hold) a Water Frontage licence under the Land Act 1958 An Agreement may specify activities or works which the landowner must undertake, which the landowner may undertake with the Authority's consent which the landowner must not undertake. An Agreement may specify activities or works which the Authority must undertake, which the Authority may undertake Section 3B of the *Victoria Conservation Trust Act* 1972 applies to a Riparian Agreement, as if A reference to a covenant is a reference to an Agreement

A reference to a covenant is a reference to an Agreement A reference to the preservation of land in its natural state is a reference to conservation or restoration of the environmental values of the land A reference to the Trust is a reference to the Secretary A reference to the Minister is a reference to the Minister administering this Act An Agreement may include provisions for Give and Take fencelines, as provided for in Part xxx of this Act An Agreement relating to Crown land, may provide that the landowner may use that land in accordance with the terms of the Agreement without any further licence under the *Land Act* 1958 An Agreement may relate to the taking of water for stock and domestic use. If so, the Secretary must consult the relevant Authority with a Water District under the Water Act, or the Agreement must comply with regulations made for that purpose under the *Water Act* 1989 Where an Agreement relates to the taking of stock and domestic water, the landholder may take that water in accordance with the terms of the Agreement, without any licence under section 51 of the Water Act An Agreement may be a Cultural Heritage Management Plan for the purposes of the *Aboriginal Heritage Act* 2006 if it is certified by the Secretary as complying with Regulations made for the purpose under that Act An Agreement may provide that the land to which it applies is exempt from rates under the Local Government Act. If so, the Authority must confer with the relevant municipality, or the Agreement must comply with Local laws made for that purpose under the *Local Government Act* 1989 An Agreement may provide for payments to be made from the Secretary to the landowner, or from the landowner to the Secretary An Agreement is binding on the	A reference to the preservation of land in its natural state is a reference to conservation or restoration of the environmental values of the land A reference to the Trust is a reference to the Authority A reference to the Minister is a reference to the Minister administering this Act An Agreement may include provisions for Give and Take fencelines, as provided for in Part xxx of the *Conservation Forests and Lands Act* 1984 relate to the use of Crown land by the landowner. If an Agreement relates to Give and Take fencelines, the Authority must first consult the Secretary for DSE, or the Agreement must comply with regulations made for that purpose under the *Conservation Forests and Lands Act* 1987 If an Agreement relates to the use of Crown land, the Authority must first consult the Secretary for DSE, or the Agreement must comply with regulations made for that purpose under the *Land Act* 1958 An Agreement relating to Crown land, may provide that the landowner may use that land in accordance with the terms of the Agreement without any further licence under the *Land Act* 1958 An Agreement may relate to the taking of water for stock and domestic use. If so, the Authority must consult the relevant Authority with a Water District, or the Agreement must comply with regulations made for that purpose under the *Water Act* 1989 Where an Agreement relates to the taking of stock and domestic water, the landholder may take that water in accordance with the terms of the Agreement, without any licence under section 51 of the Water Act An Agreement may be a Cultural Heritage Management Plan for the purposes of the *Aboriginal Heritage Act* 2006 if it is certified by the Authority as complying with Regulations made for the purpose under that Act An Agreement may provide that the land to which it applies is exempt from rates under the Local Government Act. If so, the Authority must confer with the relevant

landowner's successors in title. The Registrar of Titles is empowered and required to record any Agreement against the title of the freehold land which is the subject of the Agreement Agreements are public documents. Subject to any regulations made for that purpose, the Secretary and the Registrar must make their details available on request The landowner's successors in title will be obliged to fulfil the obligations of the Agreement both on the freehold land and the Crown land to which the Agreement relates An Agreement may be terminated by mutual consent In the event of either party defaulting on the terms of an Agreement, the other party may recover any payments made under the Agreement in the Magistrates Court.	municipality, or the Agreement must comply with Local laws made for that purpose under the *Local Government Act* 1989 An Agreement may provide for payments to be made from the Authority to the landowner, or from the landowner to the Authority An Agreement is binding on the landowner's successors in title. The Registrar of Titles is empowered and required to record any Agreement against the title of the freehold land which is the subject of the Agreement Agreements are public documents. Subject to any regulations, the Authority and the Registrar must make their details available on request The landowner's successors in title will be obliged to fulfil the obligations of the Agreement both on the freehold land and the Crown land to which the Agreement relates An Agreement may be terminated by mutual consent In the event of either party defaulting on the terms of an Agreement, the other party may recover any payments made under the Agreement in the Magistrates Court.

9.2.3 Give and Take Fenceline Agreements

The following box takes the form of drafting instructions to Parliamentary Counsel, and illustrates how a Give and Take fence between Crown land and freehold could be supported in legislation:-

Give and Take Fenceline Agreements

Amendment to the
Conservation Forests and Lands Act 1984

Drafting Instructions to Parliamentary Counsel

This Part relates to boundaries between :-

Crown land which is a water frontage as defined by the Land Act 1958, and

Abutting freehold land

The Secretary and the owner of the freehold land may enter into an agreement, to be known as a 'give and take fenceline agreement'

The agreement will specify the location of the fence to be built in the

vicinity of the boundary between the Crown frontage and the freehold

Obligations to construct and maintain the fence remain as they would be, whether under the *Fences Act* 1968 or any other legal agreement, as if the fence was on the title boundary

Agreements may provide that:-

- The landowner is able to occupy any Crown land on the freehold side of the fence, as if it were part of the freehold property
- The landowner is indemnified against any risk exposure on any freehold land on the Crown side of the fence
- Any Committee of Management appointed under the Crown Land (Reserves) Act 1978 is able to exercise its powers under that Act over any freehold land on the Crown side of the fence, as if it were part of a Crown reserve
- Any regulations made for the Crown land, whether under the Land Act 1958 or the Crown Land (Reserves) Act 1978, will to apply to any freehold land on the Crown land side of the fence, as if it were part of the Crown frontage
- The Minister is able to issue licences under the Land Act 1958 over any freehold land on the Crown land side of the fence, as if it were part of the Crown frontage
- Any provisions of the Planning and Environment Act 1987 or the relevant Planning scheme will apply to the land on either side of the fenceline, as if it were land on the corresponding side of the title boundary

Such agreements will be binding on the landowner's successors and to run with title

No adverse possession or easement by prescription will be possible as a result of such an agreement.

Regulations may be made prescribing forms, standards, codes and procedures for the purposes of this Part

9.3 What is Riparian Land?

In discussing the governance of riparian land, this paper seeks to link the real world of tangible on-ground systems to the abstractions of the cadastre and the law.

9.3.1 Waterways in Statute and Policy

Some of these definitions rely in turn on the definition of a 'waterway.' The *Water Act* 1989 provides a comprehensive definition, which is recognised by the Interpretation of Legislation Act 1984 as being the default definition of the term for the purposes of Victorian Acts and subordinate instruments, unless some contrary intention is apparent.

Water Act 1989

"waterway[2]" means[50] —

(a) a river, creek, stream or watercourse; or

(b) a natural channel in which water regularly flows, whether or not the flow is continuous; or

(c) a channel formed wholly or partly by the alteration or relocation of a waterway as described in paragraph (a) or (b); or

(d) a lake, lagoon, swamp or marsh, being—

(i) a natural collection of water (other than water collected and contained in a private dam or a natural depression on private land) into or through or out of which a current that forms the whole or part of the flow of a river, creek, stream or watercourse passes, whether or not the flow is continuous; or

(ii) a collection of water (other than water collected and contained in a private dam or a natural depression on private land) that the Governor in Council declares under section 4(1) to be a lake, lagoon, swamp or marsh; or

(e) land on which, as a result of works constructed on a waterway as described in paragraph (a), (b) or (c), water collects regularly, whether or not the collection is continuous; or

[2] Text in Times Roman font signifies a direct quote from the legislation

(f) land which is regularly covered by water from a waterway as described in paragraph (a), (b), (c), (d) or (e) but does not include any artificial channel or work which diverts water away from such a waterway; or

(g) if any land described in paragraph (f) forms part of a slope rising from the waterway to a definite lip, the land up to that lip;

In considering riparian Crown land, it is also necessary to understand the terms 'watercourse,' 'bed and banks' and 'frontage' as defined in the Land Act 1958:-

Land Act 1958

"watercourse"[51] means any river, creek, stream, watercourse, lake, lagoon, swamp or marsh.

"bed and banks"[52], in relation to a watercourse—

(a) includes the land over which the water in the watercourse normally flows and the land that is normally covered by that water;

(b) does not include land abutting on or adjacent to the bed and banks that is from time to time temporarily covered by floodwaters from the watercourse;

"water frontage"[53] means Crown land (including land temporarily or permanently reserved)—

(a) which has a frontage to the sea or a watercourse within the meaning of Part XII; and

(b) which is not under a lease, licence or residence area right; and

(c) which is not reserved as a water reserve along any public road under the **Crown Land (Reserves) Act 1978**; and

(d) which is not vested in trustees or in a municipal council or placed under the control of a public authority or in respect of which a committee of management has been appointed under the **Crown Land (Reserves) Act 1978**.

Note that a waterway as defined by the *Water Act* 1989 includes land not regularly covered in water but forming part of a slope rising from the waterway to a definite lip. 'Designated land' is thus land abutting any such lip, rather than the water's edge.

By contrast, the *Land Act* 1958 defines the bed and banks of a watercourse as including the land over which water normally flows – thus excluding any sloping land between the edge of the water and any definite lip or 'top of bank.' A 'water frontage' is thus land bordering the land over which water normally flows.

This distinction is not merely semantic: it is of vital importance in locating the position of many Crown-freehold title boundaries.

Riparian References in Policy

Policy-makers and land managers have relatively clear views about what constitutes riparian land. The Victorian River Health Strategy[54] offers a policy-maker's definition:

Scope of the Victorian River Health Strategy

The VRHS focuses on the management and ecological condition of rivers and streams. Throughout the VRHS, the definition of a 'river' to be used is one which reflects its functioning as an ecosystem:

A river, stream or natural waterway includes:

• the channel;

• the riparian zone, which includes the area of land that adjoins, regularly influences, or is influenced by, the river, including the regularly wetted floodplain and any associated floodplain wetlands; and

• the estuary or terminal lake.

Likewise, the Commonwealth Land and Water Resources Research and Development Corporation offers a functional definition of riparian land[55], as follows:

Using the functional approach, riparian land is defined as 'any land which adjoins, directly influences, or is influenced by the body of water.'

With this definition, riparian land includes

- the land immediately alongside small creeks and rivers, including the river bank itself;

- gullies and dips which sometimes run with surface water;

- areas surrounding lakes;

- wetlands on river floodplains which interact with the river in times of flood.

Riparian references in Statute

The makers of legislation and regulations have generally avoided the word 'riparian,' which makes only fleeting appearances in Victorian statute[56].

The *Water Act* 1989 refers at several points to the need, in making certain decisions and exercising certain powers, to consider the environment, including the riverine and riparian environment.

The *Murray Darling Basin Act* 1993 makes a similar reference at one point.

The *Heritage Rivers Act* 1992 and *The Flora and Fauna Guarantee Act* 1988 each make passing references to documents which in turn address riparian land.

Although Victorian legislation does not attempt to define riparian land, there are various legislative references to land alongside rivers. These include:

CMA 'Designated land' under the *Water Act* 1989. This Act (section 188) defines designated land as being land abutting or within 20 metres of a designated waterway, and subject to a proclamation by a Catchment Management Authority. Since no such proclamations have been made, there is no CMA designated land at the present time.

Melbourne Water 'Designated Land' under the *Water Act* 1989. This Act (section 188A) defines designated land of Melbourne Water as being land abutting or within 20 metres of a waterway within the Metropolitan Area.

'Water Frontages' under the *Crown Land (Reserves) Act* 1978 and the *Land Act* 1958. These two Acts govern riparian Crown land; the former enabling its reservation and the latter its occupation under licence by abutting owners.

'Waterways Land' under the *Water Industry Act* 1994. This means any Crown land comprising the bed, banks and 20m either side of a waterway within the Melbourne metropolitan area.

'Heritage River Areas' defined by the *Heritage Rivers Act* 1992. These are 18 specific being tracts of land individually defined by plan and/or description, often extending to 100, 200 or 300 metres from the river.

A 'catchment' is defined in the *Catchment and Land Protection Act* as an area which, through runoff or percolation, contributes to the water in a stream or stream system. This definition includes not only riparian land, but land which may be remote from the river into which its runoff eventually drains.

'Urban Floodway Zones' and 'Land Subject to Inundation Overlays,' are found in Planning Schemes made under the *Planning and Environment Act* 1989. They are applied in specific localised circumstances, and are not defined concepts with any wider application.

9.3.2 Waterways – a Cadastral Taxonomy

Geographers, ecologists and hydrologists may classify rivers in terms of their geomorphology, biological characteristics, or flow characteristics[3]. For our purposes, however, waterways need to be described in terms of their relation to the cadastre. The categories described below are not mutually exclusive.

The Murray

In this taxonomy the Murray stands apart. It defines the state border[57], which lies at the top of the bank on the southern side of the river[58]. 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 well-known three-chain Crown reserve established along the southern frontage was set out in 1881, when the state border was understood to be the water's edge at ordinary winter flow. As a result, the width of the reserve is three chains *less* 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. Here, the waterway and the riparian land abutting it may have dual status (being simultaneously a Crown Reserve) but such land is regarded and managed as part of the Forest or Park of which it forms a part.

A similar situation occurs on the lower reaches of many rivers: some tract of Crown land such as a flora reserve, recreation reserve or land vested in a water authority will simultaneously be a Crown reserve. Again, the riparian strip is regarded and managed as part of the larger parcel through which it runs, or for which it forms a boundary.

[3] See, for instance, the LCC Rivers and Streams Special Investigation, 1991, section C

Waterways as Property Boundaries

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 licences are most likely to be found.

"Section 385" Boundaries

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 defines both 'waterway' (see 3.1.3 above) and 'designated waterway.' Under section 188 a Waterway Authority (other than Melbourne Water) may declare a waterway as 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 under the Crown land (Reserves) Act. Although reservation may occur at any time, the most notable was in 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 that date, so the Crown reserve is discontinuous, being 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.

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 rivers, 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.

9.3.3 Riparian Land – a Cadastral Taxonomy

Description of the Topic

Every piece of land in the vicinity of a river has some recognised legal 'status.' Land status is a recurrent theme in this paper, being central to many riparian issues. This section introduces and summarises most types of land status dealt with elsewhere in this report.

Crown Land – Primary Status

'Default' Status Land

known as 'unalienated and unreserved land of the Crown.' This is land which has been given no other status. It is dealt with under the *Land Act* 1958.

Government Roads –

these are roads laid out on Crown land, usually by the original 19th century surveyor. They are dealt with under the *Land Act* 1958. They may or may not have the physical characteristics of a road. In rural

areas, many have been declared 'unused' and are the subject of licences to abutting owners, usually for the purpose of grazing.

Crown Reserves

These are parcels of Crown land set aside for some nominated public purpose, and governed by the *Crown Land (Reserves) Act* 1978. They may be either 'temporary' (i.e. revokable by executive action) or 'permanent' (i.e. revocable only by legislation). They may or may not be the subject of regulations, and may or may not be placed under the control of a Committee of Management. They may be the subject of tenures (leases and licences).

State Forest

Crown land may be dedicated as Reserved Forest or Protected Forest under the *Forests Act* 1958.

Crown Water Frontages

The term Crown frontage is used to describe the land between a waterway and a nearby freehold boundary. These may be either 'default' status Crown land or Crown reserve. Crown frontages are governed by the *Land Act* 1958, under which many are the subject of licences to abutting owners, usually for the purpose of grazing.

Dual Status

Most parcels of Crown land have only one of the foregoing statuses. It is possible, however, for some areas to have dual status. For instance, an area where a government road abuts or crosses a river may be government road and Crown reserve simultaneously.

Likewise, riparian land within a State Forest may simultaneously be a Crown Reserve.

National Parks

Created by (not under) the *National Parks Act* 1975. Included here are some parks designated as State Parks, Wilderness Parks etc. The legislation creating each park also extinguishes any previous status – so there cannot be issues of dual status. Note that so-called 'Regional' Parks are, in law, either State Forest or Crown reserve.

Crown Land – Secondary Status

The foregoing section discusses the nominal, primary status of Crown land. Any parcel of Crown land may also be the subject of one or both of the following 'secondary' forms of status.

VEAC Categorisation

The Victorian Environment Assessment Council (VEAC) has developed its own taxonomy of public land. Some VEAC categories coincide with statutory categories (e.g. National Park) but others do not.

Riparian land which does not fall within some larger-scale parcel is likely to be categorised as follows:

Category	Sub-Category
Natural Features Reserve	River Murray Reserve; Streamside Area Public Land Water Frontages Stream Beds and Banks

If VEAC recommendations are adopted, DSE will implement them by reserving this land under the Crown Land (Reserves) Act for one the purposes listed in section 4 of that Act, or for 'public purposes.'

Unimplemented VEAC Recommendations

Recommendations by the VEAC (or its predecessors the LCC and the ECC), once accepted by government, still need to be implemented – a process which may take several years. There are thus many areas of Crown land whose current status must be viewed in light of a VEAC recommendation that it be changed to some other status.

The PL / GL categorisation

Most parcels of Crown land in Victoria were assessed during the 1990s to ascertain their suitability for disposal. This resulted in each parcel being assigned a two-letter code, as follows:

PL (or Public Land) is Crown land with some inherent characteristic which warrants its retention in the Crown portfolio. The characteristics may be conservation, social, or strategic.

GL (Government Land) is Crown land whose values would be adequately protected if the land were sold as freehold. As a government asset, there is no policy reason why it should not be converted from land into dollars.

PA (Public Authority land) is Crown land which would normally be assessed as GL and transferred into the land sales program, but which is currently occupied by a public authority or in use for some community purpose. If and when that occupation ceases, it will be dealt with as GL land.

Note that these are policy-based categories, in no way recognised by legislation. If the PL/GL assessment suggested a change of status for some parcel of land, that change would still need to be implemented through normal statutory processes.

Freehold Land

Freehold is land alienated from the Crown, usually in the form of a Crown Allotment. Many CAs have since been restructured through subdivisions and consolidations. Ownership of freehold is recorded either under the Property Law Act 1958 (for 'Old Law' or 'General Law' titles) or under the Transfer of Land Act 1958 (for 'Torrens' titles).

Privately-owned freehold

All freehold has an owner. The owner may be a natural person(s) or a corporate entity, including a public agency such as a council or statutory authority. A freehold parcel may be an original Crown Allotment or a lot created on a plan of subdivision / consolidation. The owner is usually the 'registered proprietor' – i.e. the party recorded on title at Land Registry. Exceptions include owners whose recent acquisition has not yet been notified to Land Registry, and owners through adverse possession.

Freehold Roads

Roads may be created in subdivisions. They remain as freehold, and are usually owned by the municipality – although that fact may not be recorded on title.

Freehold Reserves

Reserves may also be created in subdivisions. They remain as freehold, and, depending on their purpose, may be owned by the drainage authority or the municipality. Like roads, true ownership may not be recorded on title, but avenues are available to remedy this.

9.4 Extracts from Previous Reports

9.4.1 1983 - Peter Cabena: "Victoria's Water Frontage Reserves – An Historical Review and Resource Appreciation"

The 'Cabena' Options

In a 1983 paper prepared for the Department of Crown Lands and Survey, author Peter Cabena developed a series of five options for the future of the Crown frontage resource (and, reciprocally, for the freehold frontage resource).

(i) The resource be dismantled and sold. This approach is not consistent with the conservation and recreation value of water frontages and would be socially, environmentally and, ultimately, economically irresponsible

(ii) Fixed historical legacy. The present resource be accepted as final and maintained as a monument to the past, conservation and recreation objectives being pursued as far as possible within these limits.

(iii) Rationalisation. The resource be rationalised and concentrated along major streams. Freehold frontages beside nominated streams would be re-acquired (by the Crown) and isolated Crown frontages along minor tributaries would be sold. This approach ignores the strategic environmental value of lower order stream environs.

(iv) Expansion. The resource be expanded with freehold frontages along
(a) all permanent streams, or
(b) major streams only
being re-acquired as land is subdivided or ownership is transferred.

(v) Complementary legislation. The existing Crown ownership be retained and complemented by

(a) legislation establishing public rights of access and fishery to all other waterside lands, or to all private lands which break the continuity of Crown frontages, and/or

(b) land-use control within 40 metres of all permanent water being vested in planning authorities.

9.4.2 1999 Land Victoria Review of Crown Land Legislation

9.4.2..1 The 1999 Option

In 1999 Land Victoria developed a wide-ranging set of proposals (never implemented) for the reform of the Crown Land Acts. Although some of its proposals now seem incompatible with current policy directions, the Discussion Paper[59] serves as a valuable comparison to the current project.

> *There is a need to recast existing unused road and water frontage licences as occupation rights because they are not true licences. They are not discretionary (the owner of the adjoining land is required to hold the right if the boundary between the Crown land and the freehold is unfenced)…*
>
> *The right would run with the ownership of the adjacent land and the legislation would require notification of change of ownership. This would have the administrative benefit of automating transfers.*
>
> *Proposal 44*
>
> *The present system of unused road and water frontage licences should be replaced as follows:*
>
> > *Create an occupation right which runs with the ownership of the adjacent land provided the adjacent land is used for agriculture and the shared boundary is not fenced;*
> >
> > *Deem all existing unused road and water frontage licences to be occupation rights;*
> >
> > *Enable the right to be held on conditions specified in the legislation, including land management obligations;*
> >
> > *Require notification of change of ownership of adjacent land;*
> >
> > *Provide for automatic transfer of responsibility for occupation fees and land management obligations on change of ownership;*
> >
> > *Require payment of an upfront fee with upfront payment options;*
> >
> > *Enable to right to be cancelled and reinstated;*
> >
> > *Provide statutory indemnity with respect to activities or omissions by the holders of occupation rights; and*
> >
> > *Enable recovery of costs associated with fencing and remediation.*

9.4.3 The 2000 Sinclair Knight Merz Report

In their 2000 State-wide Review of Crown Water Frontages, Sinclair Knight Merz (SKM) proposed a model for status-neutral 'Frontage Management Plans' :-

> *In the long-term it would be anticipated that this agreement forms the basis by which managers of all stream frontages (public and private) would participate in improved stream and waterway management. The agreement would be a relatively simple document that would include:*
>
> *The landholder's whole farm plan…*
>
> *A statement of the landholder's (or licensee's for occupied public frontages) rights, responsibilities and expectations of the licensing authority*
>
> *Statements relating to cost sharing between the CMA and landholder for capital works…*
>
> *An Occupation Licence for Crown water frontages that would be based on the existing agricultural licence, but emphasises the full range of environmental, cultural and aesthetic values and uses. The licence would specify any fees that might be payable for the occupation.*

9.4.4 The 1991 Land Conservation Council Recommendations

RIVER FRONTAGES, BEDS AND BANKS

Recommendations

Public Land Water Frontage Reserves

E1 That public land water frontages

(a) be used to
- (i) conserve native flora and fauna as part of an integrated system of habitat networks across the State
- (ii) maintain or restore indigenous vegetation
- (iii) protect adjoining land from erosion, and provide for flood passage
- (iv) protect the character and scenic quality of the local landscape
- (v) provide protection for cultural heritage features and associations
- (vi) provide access for recreational activities and levels of use consistent with (i)—(v) above (see Note 1)
- (vii) where this does not conflict with (i)—(vi) above, allow access for water, and for grazing of stock by adjoining landholders under licence

that

(b) where frontage reserves are currently licensed for grazing or other purposes, and where stream bank or frontage vegetation is degraded, frontage vegetation is not regenerating, or stream banks are eroding, consultative groups be established by the public land managers, with waterway management, local government, and licensee representatives, as follows:
- (i) at a State level, to develop guidelines and programs for restoration of frontages, including re-establishing or regenerating indigenous vegetation
- (ii) at a regional level, to develop strategies for managing frontage reserves while vegetation is being restored
- (iii) at a local level, to set priorities and a timetable for frontage restoration and maintenance

and these guidelines, programs and strategies be implemented according to the priorities and timetable so determined (see Notes 2–6)

that

(c) (i) where habitat and landscape are proposed to be restored, particularly in cleared or degraded areas, indigenous trees, shrubs, and ground species be planted

(ii) if appropriate, suitable areas for more intensive recreational use be identified and facilities established

(iii) where land exchanges are proposed that involve frontage land that is no longer adjacent to rivers, efforts be made to prevent loss of any nature conservation or other values of this land from the public land estate (see Note 5)

(iv) a method be developed that will allow public land frontages to be readily identified, and such frontages be so marked where appropriate

(d) (i) where a licence has been issued for a public land water frontage as in (a) (vii) above, recreation use by the public for activities such as walking, nature observation, or fishing be permitted while motorised forms of recreation not be permitted

(ii) licensees be required to provide stiles in any fences erected across their licence area if requested to do so by the land manager (see Notes 7 and 8)

(iii) no new cultivation for agriculture be permitted, and areas currently cultivated be reviewed by the land manager as part of a systematic assessment of river restoration priorities, with a view to phasing out inappropriate cultivation

(iv) in particular cases, licensees be required to fence off and exclude stock temporarily from some parts of the licence area where, in the opinion of the land manager, special measures are necessary to protect water supplies, to rehabilitate areas that are eroding or salt-affected, to permit regeneration of native plants that have particular value for nature conservation, or to protect cultural, recreational, and scenic values that are sensitive to the impacts of grazing (see Note 8)

(e) the Department of Conservation and Environment be consulted prior to the proclamation of roads, the construction of roadways, or the creation of buildings on public land water frontages

and that public land water frontages be permanently reserved under section 4 of the *Crown Land (Reserves) Act 1978* and managed by the Department of Conservation and Environment (or present manager), in consultation with the relevant waterway authority (see Note 9).

Stream Beds and Banks

E2 That stream beds and banks, subject to other recommendations and guidelines in this report and statutory requirements

(a) be used to

(i) conserve or restore habitat for native flora and fauna

(ii) provide for appropriate recreational activities and levels of use
(iii) provide for flood passage and drainage requirements of adjacent land
(iv) where necessary, provide for the passage of artificial flows of water stored within the catchment or transferred from other catchments

(b) be maintained in a stable condition using environmentally sound techniques

(c) where this does not conflict with (a) and (b) above, provide a source of sand and gravel

and that stream beds and banks be securely reserved and managed by the relevant waterway authority or the Rural Water Commission (or present manager), in consultation with the Department of Conservation and Environment.

E3 That

(a) the interrelated nature of the values and uses of river frontage, beds and banks be recognised in management planning and implementation

(b) initiatives be developed and implemented to remove economic, social, administrative and technical factors that lead to losses of river bed, bank, and frontage values, or to difficulties in achieving effective and co-ordinated restoration and maintenance programs

(c) programs for stream bed, bank and frontage stability be carried out in accordance with Recommendation F9.

Notes:
1. Recommendation F1(h) provides that a code of behaviour for recreational users of river frontages be developed and promoted.
2. Council recognises that a number of bodies currently exist which undertake, or are capable of undertaking the functional requirements at State, regional or local levels. In this context 'regional' would cover a single river basin or a number of adjacent basins, and 'local' an area within a river basin, such as individual drainage catchments or a particular river reach.
3. It is envisaged that for community consultation, Catchment Co-ordination Groups where they exist, or similar groups where they do not, could carry out or facilitate stages E1(b)(ii) and (b)(iii) above, and that the Standing Committee on Rivers and Catchments or equivalent organisation could carry out or facilitate E1(b)(i). When determining priorities, restoration or maintenance programs which lead to direct site improvement are to be given precedence.
4. Vegetation re-establishment or regeneration may require the temporary or permanent removal of stock from some frontage areas.
5. These areas could include values such as remnant vegetation, wetland habitat, opportunities for recreational use or contain features of cultural significance, such as scarred trees.
6. Identification of priorities in E1(b)(iii) should take into account the guidelines set out above.
7. The choice of a suitable design for stiles should involve representatives of the frontage user groups such as the Victorian Farmers Federation and peak recreation groups.

8. These are provisions in existing legislation, regulations, or licences.
9. It is Council's intention that these areas remain within the public land estate and be securely reserved. The *Crown Land (Reserves) Act 1978* requires that areas to be reserved be surveyed, a process which is expensive and protracted. If alternative methods become available which will achieve Council's intention of secure reservation, for example using a record plan, then these could be used, provided that the reservation is otherwise comparable to permanent reservation under the *Crown Land (Reserves) Act 1978*.

9.4.5 The 2007 VEAC Draft Redgum Report

VEAC: Time for a 'Major Shift'

VEAC's most recent Investigation has been into the River Redgum Forests of the Murray-Goulburn region. VEAC released its proposed recommendations in July 2007.
Noting that they have not yet been finalised or adopted by government, key recommendations include:

Creation of new National Parks, Regional Parks, Nature Conservation Reserves and Historic, Cultural and Natural Features Reserves. Most of these Parks and Reserves include rivers and riparian land.

New avenues for Indigenous participation in management

Development of an interstate Murray River Strategy, similar to the Victorian Coastal Strategy

A 'major shift' in management priorities for Public Land Water Frontages.

This 'major shift' is explained by reference to the LCC's earlier (1991) recommendation:-

the LCC (1991) Rivers and Streams Investigation recommended that grazing continue on stream frontages where it does not conflict with several other uses, notably conservation of native flora and fauna, and restoration of indigenous vegetation.

Although this recommendation has provided some impetus for the removal of grazing as part of frontage protection programs undertaken by catchment management authorities and DSE, it has had little if any effect on grazing elsewhere even where it seems likely that damage is occurring. This is why VEAC is explicitly recommending in this Investigation that grazing generally not be permitted other than to address a particular environmental or management problem, such as controlling particular weed infestations or maintaining a specific grassy habitat structure.

It is Council's expectation that this purpose will arise infrequently and when it does, the framework under which it is managed would be different from the current general approach. That is, domestic stock grazing should only occur to address a specific, explicitly-stated problem.

In relation to public land water frontages, VEAC recommends that existing grazing licences be reviewed with a view to phasing out grazing over five years, and that all cultivation of frontages cease. The full text of the proposed recommendation is as follows:-

Public land water frontages

Public land water frontages comprise a long narrow corridor of Crown land along major

streams and rivers. Many of these areas were set aside in 1881. On the Northern Plains, these linear reserves along with vegetated road reserves provide most of the remaining habitat for numerous threatened species. Stream frontage reserves are also an important recreation resource. Many are currently licensed to adjoining land holders for various uses but mostly for grazing and for stock access to water.

Council proposes a major shift in the management priorities for these areas in keeping with the process established by catchment management authorities to fence off and revegetate these areas. As described in the general recommendations for grazing (Recommendation R33) domestic stock grazing is to be phased out of all public land water frontages over the next five years.

Recommendations G105-G111 That:
public land water frontages, where not otherwise recommended for a specific use, be used in accordance with the natural features reserves general recommendation G, and be used to:

(a) conserve native flora and fauna as part of an integrated system of habitat networks across the state
(b) maintain or restore native vegetation
(c) protect adjoining land from erosion, and provide for flood passage
(d) protect the character and scenic quality of the local landscape
(e) provide protection for cultural heritage features and values, and
(f) provide access for recreation (including hunting where appropriate) at levels of use consistent with (a) to (e) above
and that:
(g) catchment management authorities, in cooperation with adjoining landholders, implement programs to gradually restore frontages on currently grazed, degraded, eroded or salt-affected stream-banks, where frontage vegetation is degraded or not regenerating and to protect natural, cultural, recreational and scenic values or water quality
(h) programs to restore frontages be implemented according to local priorities and a practical timetable, with particular emphasis on the Victorian Riverina bioregion
(i) where frontages adjoin farmland, fencing and off-stream stock watering points be encouraged by appropriate support
(j) where stream frontage vegetation is to be restored, particularly in cleared or degraded areas, native trees, shrubs and ground species be planted, where possible using seed of local provenance
(k) where appropriate, suitable areas for more intensive recreational use be identified and facilities established
(l) where land exchanges are proposed that involve frontage land that is no longer adjacent to rivers, efforts be made to prevent loss of any nature conservation or other values of this land from the public land estate
(m) no new licences for grazing by domestic stock be issued, and that existing licences be systematically reviewed, with a view to completing the phasing out of grazing within five years, except where there is an ecological objective or a specific management purpose
(n) where a licence has been issued for a public land water frontage, usually for grazing, recreation use by the public for activities such as walking, nature observation or fishing be permitted, while motorised forms of recreation not be permitted
(o) licensees be required to provide stiles in any fences erected across their licence area if requested to do so by the land manager
(p) no new cultivation of stream frontages for agriculture be permitted, and areas currently cultivated be revegetated
(q) timber cutting not be permitted
(r) sand and gravel extraction may be permitted by the land managers where this is consistent with the above uses, and where necessary for bed and bank stability, and
(s) public land water frontages be managed by the relevant catchment management

authority and DSE, as appropriate.

9.5 CMA Landholder Agreements

9.5.1 General observations

Often, an individual CMA's standard document has valuable conditions or characteristics which could usefully be replicated by other CMAs

The principal characteristic of these document is their lack of consistency. Each appears to have been drafted by its particular CMA with little or no reference to other CMAs

Some agreements involve the CMA making a payment or payments to the landholder; others set out a division of responsibility for provision of materials and conduct of works, without any money changing hands; and others take the form of landholder permits for the CMA itself to undertake works

Some seem indifferent to land status, apparently relating to any land either freehold or Crown. Others require identification of land status. Only a couple show evidence of detailed coordination between the CMA and DSE in relation to works on Crown land frontages.

In terms of legal enforceability, accountability for compliance, or acceptability to audit, some of these agreements are poorly structured sets of documents well below the standard normally expected for a taxpayer-funded program

Some agreements refer to the need for compliance with various other Acts etc – CaLP Act, Aboriginal Heritage, Native Title, Off-stream watering, EPBC Act – but there is no consistency in this, no guidance in what compliance involves, and no mechanism for monitoring compliance. Rather than serving to ensure compliance, these references seem to be intended to provide a measure of indemnity for the CMA in the event of non-compliance

Some Agreements have provision for the provision of evidence that the works have been conducted – some require 'before' photos, and some require 'after' photos. Some ensure compliance by linking the final payment to a satisfactory inspection.

9.5.2 Corangamite CMA

Document Title:
MOORABOOL RIVER CATCHMENT PROJECT
TERMS AND CONDITIONS

Format:- 7-page document

General comments

This agreement relates to work to be undertaken by the CMA's contractor on the landholder's land. The agreement itself does not provide for any monetary payments from the CMA to the landholder, although it refers to future cost-sharing of weedicide.

Consistency with recommended minimum conditions:

Identify both parties and name, address, contact details and ABN number	Yes – But no ABN no for tax invoices
executed by both parties (preferably on the same page; the signatures dated and witnessed)	Yes
Identify the subject land, its status, and the authority under which the landholder occupies it	By reference to appended map
recite the head of power under which they are made	No
include a process for the mediation of disputes	No
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans	Not relevant
provide a clear schedule of payments and the conditions / milestones for each payment	Not relevant
provide for invoices and receipts to meet the requirements of audit	Not relevant
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	Not relevant
provide effective remedies for non-compliance including recovery of monies through the Magistrates Court.	No

Other notable conditions

Landholder agrees to CMA referring to the project in promotional materials

9.5.3 Glenelg Hopkins CMA

Document Title: **AGREEMENTS FOR FUNDING OF LESS THAN $20,000**

Format:- 3 page document

General comments

This document is one-party's acceptance of the other party's grant, whereas the 'over $20,000' document is a two-party agreement.

Consistency with recommended minimum conditions:

Identify both parties and name, address, contact details and ABN number	Yes
executed by both parties (preferably on the same page; the signatures dated and witnessed)	No – only signed by landholder
Identify the subject land, its status, and the authority under which the landholder occupies it	No – although the form contains a box headed 'Project Specific' which could contain some of this information
recite the head of power under which they are made	No
include a process for the mediation of disputes	No
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans	Box headed 'Project Specific' but no guidance as to contents. Mention of an attached 'vegetation species guide'
provide a clear schedule of payments and the conditions / milestones for each payment	Yes
provide for invoices and receipts to meet the requirements of audit	Yes – provision for recipient-created tax invoices
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	Yes – but only 'after' photos
provide effective remedies for non-compliance including recovery of monies.	Document provides for recovery of unspent monies and total repayment in the event of default

Other notable conditions

Applicant must ensure compliance with the Commonwealth EPBC Act - but no guidance on what this might entail

Compliance is encouraged through the warning: "Applicants who do not satisfy all conditions of this agreement may be ineligible for future funding."

9.5.4 Glenelg Hopkins CMA

Document Title: **Agreement for Partnership Project: funding of over $20,000**

Format:- 7 page document. Version sighted is marked 'draft'

General comments

This document is a two-party contract, whereas the 'under $20,000' document is one-party's acceptance of the other party's grant.

Consistency with recommended minimum conditions:

Identify both parties and name, address, contact details and ABN number	Yes
executed by both parties (preferably on the same page; the signatures dated and witnessed)	Yes
Identify the subject land, its status, and the authority under which the landholder occupies it	No – although this may be done in the original application form or the attached schedules
recite the head of power under which they are made	No – but reference to "a scheme of partnership projects"
include a process for the mediation of disputes	Yes
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans	Yes
provide a clear schedule of payments and the conditions / milestones for each payment	Yes
provide for invoices and receipts to meet the requirements of audit	Yes
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	Yes – "progress reports required"
provide effective remedies for non-compliance including recovery of monies.	Yes

Other notable conditions

The agreement '*binds each party's legal personal representatives, successors and assig*ns' – but this can not be taken to bind subsequent owners of the land.

The landowner is to ensure and agrees to comply with all applicable legislation and agrees that it will obtain all necessary permits and licences to enable completion of the works in accordance with all such stated requirements (but no specific mention of Commonwealth EPBC Act – as for the under-$20,000 grants)

9.5.5 West Gippsland CMA

Format: - Set of three documents

General comments: this is an agreement for shared responsibility for materials and works - no payments are involved.

Document Title:	**Project Site Assessment Form**	**"Agreement on Fencing Works"**	**"Fencing Agreement Landholder Form"**
Format:-	1 page form plus 1 page Works Agreement	1 page Letter from CMA to landholder plus 1 page certificate - optional authority from landholder for CMA to purchase tubestock	1 page form
Identify both parties and name, address, contact details and ABN number	Yes (but no ABN)	No	Identifies landholder
executed by both parties (preferably on the same page; the signatures dated and witnessed)	Yes	No	No
Identify the subject land, its status, and the authority under which the landholder occupies it	Identifies location but not status or tenure	No	Identifies the land
recite the head of power under which they are made	No	No	No
include a process for the mediation of disputes	No	No	No
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans	No – the various documents do not link together as a coherent whole	No	No
provide a clear schedule of payments and the conditions / milestones for each payment	Does not provide for payments. Both parties' contributions are in-kind	N.A.	N.A.
provide for invoices and receipts to meet the requirements of audit	N.A.	N.A.	N.A.

provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	Photos requested, but not required.		
provide effective remedies for non-compliance including recovery of monies.	N.A.	N.A.	N.A.
Other notable conditions	Any Aboriginal sites?		Off-stream water arranged? yes/no

9.5.6 Goulburn-Broken CMA

General Comments: The CMA makes a separate formal report to Crown Land Management, DSE.

Document Title:	Letter of Offer	**Riparian Management Plan – Site Protection**
Format:-	1-page letter of conditional offer; - "An Agreement, but NOT an approval" 2-page acceptance form	4-page management plan
Identify both parties and name, address, contact details and ABN number	Yes, but no ABN	
executed by both parties (preferably on the same page; the signatures dated and witnessed)	Yes	landholder only
Identify the subject land, its status, and the authority under which the landholder occupies it	No	No
recite the head of power under which the grant is made	No	
include a process for the mediation of disputes	No	
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans		Suite of standard conditions
provide a clear schedule of payments and the conditions / milestones for each payment	Yes - payment to be made only on final inspection	
provide for invoices and receipts to meet the requirements of audit	Not in the documents sighted	
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	No	
provide effective remedies for non-compliance including recovery of monies.	N.A. Payment to be made only on final inspection	

9.5.7 Wimmera CMA

Consistency with recommended minimum conditions:

Document Title:	"Example offer"
Format	1-page letter from CMA 2-page Agreement by landholder
Identify both parties and name, address, contact details and ABN number	Yes
executed by both parties (preferably on the same page; the signatures dated and witnessed)	Pro-forma letter pre-signed by CMA CEO Agreement signed by landholder only
Identify the subject land, its status, and the authority under which the landholder occupies it	Not on documents sighted.
recite the head of power under which the grant is made	No
include a process for the mediation of disputes	No
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans	Letter and agreement linked by Project Number
provide a clear schedule of payments and the conditions / milestones for each payment	Yes - payment only on satisfactory completion
provide for invoices and receipts to meet the requirements of audit	Yes – provision for recipient generated tax invoice
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	Yes - Inspection required before payment
provide effective remedies for non-compliance including recovery of monies through the Magistrates Court.	Payment only on satisfactory completion

Other notable conditions

"Agreement expires and not valid after: (date)"

9.5.8 North Central CMA

General comments….this agreement relates to works being undertaken by the landholder, and payment being made on completion by the CMA. The agreement also allows for all or a proportion of the works to be undertaken by the CMA, with the possibility of the landholder contributing some funds.

Consistency with recommended minimum conditions:

Document Title:	Environmental Works Agreement
Format	4 page, four part document:- covering page A – works schedule B – Site plan C – conditions attachments signatures
Identify both parties and name, address, contact details and ABN number	Yes
executed by both parties (preferably on the same page; the signatures dated and witnessed)	Yes
Identify the subject land, its status, and the authority under which the landholder occupies it	Yes
recite the head of power under which the grant is made	No
include a process for the mediation of disputes	No
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans	Yes – cross references to a series of linked documents (not sighted)
provide a clear schedule of payments and the conditions / milestones for each payment	Single payment on completion
provide for invoices and receipts to meet the requirements of audit	Separate claim form (not sighted)
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	Inspections by CMA project officer – presumably involving collection of photos etc
provide effective remedies for non-compliance including recovery of monies through the Magistrates Court.	Not relevant

Other notable conditions

Detailed but relatively ineffective/pointless provisions relating to Aboriginal cultural heritage and Native title

9.5.9 Melbourne Water

Melbourne Water (MW) offers four different forms of Agreement

Stream Frontage Management Agreement

This is an Agreement between MW and the Person who is the landholder (of freehold riparian land) or the Crown licensee (called the 'Authorised Land Manager')

Features of the Agreement include:

MW may provide funding, advice, or training

Payment is made in advance

The project is assessed and audited by an independent contracted monitor

Rates of subsidy for fencing increase with the distance of the fence from the waterway

MW may reimburse the application costs for a Crown frontage licence

MW may pay rebates of training course fees

The Landholder must organise, implement and complete the works within 12 months

Retain proof of expenditure

Maintain the site and keep livestock out for a further 5 years after the 12 month implementation period

The Program is supported by a set of five documents:

A promotional / explanatory brochure

An Expressions of Interest form

A letter of offer to the applicant

A guide for use of the MW field officer, with procedures and model clauses

The Agreement itself

Security is sought by requiring the landholder to advise MW of any change in ownership of the property immediately contracts of sale are signed.

Community Grants

These are Agreements with incorporated community groups, including Landcare groups and Committees of Management. The Community Group may not be the formal Land Manager.

The Community Group must indemnify MW against any losses, claims etc, and must obtain all necessary approvals and permits

The Community Group is required to arrange for the Land Manager to be responsible for the on-going maintenance of the Project Site after completion of the Project.

"Go for Green" Agreements

These are Agreements intended particularly for golf courses and sporting clubs with riparian frontages

The recipient may be the owner of a freehold frontage, the Committee of Management of a Crown frontage, or the licensee of a Crown frontage.

Security is not considered to be a major issue, because the likelihood of change of land ownership within the medium-term future is low.

"Corridors of Green" Agreements

These are Agreements with public land mangers such as Parks Victoria and municipal councils

Security is not considered to be an issue, because the likelihood of change of land ownership within the medium-term future is low, and the corporate status of the recipient entity provides assurance that contracts will be honoured.

Document Title:	MW Agreement Master 2006-07	Community grants funding agreement	Corridors of Green
Format	8 page agreement	5 page agreement	5 page agreement
Identify both parties and name, address, contact details and ABN number	Yes	Yes	Yes

executed by both parties (preferably on the same page; the signatures dated and witnessed)	Yes	Yes	Yes
Identify the subject land, its status, and the authority under which the landholder occupies it	Yes	No - this is in separate grant application	No - this is in separate grant application
recite the head of power under which the grant is made	No	No	No
include a process for the mediation of disputes	No	No	No
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans	Yes	Relies on cross-reference to application form	Relies on cross-reference to application form
provide a clear schedule of payments and the conditions / milestones for each payment	Yes – full payment within 30 days of signing	Yes – full payment within 30 days of signing	
provide for invoices and receipts to meet the requirements of audit	Yes	yes	
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	Not mentioned in document	Yes – full written report required	Yes – annual report for 3 years on state of project
provide effective remedies for non-compliance including recovery of monies through the Magistrates Court.	No	No	No
other	Requires unlicensed CL to obtain licence from DSE	Land manager's consent provided on application form	

9.5.10 East Gippsland CMA

The Snowy River Agreements

One form of CMA-landholder agreement which differs from the others is the River Bank Rehabilitation and Land Management Agreement developed for use on the Snowy River.

This takes the form of status-neutral agreement between the Secretary for Conservation and Environment and a landholder. The agreement may be in relation to freehold land and/or Crown land held under licence.

In some respects, these Snowy River Agreements are made under section 69 of the Conservation Forests and Lands Act 1987; and in some respects they are a set of instructions issued by the Secretary pursuant to clause 2.9 of the standard Water Frontage licence issued under the Land Act 1958.

Concerns and Comments

The agreement contains a clause asserting that it is binding on the owner's successors in title. However, none of the 20+ agreements made to date has been lodged with the Registrar of Titles, and it remains to be seen whether they would deemed acceptable for registration.

Section 69 allows agreements to be made "to give effect to the objects or purposes of a relevant law." Relevant laws are listed in schedules to the Act, which do not include the Water Act. A section 69 agreement can therefore not be made to give effect to a program undertaken by a CMA acting as a Waterway Manager under the Water Act

A section 69 Agreement must be made under seal of the Secretary. The Snowy River agreements are made under the signature of a delegated officer

Although these agreements insert conditions into a Crown licence, they do not attempt to replace that licence.

Document Title:	On Ground Works Project Brief	River Bank Rehabilitation and Land Management Agreement 2006
Format	2 page joint CMA/ landholder project initiation	13-page "deed"
Identify both parties and name, address, contact details and ABN number	Parties are EGCMA and landholder	Yes – parties are Sec DSE and landholder but no ABN details
executed by both parties (preferably on the same page; the signatures dated and witnessed)		Yes
Identify the subject land, its status, and the authority under which the landholder occupies it		Yes
recite the head of power under which the grant is made		Yes
include a process for the mediation of disputes		Yes (Review committee)
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans		Yes (but also contains extraneous stuff better in a brochure) Details in schedules
provide a clear schedule of payments and the		No

conditions / milestones for each payment		
provide for invoices and receipts to meet the requirements of audit		No
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended		No
provide effective remedies for non-compliance including recovery of monies through the Magistrates Court.		Rectification of defaults on advice of review committee
other		Sec 69

9.5.11 North East CMA

This Agreement seems to be for joint works projects – some works by the CMA, some works by the landholder – but with no cash payments.

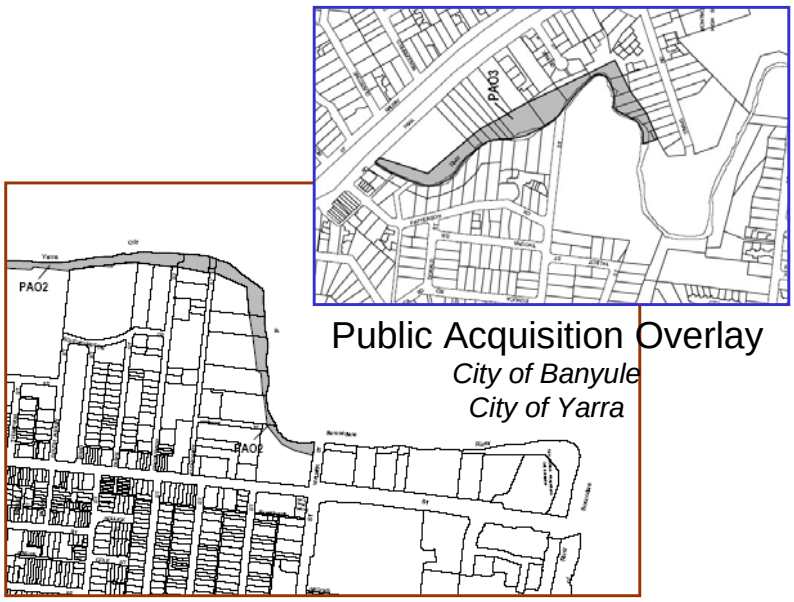
Separate brochure lists 20 different grants programs offered by NECMA, DSE, DPI, Trust for Nature, etc.

Document Title:	Landholder Works Agreement
Format	Excel Spreadsheet
Identify both parties and name, address, contact details and ABN number	Yes
executed by both parties (preferably on the same page; the signatures dated and witnessed)	Yes Not witnessed
Identify the subject land, its status, and the authority under which the landholder occupies it	Land identified by location and map No indication of land status or tenure Process checklist includes 'check if Crown land present'
recite the head of power under which the grant is made	No
include a process for the mediation of disputes	No
well-structured – e.g. a covering contract with cross-references to matters of detail in attached schedules and plans	Includes 3 parts:- Process Checklist Agreement Activities List
provide a clear schedule of payments and the conditions / milestones for each payment	N.A.
provide for invoices and receipts to meet the requirements of audit	N.A
provide for the collection of documentary evidence (e.g. before and after photos) to verify that the grant has been correctly expended	Provision for photos before, but not after Process checklist includes 'completion report inspection'
provide effective remedies for non-compliance including recovery of monies through the Magistrates Court.	No

Other notable conditions

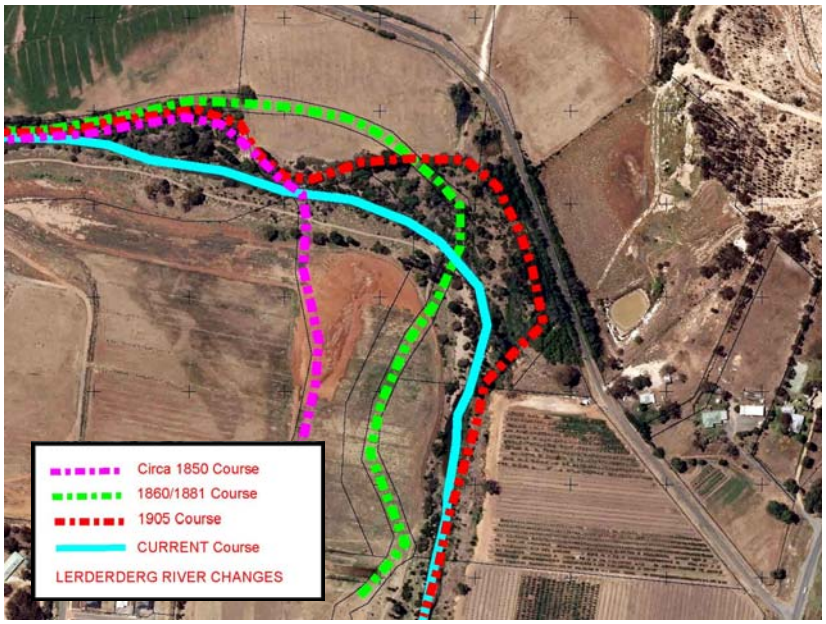
9.6 Supporting Documents

9.6.1 Public Acquisition Overlays



Public Acquisition Overlay
City of Banyule
City of Yarra

9.6.2 The Lerderderg at Bacchus Marsh



9.6.3 Crown Water Frontage Licence

Natural Resources and Environment

AGRICULTURE • RESOURCES • CONSERVATION • LAND MANAGEMENT

AGRICULTURAL LICENCE

LAND ACT 1958
Section 130

THIS LICENCE is granted by the Licensor to the Licensee and commences on the date set out in the Schedule.

In consideration of the payment of the licence fee and the conditions contained in this Licence, the Licensor or a person authorised by the Licensor, at the request of the Licensee HEREBY AUTHORISES the Licensee to use the Crown land described in the Schedule for the specified purposes set out in the Schedule.

This Licence is subject to the provisions of the *Land Act 1958* and Regulations thereunder, the licence conditions attached and any Statutory and other Special Conditions set out in the Schedule.

.....
Signature of Licensor or Authorised person

.....
Print Name

The Licensee hereby agrees that payment of the Licence Fee, shown in Item 7 of the Schedule, by the Licensee shall constitute acceptance by the Licensee of this Licence and shall constitute an undertaking by the Licensee that the Licensee shall comply with the terms and conditions of this Licence.

NOTE:

1	***This licence is not valid until payment of the Licence Fee shown in Item 7 of the Schedule is received by the Department of Natural Resources and Environment.***
2	***This Licence is an important document and should be stored in a secure and safe place. It will be needed if you sell your property. In the event of loss, a replacement fee will be charged.***

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SCHEDULE

ITEM

1. Licence Number

2. Licensor **MINISTER FOR ENVIRONMENT AND CONSERVATION**

3. Licensee

4. Licensee's Address
Town

5. Commencement Date

6. Term

7. Licence fee

8. Payable

9. Licensed land

10. Area

11. Powers under which licence granted: **Section 130 Land Act 1958**

12. Specified Purposes **Grazing**

13. Statutory and other Conditions

Unused Road - The Licensee must if directed to do so in writing by the Licensor maintain suitable unlocked swing gates, cattle pits, ramps or other suitable means of passage in any fence across the licensed land.

Water Frontage - The Licensee

(a) must erect and maintain a stile, gate or some other suitable means of pedestrian access in any fence or fences on or around the licensed land except any fence between the licensed land and adjoining private land; and

(b) must not erect or permit to remain erected on the licensed land or on any fence across the licensed land any signs that purport or convey that public pedestrian access to the licensed land is restricted in any way; and

(c) pursuant to Section 401A of the *Land Act 1958* acknowledges that any person may enter and remain on the licensed land for recreational purposes (except camping) and the Licensee must not do anything to suggest or convey to any person that he or she may not enter the licensed land for this purpose.

14 Special Conditions

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LICENCE CONDITIONS

1 *Grant*

The rights conferred by this Licence are non-exclusive, do not create or confer upon the Licensee any tenancy or any estate or interest in or over the licensed land or any part of it, and do not comprise or include any rights other than those granted or to which the Licensee is otherwise entitled by law.

2 *Licensee's Obligations (Positive)*

The Licensee **Hereby Covenants** with the Licensor that during the term the Licensee will:-

2.1 Licence fee

Duly and punctually pay or cause to be paid the licence fee to the Licensor at the payment address advised by the Licensor from time to time on the days and in the manner provided in Item 8 of the Schedule without demand, deduction, set-off or abatement.

2.2 Rates and Taxes

2.2.1 Duly and punctually pay as and when they respectively fall due all rates and taxes on the licensed land.

2.2.2 If requested to do so by the Licensor, produce receipts to the Licensor evidencing payment of the rates and taxes.

2.2.3 Duly and punctually pay to the Licensor at the same time and in the same manner as the licence fee is payable to the Licensor (or as otherwise notified to the Licensee by the Licensor) under clause 2.1 above the amount of any GST payable on or in relation to this licence and/or the rent payable thereunder or that becomes payable by the Licensor during the period covered by the fee.

2.3 Indemnity

Indemnify the Crown in respect of any claim or liability for property damage and/or injury or death of any person which arises directly or indirectly out of negligence, tort, contract, or breach of a statutory duty by the Licensee or any associated party consequential to the use or occupation of the licensed land, including, but without restricting the generality of the foregoing, the pollution or contamination of land or water, and any costs, charges and expenses incurred in connection therewith.

2.4 Maintenance

2.4.1 Throughout the term keep the licensed land in good order and condition and the improvements (if any) on it in good order and condition having regard to their condition at the commencement date or, if constructed or added to the licensed land after the commencement date, at the date of such construction or addition as the case may be and in particular but without restricting the generality of the foregoing will:-

2.4.1.1 Keep the licensed land free of pest animals and weeds;

2.4.1.2 Remedy every default of which notice is given by the Licensor to the Licensee within a reasonable time specified in the notice but in any event the time specified in the notice will not be less than 14 days.

2.5 Fire Protection Works

Undertake all fire protection works on the licensed land required by law to the satisfaction of the Licensor and the responsible fire Authority

2.6 Condition at Termination

On expiry or prior determination of this Licence return the licensed land to the Licensor in good order and condition and otherwise in accordance with the Licensee's obligations.

2.7 Notice of Defects and other matters

2.7.1 Give the Licensor prompt notice in writing of any accident to or defect in the licensed land and of any circumstances likely to cause any damage risk or hazard to the licensed land or any person on it;

2.7.2 Give to the Licensor within 7 days of its receipt by the Licensee a true copy of every notice, proposal or order given, issued or made in respect of the licensed land and full details of the circumstances of it;

2.7.3 Without delay take all necessary steps to comply with any notice, proposal or order referred to in paragraph 2.7.2 with which the Licensee is required to comply; and

2.7.4 At the request of the Licensor make or join with the Licensor in making such objections or representations against or in respect of any notice, proposal or order referred to in paragraph 2.7.2 as the Licensor deems expedient.

2.8 Compliance with Law

Comply at the Licensee's cost with the provisions of all statutes, regulations, local laws and by-laws relating to the licensed land and all lawful orders or direction made under them;

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2.9 Compliance with Directions

2.9.1 At the Licensee's cost forthwith comply with any written direction given by the Secretary during the term as to the:-

2.9.1.1 grazing or management of the licensed land (including fencing), or the number and type of stock which may be depastured on the licensed land;

2.9.1.2 frequency, timing and method of cultivation;

2.9.1.3 water supply and other improvements;

2.9.1.4 reclamation of eroded areas and land degradation; or

2.9.1.5 retention or clearance of native vegetation.

2.10 Arrears and Interest

2.10.1 Pay to the Licensor:-

2.10.1.1 on any moneys payable by the Licensee to the Licensor and outstanding for thirty (30) days or on any judgment for the Licensor in an action arising under the Licence, interest at the penalty rate of interest for the time being made payable under the *Penalty Interest Rates Act 1983* computed from the date the moneys or judgment became payable until all moneys (including interest on them) are paid in full;

2.10.1.2 on demand all the Licensor's legal costs and disbursements payable in respect of or in connection with any assignment of this Licence or under-licensing of the licensed land, any surrender of this Licence, the giving of any consent by the Licensor or any failure by the Licensee to perform and observe this Licence, or any deed or other document executed in connection with this Licence.

2.11 Further Conditions

Comply with the Statutory and other Conditions contained in Item 13 of the Schedule and with the Special Conditions contained in Item 14 of the Schedule.

3 Licensee's Obligations (Negative)

The Licensee **Hereby Covenants** with the Licensor that during the term the Licensee will not -

3.1 Use of Licensed land

Use the licensed land for any purpose other than the specified purpose referred to in Item 12 of the Schedule or any additional purpose specified in Item 14 of the Schedule without first obtaining the Licensor's written consent which can be given or withheld at the absolute discretion of the Licensor or be given subject to conditions.

3.2 Allow rubbish

Permit any rubbish to accumulate in or about the licensed land.

3.3 Hazardous Chemicals

Keep any hazardous chemical on the licensed land without the Licensor's written consent which can be given or withheld at the absolute discretion of the Licensor or be given subject to conditions.

3.4 Burning

Undertake any burning of vegetation or any other matter on the licensed land without first obtaining any necessary permit and the written approval of the Licensor which can be given or withheld at the absolute discretion of the Licensor or be given subject to conditions PROVIDED HOWEVER that the consent of the Licensor is not required for the burning of crop stubble.

3.5 Assignment

Without first obtaining the written consent of the Licensor assign, under-license, mortgage, or charge this Licence or part with or share possession of the licensed land or any part of it.

3.6 Licensor's Entry

3.6.1 Prevent, attempt to prevent or in any other way hinder, obstruct or permit the hindrance or obstruction of the Licensor or the Licensor's employee or agent at any time from entering and remaining on the licensed land either with or without motor vehicles or other equipment for any purpose and in particular, but without restricting the generality of the foregoing, for any of the following purposes:-

3.6.1.1 retaking or attempting to retake possession of the licensed land;

3.6.1.2 inspection; or

3.6.1.3 any other lawful purpose.

3.7 Void insurance

Do or allow anything to be done which might result in any insurance's relating to the licensed land becoming void or voidable or which might increase the premium on any insurance.

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3.8 *Cultivation and Use of Licensed land*

3.8.1 Without the Licensor's prior written approval, which can be given or withheld at the absolute discretion of the Licensor or be given subject to conditions, :-

3.8.1.1 fell, ringbark, injure, destroy or remove any living or dead vegetation (except weeds) or fallen timber on the licensed land;

3.8.1.2 plough, cultivate, work, break up or remove soil or construct any earthworks on the licensed land;

3.8.1.3 plant any vegetation, seed or crop on the licensed land; or

3.8.1.4 apply fertilizer to the licensed land.

3.9 *Erection of Improvements*

Erect or permit the erection of any improvement on the licensed land without the Licensor's prior written approval, which can be given or withheld at the absolute discretion of the Licensor or be given subject to conditions.

4 *General Conditions*

4.1 *Termination upon Default*

If the Licensor is satisfied, after giving the Licensee a reasonable opportunity to be heard, that the licensee has failed to comply with any terms or conditions of the licence, the Licensor may, by notice published in the Government Gazette, declare that the licence is cancelled, and upon cancellation the licensee will not be entitled to any compensation whatsoever.

4.2 *Termination without Default*

4.2.1 In addition to and not in substitution for the power to cancel this Licence under clause 4.1, the Licensor may by giving to the Licensee at least 30 days' written notice to that effect cancel this Licence upon a date to be specified in that notice notwithstanding that there has been no breach by the Licensee of any term or condition of this Licence.

4.2.2 If the licence is terminated under this clause the Licensee is entitled to receive and will be paid by the Licensor a refund of an amount of the licence fee paid.

4.2.3 The amount of refund will be determined by the Licensor on a pro rata basis, taking into account any period of the licence remaining at the date of cancellation.

4.2.4 Except as provided in sub clause 4.2.2 above no compensation is payable in respect of the cancellation of the licence.

4.3 *Licensee's Improvements*

4.3.1 The Licensee's improvements shall remain the property of the Licensee.

4.3.2 On the cancellation or expiration of the Licence the Licensee must, within a period of time specified by the Secretary, remove all Licensee's improvements from the licensed land and forthwith make good all damage caused to the licensed land by the affixing, retention or removal of Licensee's improvements to the satisfaction of the Secretary.

4.4 *Secretary may remove and dispose of property*

If the Licence expires, or is cancelled under clauses 4.1 or 4.2, the Secretary may at the end of the period of time specified under Clause 4.3.2 remove the Licensee's chattels and improvements and store them at the Licensee's expense without being liable to the Licensee for trespass, detinue, conversion or negligence. After storing them for at least one month, the Secretary may sell or dispose of them by auction, private sale, gift, distribution or otherwise and apply the net proceeds towards the payment of any moneys owed by the Licensee to the Licensor.

4.5 *Licensor's/Secretary's Agents*

Every act or thing to be done, decision to be made or document to be signed pursuant to this Licence by the Licensor or the Secretary and not required by law to be done, made or signed by the Licensor or the Secretary personally may be done made or signed by any person to whom such power has been delegated by the Licensor or the Secretary.

4.6 *Notices*

Any notice consent or demand or other communication to be served on or given to the Licensee by the Licensor under this Licence shall be deemed to have been duly served or given if it is in writing signed by the Licensor and delivered or sent by pre paid post to the Licensee's address set out in Item 4 of the Schedule or to the latest address stated by the Licensee in any written communication with the Licensor.

4.7 *Review of Licence fee*

The licence fee, unless it has been paid in full for the term, will be reviewed by the Licensor every three years from 1st October 1997, and the reviewed fee shall commence on the day following the date fixed for each such review.

4.8 Debt recovery

All moneys payable by the Licensee to the Licensor under this Licence are recoverable from the Licensee as liquidated debts payable on demand.

5 Definitions

Unless inconsistent with the context or subject matter each word or phrase defined in this clause has the same meaning when used elsewhere in the licence.

"**commencement date**" means the date described in Item 5 of the Schedule and is the first day of the term;

"**Crown**" means the Crown in right of the State of Victoria and includes the Secretary and each employee and agent of the Crown or the Secretary;

"GST" means a goods and services tax within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999.*

"**Department**" means the Department of Natural Resources and Environment or its successor in law;

"**flora**" has the same meaning as in the *Flora and Fauna Guarantee Act 1988*;

"**hazardous chemical**" includes gas, inflammable liquid, explosive substance, pesticide, herbicide, fertilizer and other chemicals;

"**improvement**" includes building, dam, levee, channel, sign, permanent fence, or other structure and any addition to an existing improvement;

"**licensed land**" means the land described in Item 9 of the Schedule;

"**Licence fee**" means the licence fee described in Item 7 of the Schedule as varied during the term;

"**Licensee**" means the person named in Item 3 of the Schedule and includes the permitted assigns and successors in law to a Licensee;

"Licensee's Improvements" includes growing crop, building, structure, sign, fence and any other structural improvement including dam, levee, channel or any other earthworks but does not include any such improvement shown in Item 14 of the Schedule as being or becoming the property of the Licensor.

"**Licensor**" means the Minister of the Crown for the time being administering Division 8 of Part 1 of the *Land Act 1958* or such other Minister of the Crown or Government Authority to whom responsibility for this Licence may at any time be given;

"**person**" includes a body corporate as well as an individual;

"pest animals" has the same meaning as in the *Catchment and Land Protection Act 1994;*

"**rates and taxes**" means all existing and future rates (including excess water rates and any special rates or levies) taxes, charges, tariffs, assessments, impositions and outgoings whatsoever now or at any time imposed, charged or assessed on or against the licensed land or the Licensor or the Licensee or payable by the owner or occupier of the licensed land;

"**schedule**" means the schedule to this Licence;

"**Secretary**" means The Secretary to the Department of Natural Resources and Environment, the body corporate established under the *Conservation, Forests and Lands Act 1987*;

"**sign**" includes names, advertisements and notices;

"**soil**" includes gravel, stone, salt, guano, shell, sand, loam and brick earth;

"**term**" means the period of time set out in Item 6 of the Schedule, as and from the commencement date;

"**weeds**" include noxious weeds within the meaning of the *Catchment and Land Protection Act 1994* , and prescribed flora within the meaning of the *Flora and Fauna Guarantee Act 1988*;

"**writing**" includes typewriting, printing, photography, lithography and other modes of representing or reproducing words in a visible form and "written" has a corresponding meaning.

6 Interpretations

6.1 A reference importing the singular includes the plural and vice versa.

6.2 The index and headings are included for ease of reference and do not alter the interpretation of this Licence.

6.3 If any day appointed or specified by this Licence falls on a Saturday, Sunday or a day appointed under the *Public Holidays Act 1993* as a holiday for the whole day the day so appointed or specified is deemed to be the first day succeeding the day appointed or specified which is not a Saturday, Sunday or day appointed as a holiday.

6.4 References to an Act of Parliament or a section or schedule of it shall be read as if the words "or any statutory modification or re-enactment thereof or substitution therefor" were added to the reference.

6.5 If the Licensee comprises more than one person, the covenants and agreements contained in this Licence shall be construed as having been entered into by, and are binding, both jointly and severally on all and each of the persons who constitute the Licensee.

6.6 References to clauses, sub-clauses and Items are references to clauses, sub-clauses and Items of this Licence respectively.

9.6.4 Aboriginal Heritage Act Extracts

Section 194 Regulations

(2) The regulations—
(a) may be of general or of specially limited application; and
(b) may differ according to differences in time, place or circumstance; and
(c) may require a matter affected by the regulations to be—
(i) in accordance with a specified standard or specified requirement; or
(ii) approved by or to the satisfaction of a specified person or a specified class of person; or
(iii) as specified in both sub-paragraphs (i) and (ii); and
(d) may apply, adopt or incorporate any matter contained in any document whether—
(i) wholly or partially or as amended by the regulations; or
(ii) as in force at a particular time or as in force from time to time; and
(e) may confer a discretionary authority or impose a duty on a specified person or a specified class of person; and
(f) may provide in a specified case or class of case for the exemption of activities or operations from all or any of the provisions of this Act, whether unconditionally or on specified conditions, and either wholly or to such an extent as is specified; and
(g) may be expressed as requiring the achievement of a specified object in relation to any particular subject matter

9.7 Stakeholder Workshop 8 Aug 2007

9.7.1 Workshop discussion paper – Land Status and Boundaries

Department of Sustainability & Environment
Riparian Project Workshop
8 August 2007

Land Status and Boundaries

A whole series of problems relate to questions of land status, land boundaries, and land ownership. These include:

- The distribution of Crown land and freehold, due to accidents of history
- The movement of rivers; and the non-movement of the Crown reserve
- The common law doctrines of accretion and adverse possession
- The historical categorisation of Crown land into unreserved, temporarily reserved, and permanently reserved

Current mechanisms for rationalising land status are either inadequate, or they are purely reactive, or there are no accepted protocols for their use.

Changes of Crown land status may require agreements under the C'wealth Native Title Act.

The Vision

- A community (via its CMA or municipality) should be able to initiate a reconfiguration of land status along priority stretches of rivers
- An independent, well-respected public sector agency should be able to employ a robust process to analyse land status problems and propose reconfigurations
- Having adopted a reconfiguration, government should have adequate powers to effect land purchase, land sale, and land exchange as required

The end result would be a planned map of private freehold, municipal freehold, and Crown land which best meets the needs of all stakeholders.

Options for *Planning* Reconfigurations

1 Market Forces: private landholders initiate sales, subdivisions, or developments

2 New statutory process: at the request of the CMA or municipality, the Minister would be empowered to engage Panels Victoria or The Victorian Environment Assessment Council (VEAC) to conduct an Investigation and recommend a reconfiguration.

3 The Planning & Environment Act
   a) Make the Restructure Overlay (RO) more applicable to riparian situations. (The RO is now used to reconfigure old subdivisions, such as in the Dandenongs)
   b) Through a Planning Scheme Amendment (PSA), insert a Public Acquisition Overlay (PAO) and Restructure Overlay (RO) into the relevant Planning Scheme.
   c) Make the relevant CMA the Planning Authority for such projects (just as VicRoads is Planning Authority for new road projects)

Options for *Implementing* Reconfigurations

4 Reactive: allow market forces to proceed, within the adopted reconfiguration plan

5 Pro-active: cause the reconfiguration to be implemented through compulsory acquisition (as for a new arterial road)

6 Opportunistic: develop mechanisms to intervene when the subject land is about to be sold, subdivided or developed (like Phillip Island, 90-mile beach etc)

7 Amend the Land Act / CL(R)Act to widen Governor-in-Council (GinC) powers to buy, sell and exchange riparian Crown land.

Recommendation

- Adopt options 2, 3(a) and 3(b). The reconfiguration process should be initiated by the CMA or municipality, conducted by an independent agency, such as VEAC, and result in the insertion of PAOs and ROs in the Planning Scheme
- Adopt options 5, 6 and 7. Implement recommended restructures through - use of the PAO and RO, the well-tested provisions of the Land Acquisition and Compensation Act; and expanded Governor in Council (GinC) powers to deal with Crown land.
- Recognise Native Title through a State-wide "Alternative Procedure Agreement."

* * * * *

The Public Land Consultancy

9.7.2 Workshop discussion paper – Contractual Protection of Riparian Works

Department of Sustainability & Environment
Riparian Project Workshop
8 August 2007

Contractual Protection of Works

Government investment in on-ground riparian works relies on partnership arrangements with landholders. Each Catchment Management Authority (CMA) has a form of agreement which may require the landholder to implement the works and/or take responsibility for their on-going maintenance. The works concerned may be on either freehold or Crown land.

There is concern that these agreements are inconsistent across the various CMAs, that they may not be legally sound, they are not binding on successors in title, they do not correlate well to the terms and conditions of Crown water frontage (WF) licences, and that they may have adverse impacts on land values.

The Vision

Agreements between CMAs and landholders should be:

- status-neutral, applying to both freehold and Crown frontages
- voluntary, and entered into only by landholders who see a net benefit for their property
- able to include either positive ('must do') or negative ('must not do') conditions
- generally consistent across the state, but with sufficient flexibility to reflect regional policy positions and to incorporate site-specific requirements
- legally enforceable, and binding on future owners / licensees
- responsive to changes such as floods

The end result will be a consistent, robust form of partnership agreement acceptable to both CMAs and landholders

Non-Legislative Options

1. Common law covenants – freehold only; may include only negative conditions
2. Water Frontage (WF) licences – Crown land only; not an instrument for making payments to the licensee
3. Agreements under sec. 69, Conservation Forests and Lands (CF&L) Act – freehold only. These agreements may be positive or negative; the parties are the Secretary for DSE and the landholder. Legally enforceable; run with title.
4. Contracts under sec. 18, CF&L Act. These are contracts for purposes of a 'relevant law' ('relevant laws' include the Land Act and the Catchment and Land Protection (CaLP) Act). They may be for Crown or freehold land; the parties are the Secretary for DSE and the landholder. They are enforceable, but do not run with title.
5. For options 3 and 4: the Secretary for DSE may delegate to (for instance) the CEOs of CMAs.
6. Trust for Nature (TforN) covenants – freehold only; parties are TforN and landholder. May attract tax benefits; may enhance land value. Enforceable; run with title. TforN primarily interested in conservation of high-value vegetation.
7. Agreements under sec. 173, Planning & Environment Act – Agreement between municipality and landholder.

Legislative Options

8. New form of status-neutral Management Agreement in CaLP Act

Recommendation

Shorter Term:-

- Contents of Agreements: uniformity to be agreed across CMAs
- Adopt option 3: - sec. 69 CF&L Act agreements for freehold land;
- Adopt option 4 – sec. 18, CF&L Act contracts for Crown frontages;
- Adopt option 5 - delegation from the Secretary of DSE to the CEO of the CMA
- Further cooperation with Trust for Nature, including publicity for tax benefits and positive impacts on property values

Longer-term:-

- Adopt option 8

* * * * *

The Public Land Consultancy

9.7.3 Workshop discussion paper – Statutory Protection of Riparian Values

Department of Sustainability & Environment
Riparian Project Workshop
8 August 2007

Statutory Protection of Riparian Values

For riparian land where CMAs are not actively funding improvements, measures are still needed to prevent degradation, and to protect or even enhance existing values.

The principal challenges are:-

- To manage/restrict stock on riparian land
- To protect native vegetation and biodiversity; to control weeds, pests and erosion
- To prevent / reverse inappropriate uses, works and developments

The Vision

- A robust and well-founded concern for riparian values – shared by government agencies, local government, community groups and landholders
- Suites of positive mechanisms to allow, support, empower and reward the protection of riparian values…
- …backed up by appropriate negative mechanisms to deter injury to riparian values

The end result: a self-sustaining culture of respecting and protecting riparian values

Options: Crown Land

1. Enable the full range of management options to be available for riparian Crown land – including appointment of Councils and CMAs as Committees of Management, and licences to tenants other than abutting owners
2. Use the procedures of the Subordinate Legislation Act to introduce deterrent penalties for offences against CL(R)Act and Land Act regulations
3. Allow native vegetation offsets to be sited on riparian Crown land

Options: Freehold Land

4. Domestic and Stock 'Private Rights' under sec. 8 of the Water Act
   (a) clarify that these are not a right to put stock in the waterway, and are not lost on construction of a fence
   (b) reform the Water Act and the Subdivision Act to specify exactly which land in a subdivision holds 'Private Rights' to domestic and stock water
5. Require new subdivisions to include covenants and/or easements over frontages

Options: Status-Neutral

6. Amend Planning Schemes by Ministerial insertion of Environmental Sensitivity Overlays (ESOs) for all priority waterways. This will result in all new uses and developments having to satisfy the requirements of the ESO
7. Works on Waterways – strengthen the bylaw to cover uses as well as works, and to cover designated land as well as designated waterways
8. Catchment and Land Protection (CaLP) Act – introduce Frontage Management Agreements which will gradually replace both Crown WF licences and Agreements under sec. 69 of the CF&L Act
9. Insert new delegated management provisions in the CL(R)Act allowing better-structured relationships between CMAs and voluntary community groups
10. Pollution and litter – strengthen and/or enforce the Environment Protection Act/Regs
11. Gravel Extraction – strengthen or revise the Extractive Industry Development Act/Regs
12. Enforcement – give CMAs powers to initiate or conduct enforcement proceedings against riparian offenders, either through:-
    (a) CMA staff appointed as Authorised Officers for enforcement and prosecutions
    (b) CMAs engaging DSE and EPA enforcement staff to conduct prosecutions

Recommendation

- Further evaluate all of the above options

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The Public Land Consultancy

9.7.4 Workshop discussion paper – Crown Frontages

Department of Sustainability & Environment
Riparian Project Workshop
8 August 2007

Crown Water Frontage Licences

There are nearly 10,000 Water Frontage licences issued by DSE under the Land Act 1958. Nearly all are for grazing; a few are for cultivation, vineyards, etc. Some are for 'conservation,' although this is stretching the provisions of the Act.

Many concerns are expressed about frontages being inappropriately licensed; licences with inadequate conditions, and conditions not being enforced.

WF licences are renewed at 5-year intervals, the next renewal being in 2009.

The legislation regards these licences as personal. In reality they run with an adjacent 'parent' property, and are transferred with that property.

The Victorian River Health Strategy states: *Any changes to licence conditions will be based on the recommendations and priorities of Crown frontage reviews and will only be made in consultation with licensees or on licence transfer or renewal.*

The Vision

- Landholders will recognise that they do not own this land, but have stewardship of it on behalf of the public. Government will acknowledge the benefits of fostering responsible management by landholders.
- Government support for riparian outcomes (on Crown and freehold land alike) will be provided through comprehensive, status-neutral frontage agreements.

The end result: many Crown frontages will continue to be managed through robust partnerships between the CMA and abutting landholders.

Pre-2009 Options

1. Individual renegotiation of licences in highest priority reaches, as identifies in Regional River Health Strategies (RRHSs) or where potable water quality is threatened. Immediate implementation through grants, secretary's directions or cancellation as appropriate.
2. Group renegotiation of licences in high-priority areas as identified in RRHSs, Heritage Rivers, Water Supply Catchments. Implementation on expiry of current licence (2009).
3. Develop procedures at the Land Titles Office to alert:-
   (a) prospective purchasers to the existence of the Crown frontage licence, and
   (b) DSE and the relevant CMA to a forthcoming transfer of a 'parent' property.

2009 Options

4. Renew existing licences, but for a conditional term:- 5 years, or until transfer of parent property, or until a grant from the CMA – whichever comes first.
5. Replace the present standard 7-page one-size-fits-all licence document with a suite of conditions which can be included or excluded on a strategic basis.
6. Do not renew cultivation licences.

Longer term Options

7. Move the provisions for WF licences from the Land Act 1958 across to the Crown Land (Reserves) Act 1978.
8. Introduce a new scale of fees more aligned to true costs and benefits of holding a licence
9. Amend the Act to (a) change purpose of licences from 'agricultural purposes' to 'stewardship of the riparian environment,' and (b) clarify that there is no obligation on the Minister to issue a licence where a frontage is unfenced.
10. Amend the CaLP Act to provide for Whole Frontage Management Agreements, which will replace both licences (for Crown frontages) and section 69 Agreements (for freehold frontages).

Recommendation

Adopt all options 1 to 10 above.

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9.7.5 Workshop discussion paper – Roles and Responsibilities

Department of Sustainability & Environment
Riparian Project Workshop
8 August 2007

Roles and Responsibilities

As in many areas of public administration, the responsibility for protecting the public interest in relation to riparian land lies with several agencies. These include the CMAs, DSE, Councils, Melbourne Water and other Water Authorities, the EPA, and Parks Victoria.

This is seen as inevitable: it would be neither realistic nor desirable to have all these roles consolidated under some riparian super-authority.

CMAs have more than once been nominated as the 'primary caretakers of riparian health.' For instance, the key recommendation of the 1997 review which led to CALP Boards being reconstituted as CMAs was that:-

> *(1) CMAs … will integrate all existing advisory mechanisms related to catchment management (including) management of Crown frontages outside National Parks …*
>
> *(2) Adequate funding be provided by government for the establishment of these CMAs, taking into account their increased responsibilities…*

This recommendation was implemented, with the exception of the transfer of the Crown frontages, which remained with DSE due to "practical and legislative issues." Thus the management of these Crown frontages (whether licensed or unlicensed) remains one specific area often nominated for transfer to the CMAs.

The Vision

- Management outcomes will drive administrative arrangements, not vice-versa
- Functions will reside with the agency best placed to handle them. Where related functions are assigned to different agencies, effective cooperation will avoid gaps, duplications and inefficiencies
- Power to impose conditions will be backed up by power to monitor and enforce
- Although self-sufficiency should be encouraged, government will provide adequate funding for any increased responsibilities

The end result:

- CMAs will be the central, focused "caretakers of riparian condition" (and Melbourne Water in the Port Phillip Westernport catchment)
- In keeping with their core functions, other agencies will (a) provide services to the CMAs, (b) engage CMAs to provide services on their behalf, or (c) exercise powers in cooperation with CMAs, as appropriate.

Options – Crown Frontages

Four options are identified for assigning functions between DSE and the CMAs:-

Option	Monitor	Decision-maker*	Enforcement**	Administration***
1	CMA	DSE	DSE	DSE
2	CMA	CMA	DSE	DSE
3	CMA	CMA	CMA	DSE
4	CMA	CMA	CMA	CMA

* *Decision-maker: deciding on licence allocation, renewal, revocation, terms and conditions*

** *Enforcement: issuing warnings and compliance notices, conducting prosecutions*

*** *Administration: implementing 'decision-maker' instructions, database administration, issuing invoices, receipt of rents etc.*

Funding Options

5 Licence revenue goes into the Consolidated Fund (as at present). Any new CMA responsibilities should be separately funded

6 Redirect rentals from WF licences from the Consolidated Fund to CMAs; with any shortfall between revenue and costs being made up by government

Recommendation

- Adopt options 3 and 6.

* * * * *

The Public Land Consultancy

9.7.6 Workshop Feedback Notes

Department of Sustainability and Environment
Review of riparian land management in Victoria

OPTIONS WORKSHOP

9.45 am to 3 pm, Wednesday 8 August 2007
Metropole Hotel, Fitzroy

WORKSHOP NOTES

Attendees

DSE

Environmental Policy and Climate Change
Ian Mansergh

Public Land
Caroline Douglass
Sally Burgess
Merv McAliece
Maurie Grealy
Wayne Malone
Adam Melis
Anthony Costigan

Biodiversity and Ecosystem Services
Gavan Mathieson
Bill O'Connor
Michelle Dickson

River Health
Sarina Loo
Sara Johnson
Kishor Melvani
Peter Vollebergh

DPI
Lisa Goeman

CMAs
Glenn Dixon - Wimmera
Elyse Riethmuller – Wimmera
Wayne Tennant – Goulburn Broken
Tom O'Dwyer - Goulburn Broken
Frank Donahue – West Gippsland
Mark Turner – Corangamite
Kevin Wood – Glenelg Hopkins
Natalie Ord – North East
Natalie Martin – North East
Veronica Lanigan – North East
Matt Jackson – North Central

MW
Jan Smith
Greg Bain
Michelle Ezzy

Parks Victoria
Ann van de Meene
Graeme Davis

Consultants
David Gabriel Jones – The Public Land Consultancy
Bruce Turner – Phoenix Facilitation

Purpose

To test a range of options and preliminary recommendations for riparian land management in Victoria

Welcome and introductions

Tom O'Dwyer (Steering Committee Chair) thanked everyone for coming and outlined the purpose of the workshop.

Background and context

Peter Vollebergh (Project Manager) presented an overview of the context for the project as a reminder to all.

Overview of topics for discussion

David Gabriel-Jones (consultant) provided an outline of the issues and options associated with each of the five workshop topics. Bruce Turner (facilitator) then explained the workshop process. The workshop involved two rounds of discussions on the five topics in self-appointed groups, followed by a review and report back on key points from each topic discussion. The guidelines for the topic discussions were:

1. Make sure all in your group are clear on the scope of this theme (key issues)
2. Briefly review/confirm the desired outcomes
3. Discuss and record the pros and cons of the options (including your reasoning)
4. Are there any other promising option ideas you can suggest?
5. Conclusions: should the preliminary recommendation(s) be carried forward for further work?
   If so, how could it be strengthened? What are the priorities for action? What issues still need to be addressed?
   If not, what do you recommend?

Notes of the topic discussions

The following pages reproduce the records of the discussions.

Topic 1: Statutory Protection of Riparian Values

Table hosted by Jan Smith, Melbourne Water

(NB comments in italics were added later)

Group 1:

- **Need a riparian protection act**
- Effect of climate change

Vision

- If entirely voluntary, timeline will be very long
- Incentives must be ongoing not short term
- Recognise benefit to landholders of riparian management (value to is to landholder and community, not just paying people *(i.e. handing out money is not the only answer)*. There are economic benefits to landholders that they need to recognise – education is needed to help people understand these benefits and the value of riparian areas for landholders and the community)
- Motives between CMA and landholders may not match
- Group 1 said: Need a united consistent direction not a
  Suite or gladbag – one mechanism that is tenure blind (Group 2 said: disagree, need as many tools as possible as what works well with one landholder will not work with another)
  Specify riparian land & value (*meaning true triple bottom line riparian values are not well understood by the community and are undervalued in current arrangements?*)
  Group 1 felt that Statutory protection requires vision as in 1881 (*i.e. they wanted bold policy moves and a new Act – Group 2 disagreed – a new act would further silo riparian management from catchment/land management – see below*)
  Make this explicit not implicit
- Robust and well rounded

Group 2:

- **No to riparian act**
- Strengthen existing arrangement/Acts, do not add a new layer of complexity with a new act (integrated catchment management)
- Review existing arrangements and explain them
- Just putting a new act in place for riparian land further compartmentalises catchment management, makes it more complex.
- Stewardship payments – cost and benefit of managing riparian land needs to be worked out and payments to maintain the land may be necessary. The option of becoming the manager of the riparian land should be offered 1st to the adjacent landholders or otherwise goes to an alternative manager (i.e. community group)
- How do we compensate for loss incurred by landholders if an existing use is no longer allowed?

Representatives of both groups worked together to write principles of an alternative vision

Vision:

- Motivators need to be long term (rather than just incentives)
- Need comprehensive legislative toolkit (+ cohesive) plus a suite of positive motivators
- Need a shared responsibility, common vision, clear roles and an overarching legislative framework and a suite of supporting positive motivators
- Options 1 and 2 -: Review of legislation to I.D. overlaps and gaps will inform best short and long term legislative reform (ie don't jump straight to the conclusion that we need a new act)

Option 1

Question need for different forms of reserves. It is the legislation + status of CL that needs to be reformed not power over its management (i.e. do not transfer to CMA/Councils)

- CL needs reform
- Concern for local government – extra responsibilities
- Need to involve all possible managers
- All responsibilities must be resourced
- Don't give responsibility for riparian land wholesale to any one agency – in the end adjacent landholders are the main manager/influence. (ie you can't do anything without taking the landholder along with you, in sympathy with your objectives – projects might be implemented but without landholder support in the long-term the outcomes will be degraded or fail.
- Allow community involvement.

Option 2

- Can't be land manager, policy maker and monitor/enforce (poacher/game keeper); Dracula in charge of the blood bank: the danger of outing all functions under one agency
- Agree with need for single/rationalised regulatory framework or simplification
- Needs an overhaul of overall legislation

Option 3

- Veg offsets – allowing private clearance offsets on CL is too simplistic – alternative wording suggested is as follows:
  "Achieve native veg gains on riparian CL through a range of options including veg offsets" (*also thought that Carbon credits should be explored – how do these link?*)
- If allowed they Must be like for like + secure tenure/outcomes
- All Agreed a fence is not a change of tenure, it is a management tool

- (Group 2 noted that DSE already allows veg offsets to happen on CW to happen – a precedent exists)

Option 4
- Needs clarification if there is a perception by community that it is an issue
- Could be achieved through education
- How do we influence riparian management on private land? – not sure that management options provide the tools. Statutory protection is lacking
- Riparian rights agreement

Option 5
- Local government strapped for cash so tend to take $ rather than 5% land (is 5% enough?)
- Option 6 is preferable to option 5 – how do we fund + manage all the new open space that is created?

Option 6
- Only works for new development – change of use
- Most agricultural activity is an as-of-right under planning scheme
- ESO's – Group 1 thought it would be an added complexity to riparian management (Group 2 thought no, could be written out, get an exemption)
- Zones stronger than existing ESO but won't change existing uses (to what order of waterway do you go to? How far up catchment?)

Option 7
- Already possible – not used

Option 8
- Would not reduce legislative complexities – section 69 would still be there as well – unless modified by legislation
- Group 1: Better option is a new act with its own sections; Group 2: no, option exists with 2009 license renewal to replace CL license with frontage management agreements (stage by priority)
- Strongly support priority areas of rapid land use change

Option 9
- Is already happening, it is an obligation under the water act
- Objectives for the protection of riparian land need to be clearly stated under legislation (Group 1: new act – riparian lands act?). Process for defining riparian land needed

Option 10
- Already a delegated litter authority

Option 11
- Opportunity to strengthen riparian management now through current review of extractable industry development requirements = DPI
- Depends on scale of extraction (volume/depth) + will be partially addressed by Heritage Act 2006

Option 12
- Dependant on other tasks – eg CWF license review
- Enforcement needs to be linked to police/EPA otherwise too weak
- Enforcement needs to be prioritised (current culture of little/no enforcement)
- Define riparian offenders – can be done under water act or relevant act (CALP

- Don't create a new force – empower existing agencies
- Don't generally agree that CMA's should enforce everything in Riparian zones/land, e.g. Council permit conditions
- Funding on enforcement would be better spent on positive mechanisms (Vision point 2). Things are not achieved by enforcement alone
- Vision is OK but need to balance where money is spent.

Topic 2: Crown Water Frontage Licences

Table hosted by Tom O'Dwyer, Goulburn Broken CMA

Vision: comments on vision

1 - Landholders recognise they don't own land etc ….

- There is an assumption the adjoining landowner wants to actively manage the frontage for 'broader" public benefit outcomes. It was felt this isn't the true motivator of the landowner
- Assumes landowner actually manages frontage when in fact there is often no positive management and activities are not in line with the terms and conditions at all– the stewardship concept is good
- Agricultural gain (the current focus for frontages) is at odds with environmental protection think
- Private use dominates (public use/ environmental values although present are not the main driver of the licence arrangement)

Change to focus to Environmental & Recreational

- Land Act – disposal & occupation
- Manage for better biodiversity outcomes – current thinking is at odds with Land Act

2 – Status of neutral agreements – what does it actually mean? The group needed a definition. It was felt it needed to consider:

- Flexibility in terms of on site arrangements but very much in line with clear and consistent objectives
- Riparian outcomes – horses for courses, complex
- Most common problem – uncontrolled grazing
- Comprehensive – what does that mean? A need for clarification/definition.

End Result

3 – Need to identify social & economic & environmental elements independent of land status/tenure

- Assumes CMA & Landholder but should say "appropriate government agencies e.g. DSE – C&CLM. Focus on partnerships – awareness of existing RH/environmental programs. Defining roles & responsibilities & higher order outcomes.
- Mechanisms are in place now for robust partnerships however it isn't working

Options

Pre-2009

1 Individual negotiation;

- Currently occurring e.g. Port Philip working closely with Melb Water. NCCMA working on frontages etc. Happening across the state in various forms, possibly

not consistent/ but maybe in line with some common objectives. (VEAC will have an influence)
- Cancellation a last option
- Review the timeframe for giving notice
- DSE (C&CLM) – not a major focus for CLM staff as they are really administrators: this work is being actively undertaken by CMAs and Melb Water (problematic when CLM/CMAs don't have a common goal or understanding of what CMAs/ MW are trying to achieve)

2 Group negotiation (1 and 2 are very much about the same thing)
- Strategic focus. Driven by CMA's. Need strong relationship with land manager (DSE). CLM need to be on board with CMA objectives.
- On ground actions/decisions need to reflect/link with Water Action Plans etc developed by CMA's via RRHS (crown water frontage assessment etc)
- Change of land use – change intent from production to environmental outcomes. Still needs a mechanism to bring on more responsible frontage management – still slow/ current arrangements are not working.
- Current management practise is in conflict with RH outcomes (current grazing regime).

3 Titles Office procedures
- Problem that the licence isn't attached to title
- Link established at Titles office – section 32
- Good process/no real on ground outcome but does identify who is responsible for the frontage management/ support better admin arrangements

2009 options

4 Renew existing licences
- Building new conditions & triggers for possible review/changes to conditions – should be considered
- Extent of review/renew will depend on resources from CLM
- Provides an opportunity to renegotiate priority reaches
- Triggers: Incentives from RH programs or review by relevant statutory authorities for RH outcomes
- What will actually happen after review? Will there be a material change to how the frontage is managed or does status quo remain?

5 Replace standard conditions
- Concerns of changes or removal of obligations – expressed by CLM reps
- Suite of special conditions can currently be included
- Conditions must reflect regional issues/stream issues/ riparian zone etc
- Current conditions considered robust – no real need for change – accept maybe review (view held by CLM reps)
- More clarification on this issue

6 Do not renew cultivation licences
- Yes – consideration of possible compensation maybe
- Who manages – etc after a change in practise (cultivation sites are highly impacted on) –large rehab costs possible/ but if on a priority stream etc possibly a good investment

7 Longer term
- Possibly limiting (with the current legislation as it is)
- Some issues (not all WF reserved/temporary/permanent etc)
- Would there be better results on ground? /but maybe not the right move?

- Need to make changes to legislation (manage in a different way); group acknowledged changes would be good if there are demonstrated on ground outcomes
- More work in this area needed

8 Fees
- Not sure if this is that critical
- User pays – government policy
- May encourage less grazing but it may also possibly lead to more grazing
- Not a real positive outcome for environmental outcomes/"better management

9a Amend Act to include 'stewardship'
- Name change would be positive from an environmental message/communications view point
- Current ability exists – change intent of activity

9b Amend Act to clarify no obligation for a licence
- Greater ability to enforce fencing options/better management (targets grazing)
- Consider stewardship payments with adjoining landholders

10 Amend CALP Act
- More work – problems with CALP Act / group unclear about this

<u>New Options</u>
- Don't issue licenses (doesn't work!) – link frontages together and place in the hands of others eg CoM, LC, LG, friends groups etc
- Look at stewardship agreements
- Monitoring/compliance
- CoM – current options
- Parks Vic – Land Manager
- Landcare – community groups
- Focus on Public Land Values (recreational/environmental etc
- Resource DSE/CMA
- Strengthen relationship between DSE/CMA/licensee – develop triggers for compliance to conditions – self audit
- Renewal – send out information (education) on renewal notices/ make licensee communicate with CLM/CMA some how
- Problems with working with individuals, too many/not strategic and ineffective

Overall comments

1 Support – happening now in places
2 Better results on being strategic
Links to RRHS etc WAP's
3 Support – Admin Improvement
4 Support – build in extra triggers for potential improvement in frontage management
5 Review existing & introduce special conditions (not supportive of major change)
6 Yes – non renewal /different conditions for different purposes (environmental intent)
7 Good reasons for the move from Land Act to Crown Reserves Act but needs changes in focus from agricultural/occupation to public land values
8 Not critical
9 Support: maybe suggest different wording and not focusing on agriculture/ future activities TBL (To Be limited)
10 Possibly not critical/leave it to Crown Land Res. Act. More work/investigation required

Topic 3: Roles & Responsibilities

Table hosted by Sarina Loo, DSE River Health (with assistance from Sarah Johnson, DSE River Health)

Overall impressions

- The paper does not deal well with the roles and responsibilities of freehold land or unlicensed Crown frontage.
- Triple bottom line outcomes need to be recognised, not just environmental outcomes.
- The options were simplistic in their approach and did not cover areas where dual responsibilities (i.e. mixed involvement/partnership) lie (e.g. decision-making for social, economic and environmental uses). It needs to be recognised that there are different kinds of monitoring i.e. monitoring of resource condition versus monitoring of the license process.
- The paper was narrow in focus and did not cover the role of ParksVic or local government.
- The terms riparian zone and frontage are not interchangeable. This is a definition/language issue that need to be clarified.

Vision

- Resource outcomes (that recognise the triple bottom line) should be the driver of administrative arrangements not management outcomes.
- Is "best placed" equivalent to caretaker functions?
- Some of the group felt that the monitor and enforcement roles do not need to sit with the caretaker (e.g. VicForest and EPA example). Others felt that the ownership of enforcement should sit with those who monitor and the decision makers

Options – definitions

The first group believed that monitoring and decision-maker should be together and should not be in separate columns. They also believed that decision-making should recognise DSE's lead role in Statewide decision-making and CMA's lead role as regional decision-makers.

It was generally agreed that options 1 and 4 were not suitable and the majority of the discussion was around options 2 and 3. Although the first group was not happy with either option 2 or 3 and proposed a new option – option 5, in which the CMAs were responsible for monitoring river health condition and DSE was responsible for monitoring the license process. Because no definition of monitoring was given on the discussion paper the need for clarity and the recognition of different types of monitoring was expressed.

The question was raised as to whether we needed a new model, or if the current model just needed better processes, arrangements and funding to make it work.

It was generally agreed that DSE was the best placed to do the administration. DSE has the administration skills and it is more economically efficient to have it centralised. Some also believed that DSE should do the monitoring and evaluation of the whole licensing process.

The question was raised that if enforcement is going to be done, we need to know what we are doing it for (e.g. environmental outcomes, revenue raising, licence conditions). Enforcement would also need sufficient resources and the backing of appropriate legislation.
Table 1:

Option	Advantages	Disadvantages
1		• Regional decision-making should lie with the CMAs • DSE has the administration skills and keeping the administration centralised is resource efficient (NB: need a service agreement, MOU, between DSE and CMAs) • Enforcement by DSE is not currently working, but this may be due to a lack of resources.
2	• DSE has the power to cancel licenses and strengthen provisions on the licenses	• DSE has the administration skills and keeping the administration centralised is resource efficient • Enforcement by DSE is not currently working, but this may be due to a lack of resources.
3	• DSE is not getting enforcement results • Would link enforcement to decision-maker • CMAs have the on-ground presence to do enforcement	• DSE has the administration skills and keeping the administration centralised is resource efficient • Conflicting role for CMAs to do enforcement (e.g. good guys image)
4	• Administration with monitoring so they can work to the same direction	• Administration not cost effective • May not have a consistent approach to administration across CMA's.

Details of proposed Option 5:

CMA roles:

- Regionally based strategic direction
- Priority setting
- Decision making at operational level
- Monitoring of river health condition
- Implementation of works
- Communication (of above) to educate community

DSE roles:

- Monitoring of licenses and licensing process
- Administration
- Enforcement
- Bundle DSE/PV/LG/WC/Land manager for compliance

Funding

- Effort to change the current arrangements may outweigh the benefits so it was generally agreed that option 5 (of the funding options) is better.
- The real cost of implementing the new model also needs to be calculated.
- A resource condition increase is preferred over a license fee increase. An appropriate model must be put in place that will allow this to happen.

Note: Adequate revenue is needed to meet the vision. Currently, a lack of resources has caused model failure.

Implementation issues

A number of implementation issues that need resolution for the success of any model:

- Funding relationships
- Understanding of model by all parties
- Clear relationships
- Common goals
- Align separate policies (e.g. land, biodiversity, river health, agriculture)
- Appropriate access to information
- Avoid management duplications
- Licence conditions to reflect the movement towards goals (e.g. standard conditions and specific management actions)
- Legislation – enforcement is not easy under current legislation (need to strengthen the penalties)
- Improved community expectations/perceptions (note: there are regional differences in landholder awareness)
- Unlicensed crown frontage – how do we manage them and how does this fit into the model.
- Spatial scale may vary model (e.g. Large Scale River Restoration)
- State policy role (DSE)
- Recognition of triple bottom line values - social and economic values such as reserves, road access, recreation and ports.

Topic 4: Land Status

Table hosted by Merv McAliece, DSE Public Land

Key Points

- It is difficult
- Need clarity
- Need tools to acquire or change status where necessary
- Provided environmental outcomes are achieved land tenure is not important
- Environmental and biodiversity values dictate that the riparian land should be in public ownership?
- Needs to be debated through land & biodiversity paper process

Pro's – Con's

- Rivers are dynamic and will continue to be so
- Market forces will take time
- Need to develop master plans based on principles
- Rural communities unlikely to initiate changes on land status
- Compensation packages

Recommendations

- Master plans to be initiated by CMA's/Local Government
- Consider areas with no crown frontage
- Use existing systems (i.e. VEAC, Panels, Planning scheme amendments)
- Planning options 2 & 3
    - Proactive – Depending on circumstances
      Economic/community/scientific

Topic 5: Contractual Protection of Works

Table hosted by Michelle Ezzy, Melbourne Water

(NB Comments in black are from first round of workshops; comments in green are additional comments from second round.)

Vision:

Workshop participants generally agreed with the vision presented, but made the following comments about specific items:

- Voluntary? Ideally – backup required. While agreements would ideally be voluntary – it is important to have other options available to encourage agreements – these could take the form of incentives or "threats", i.e. use of legislation etc. The use of powers under designated land would also play a role here.
      Incentives
      Threats
      Designated land

- Responsive – Yes – case by case
    - Guidelines (e.g. flood recurrence). Agreements need to be responsive to events such as drought and flood. While such responsiveness requires consideration of situations on a case by case basis, some general guidelines could be applied. For example, a flood of a certain magnitude would result in the waterway manager replacing fences, while under that would be the owner's responsibility.

- Positive/Negative conditions – consistency here also. A "grab bag" positive and negative conditions could be developed to cover most situations to allow consistency in conditions across regions.

- Tenure neutral (separation still required)- legislation (EGCMA delegation). The first group felt that tenure neutral was important, as river health outcomes should be the primary concern, not the tenure type. The second group felt that separation of river health objectives between tenure was inevitable because of differences in land management objectives between tenures (e.g. agreements

may be for different management regimes on different tenure types, even though the same land manager is involved)

Non legislative options

- All part of a "tool box" & may be good options in different circumstances
- Delegation – roles/responsibilities/models (inter-linked – which first). The type of agreement to be used cannot be resolved until roles and responsibilities of different agencies has been resolved.
- Little experience in options/pros/cons (Parks?)(offsets). All the non-legislative options seem to offer good agreements for certain situations, but no one has had experience in implementing them to understand the particular pros and cons.
- New options – River Health Covenants (TFN or not), how to include offsets. The use of covenants specifically to protect river health should be explored (this may involve working with TFN). The issue of net gain offsets is an important opportunity that should be investigated and which would be particularly relevant to contractual protection of works.

Issues

- Practicality of enforcement (effects relationship) and education. Although contractual protection mechanisms may be legally binding, the ability/willingness to enforce needs to be considered. In particular, the impacts on relationships with the landholder and the role of education as a precursor to enforcement are issues that need further consideration.
- Potential importance of offsets & need for a mechanism that includes this. As above – this is an opportunity that needs to be better understood by waterway managers.
- Tenure neutral – is it achievable? – outcome driven 1st priority. As above – some participants felt that the objectives on crown vs private are too different, others thought the objectives need to take priority, regardless of tenure type.

Legislative options

- New agreement & a new Act (Water Act)? (too much specific legislation)? to address more than just the agreement issue. Some participants thought a new agreement could best be facilitated through a new Act, others thought this is problematic as too much "specific" legislation already exists that "trips over" other related legislation
- Would be political (perception) or seen as a simplification. A new, tenure neutral and enforceable agreement for protection of works could potentially be very political – could be viewed as a threat to landholders or as a simplification of current systems, depending on how it is marketed.
- Have we fully explored the current options & used them to their full capacity – consistency of application & understanding of options. Most participants had little or no experience in implementing contractual arrangements currently available and therefore were not aware of their pros/cons. They felt that further assessment of current contract types is required before deciding that a new agreement is actually warranted.

Recommendations

- Uniformity – consistent "grab bag" of conditions/wording
- Timing – pro's/con's of interim arrangements – is a "handshake" OK until we get options up and running? That is, if a new agreement is required, current

arrangements should be left in place until that time rather than having a confusing "interim" process.

Reporting back

The table hosts presented a summary of the key points from the discussions. The following additional points and questions were raised during the open discussion following each presentation:

Contractual protection

- The issue of the usefulness/role of s.18 contracts was raised: they are not an authorisation to occupy.

Protection of riparian values

- We need legislative protection for riparian land (new act or existing).
- If we have all the relevant tools already, why are we still in the current position of degraded riparian zones with not enough being done?

Roles/responsibilities

- There was general agreement that regional decision making should be with CMAs, but administration stay with DSE, ie the preference lies somewhere in the realm of options 2 and 3
- Need to align goals between agencies
- Enforcement is the key point; what is it for? Revenue? To get changed practice? This could determine who does it
- It was noted that the policy role was left off: this is probably DSE statewide, but CMA regionally.

Land Status

- What is scale of proposed Master Plan?
- Should all riparian lands be converted to public? Would this afford them better protection and better biodiversity outcomes? If not (i.e. if biodiversity is sometimes well managed on freehold and poorly on public land) then no need to convert freehold frontages to public.

Frontage licences

(No additional discussion.)

Next steps

Peter Vollebergh outlined the next steps in the review and thanked everyone for their willing participation, especially the topic hosts.

[1] Peter Cabena, Victoria's Water Frontage Reserves – *An Historical Review and Resource Appreciation*, 1983, Department of Crown Lands and Survey
[2] Victorian River Health Strategy, DNRE, 2002, page 97: "NRE will work with CMAs to resolve the practical and legislative issues associated with the transfer to CMAs of responsibility for the management of Crown water frontages outside parks and forests reserves, and coastal and urban land. ' VRHS p 117: "To further consolidate this role, Government will: make arrangements for the transfer (to the CMAs) of management of Crown frontages"

[3] Any estimate of frontage length, however, relies on the adoption of some arbitrary minimum size of waterway: the smaller the size of watercourse included in the estimate, the greater the resulting length of frontage.

[4] Commonwealth Land and Water Resources Research and Development Corporation, Nov 1999, *Riparian Land Management Technical Guidelines*, Canberra.

[5] The LCC Act (and subsequently, the VEAC Act) restrict LCC / VEAC investigations to 'public land' which in the case of riparian land is, essentially, Crown land.
[6] Victorian River Health Strategy, DNRE, 2002
[7] "Policies and Practices for Better Waterways" - State of the Rivers task Force, April 1986
[8] www.dpi.vic.gov.au/DPI/Vro/vrosite.nsf/pages/stream_cond_index
[9] www.**vcmc**.vic.gov.au/Web/**vcmc**-projects.html
[10] Unless the context suggests otherwise, references on this report to CMAs may be taken as references to CMAs and Melbourne Water
[11] DSE website
[12] Government Gazette No 43, Thurs 26 October 2006, p 2309
[13] DSE website
[14] www.dse.vic.gov.au/landwhitepaper/
[15] Green Paper, page 96
[16] www.**vcmc**.vic.gov.au/Web/**vcmc**-public.html
[17] "Our Environment Our Future" – Land and biodiversity at a time of climate change" – Victorian Government, April 2008
[18] Cabena
[19] Crown Land Legislation Review – Discussion Paper, 1999, Land Victoria, DSE

[20] Pers Comm Leon Stackpole, EPA, 7 Sept 2007
[21] Parliament of Victoria, Environment and Natural Resources Committee, Inquiry into the Allocation of Water Resources for Agricultural and Environmental Purposes, November 2001

[22] Victorian Farments' Federation – Submission to Land and Biodiversity White Paper – June 2007 http://www.vff.org.au/main/index.php?option=com_content&task=view&id=361&Itemid=261

[23] http://www.g-mwater.com.au/water-resources/surface-water/diversions
[24] Rural Law website – www.rurallaw.org.au

[25] John Adams, Dawes & Vary Pty, Kyabram and Tatura, 18 July 1996, advice to Stuart Gemmill of G-MW.

[26] Peter Cabena, Victoria's Water Frontage Reserves – *An Historical Review and Resource Appreciation*, 1983, Department of Crown Lands and Survey
[27] Peter Cabena, Victoria's Water Frontage Reserves – *An Historical Review and Resource Appreciation*, 1983, Department of Crown Lands and Survey

[28] DSE Transaction Centre, Seymour
[29] DSE Transaction Centre, Seymour
[30] Data from Transaction Centre, Seymour
[31] Private contact recommended by GBCMA
[32] Fencing costs: see various references on GBCMA website. $7 figure from Tom O'Dwyer, GBCMA.
[33] Watering costs – variable, depending on numerous factors. Given the magnitude of the rental increases (20 or 30-fold) implied by inclusion of this factor, any further refinement would be academic.
[34] (See, for instance, the work of Neil Barr, DPI, Bendigo)
[35] State of Victoria, Policies and Practices for Better Waterways, Report of the State of the Rivers Taskfoce, April 1986
[36] Department of Treasury and Finance, Melbourne, March 2007 - Guidelines for Setting Fees and User-Charges Imposed by Departments and General Government Agencies 2007-08

[37] 'Any changes to licence conditions will be based on the recommendations and priorities of Crown frontage reviews and will only be made in consultation with licensees or on licence transfer or renewal' – VRHS, page 97

[38] Victorian Water Industry Association, Victorian Catchment Working Group, Draft Position Paper, August 2007
[39] http://www.nntt.gov.au/publications/data/files/VIC_TAS_NTDA_Schedule_A3.pdf
[40] VRHS, page 97: "NRE will work with CMAs to resolve the practical and legislative issues associated with the transfer to CMAs of responsibility for the management of Crown water frontages outside parks and forests reserves, and coastal and urban land. '
VRHS p 117: "To further consolidate this role, Government will: make arrangements for the transfer (to the CMAs) of management of Crown frontages"

[41] Catchment Management Structures Working Party, Review of Catchment Management Structures in Victoria, February 1997
[42] Sinclair Knight Merz (SKM), 2000, Summary of Regional Crown Water Frontage Review Projects
[43] see Endnote 1 above.
[44] Pers Comm – Ron Waters, Principal enforcement officer, DSE Port Phillip Region
[45] Government Gazette, 26 October 2006
[46] see, for instance www.egcma.com.au/file/SoO%20Water%20Act%201989.pdf
[47] melbournewater.com.au/content/library/about_us/melbourne_water_statement_of_obligations.pdf
[48] Victorian River Health Strategy, Section 5 – management
[49] Context P/L for DSE: Conservation Management Networks Strategic Plan, August 2007

[50] Water Act 1989, section 3

[51] Land Act 1958, section 384

[52] Land Act 1958, section 384

[53] Land Act 1958, section 3

[54] Government of Victoria, 2002, *HEALTHY RIVERS HEALTHY COMMUNITIES & REGIONAL GROWTH - VICTORIAN RIVER HEALTH STRATEGY*, Melbourne

[55] Commonwealth Land and Water Resources Research and Development Corporation, Nov 1999, *Riparian Land Management Technical Guidelines*, Canberra.

[56] All current Victorian legislation is available at: www.dms.dpc.vic.gov.au

[57] Surveyors Registration Board of Victoria, Guidelines for the Determination of the State Border Between New South Wales and Victoria Along the Murray, 1991

[58] High Court of Australia, Ward v the Queen, 1980, 54 AWR 274-283

[59] See endnote 19