

Report

on

Crown frontage grazing licences, water quality and human health – an analysis of legal obligations and risks

prepared by

Environment Defenders Office (Victoria) Ltd

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1. Executive summary

Crown water frontages are important in relation to water quality, biodiversity, river health and human health.

Victorian National Parks Association ('VNPA') supports policy measures to improve the condition of Crown water frontages. One of its central objectives is to prevent uncontrolled stock access to riparian land by phasing out grazing licences, which it says significantly contribute to poor environmental health, and pose risks to human health. VNPA believes that the government has not adequately addressed this issue to date, in spite of the large body of evidence – legal, policy and scientific – in support of doing so.

VNPA has instructed EDO to consider the statutory, common law and policy arguments that would support better management of riparian land in Victoria.

In summary:

- There is a robust, if sometimes complex, legal framework for the protection of riparian land, waterways and human health in Victoria. Some legislation creates penalties for polluting water and/or for damaging human health as a result of polluted waterways. Other legislation provides avenues for judicial review, or the recovery of damages, in the case of a breach of duty of care by a public authority.
- There is now a significant body of evidence in Victoria, in scientific literature, expert panel recommendations and government policies and reports, that links uncontrolled stock access in riparian zones to very poor water quality in the local waterway and potentially downstream. This has potential human health impacts.
- This evidence is or ought to be well known to the Victorian government and those involved and responsible for riparian land management. Further, it has recognised the importance of good management of Crown water frontages, and riparian land in general, in a way that minimises negative impacts on water quality and river health. In spite of this knowledge and recognition, it has failed to act, or at best has only responded in a limited way.
- Allowing waterways to be polluted by cattle which result in damage to human health creates a legal liability risk. The five-year license renewal process is due to commence in October 2009. Reissuing cattle grazing licences for Crown water frontages in a "business as usual" manner may increase this risk.
- Apart from the public health implications and the liability risk, there are strong scientific, environmental, policy and legal arguments in favour of amending the current licensing process to address this risk. The Victorian government has a unique opportunity to act strategically to introduce a new system of management of riparian land which would improve the environment and correspondingly provide them with greater legal protection.

2. Introduction and background

Riparian Crown land is principally governed by two Acts: the *Land Act 1958*, and the *Crown Land (Reserves) Act 1978*. Under the Land Act DSE may issue a licence for agricultural use over a Crown water frontage to an owner/occupier of the adjoining private land on behalf of the Minister for Environment and Climate Change ('Minister') (s 130AB(c)). A licence over a Crown land water frontage provides personal permission to enter and use the land for a specified purpose. It does not offer exclusive use to the licensee. Rather, when a Crown land water frontage is licensed, the public retains the right to enter and remain on the land for passive recreational purposes, eg. walking, fishing, swimming or bird watching.

There are about 25,000 km of Crown water frontages along rivers in Victoria. Grazing is the main use for which such frontages are licensed. The current policy of the Government in relation to such licences is to issue licences for a five year term with six further options for renewal (35 years total). All Crown water frontage licences for grazing in Victoria are due for renewal in October 2009.

It is well established that uncontrolled stock access to riparian zones results in very poor water quality in the local waterway and potentially downstream. E.coli and cryptosporidium are the main problem pathogens. Testing by DSE, among others, indicates that levels of these pathogens are high where uncontrolled stock access is allowed, sometimes resulting in higher levels of bacteria than is found in unsewered urban areas. Most water authorities now exclude cattle from their catchments due to the high level of contamination they create.

Downstream uses of potentially contaminated water include:

- recreation in the local stream area where the cattle are grazing through public access to Crown land frontages;
- non-potable water supplied to homes;
- downstream recreation away from grazing areas including fishing, swimming, canoeing;
- campers bathing and washing cooking utensils;
- impacts on animal health where animals drink contaminated water; and
- potable water supplied to homes (though only after treatment).

These uses expose the public to significant health risks.

The DSE offers incentives to landholders, via Catchment Management Authorities ('CMA's'), to fence off riparian areas, remove stock from waterways and to provide off-stream watering on freehold riparian land.

In light of the health and environmental risks posed by grazing on riparian land, and the incentives and other measures available to mitigate these risks, VNPA believes that the State government should withdraw most or all of its grazing licences on Crown riparian land.

3. Policy context

There is strong policy support for the removal of grazing licences on riparian Crown land.

3.1 State of the Environment Report

The State of the Environment report was released in December 2008. The report highlights the importance of riparian vegetation and the major problems arising from damage caused by uncontrolled stock access. Among other things, it identifies the addition of nutrients through dung and urine as one of the negative effects of riparian grazing. It further highlights the costs of treatment to ensure catchment health.

In its key findings and recommendations, the report recommends, among other things, that the Victorian Government consider progressively extending VEAC recommendations (see below at 3.2) to phase out uncontrolled grazing of domestic stock on Crown land water frontages to the rest of Victoria, beginning with the 2009 licence renewal process.

It also recommends that the Victorian Government consider more ambitious targets for the rehabilitation of riparian vegetation for the Victorian River Health Program beyond 2011; that it update and streamline governance arrangements to facilitate protection and restoration of Crown Land water frontages; and that it, together with catchment management authorities, should consider regional-scale connectivity of riparian vegetation in the prioritisation of rehabilitation projects, as part of forming an integrated habitat network across the State. Finally, it endorses the increase in typical licence fees for Crown frontage grazing from \$37.80 to \$1,105.00 a year to discourage farming of unfenced crown water frontages.

3.2 VEAC Red River Gum Investigation

The Victorian Environment Assessment Council ('VEAC') released its Red River Gum Forest Investigation in July 2008. The Investigation recommended that the grazing of stock on parks and state forests cease at once, and proposed a five year phase-out for grazing on public water frontage, in order to ensure the long term viability of biodiversity assets. The Investigation detailed that stock grazing in riparian habitats were detrimental to water quality, caused soil erosion, and increased concentrations of invasive weeds in the area. The VEAC recommended the installation of fencing along water frontage to decrease these adverse impacts, with the economic flow-on effects of riparian protection to be worth an estimated \$2.3 per annum.

3.3 Land and Biodiversity Green Paper

The Land and Biodiversity Green Paper ('Green Paper') was released in 2008. It has emphasised the importance of improving the condition of riparian land, though it has not suggested the wholesale non renewal of leases. (Incidentally, there has been some criticism of the Green Paper's failure to go far enough on a number of fronts.) It does however recommend better management solutions to protect riparian land (see eg p. 48). The Land and Biodiversity White Paper is due for release in mid 2009.

3.4 VCMC Catchment Condition Report

The Victorian Catchment Management Council ('VCMC') published its five-yearly report on the condition of Victoria's catchments in 2007. It found that only one of our ten catchments have rivers and streams in good condition; two were in moderate condition; three were in moderate/poor condition; and four were in poor condition.

3.5 Victorian River Health Strategy

The Victorian River Health Strategy, released in 2002, outlines the Victorian Government's long-term direction for the management of Victoria's rivers. The strategy identifies uncontrolled stock access as being one of the major threats to riparian land. It recommends the introduction of a management framework 'where all managers of riparian land, both public and private, recognise the ecological importance and functions of that land and aim to manage it in a way that protects and restores these functions for river health outcomes.

The Strategy further recognises that poor water quality affects human and livestock health, water supplies, biodiversity, recreational uses and future amenity. However, it also recognises the complex task of addressing the cumulative effects of 'diffuse' pollutant sources (such as agricultural run-off and intensive animal industry effluent).

The Strategy sets specific future targets to measure progress across the State. By 2011, for example, it aims to have 4,800 kilometres of rivers with an improvement of one rating in the measurement of riparian condition; and an increase of 7,000 hectares of riparian areas under management agreements.

3.6 Victorian River Health Program

The Victorian River Health Program was developed by the Victorian Government to deal with the causes of poor river health in the State. Where the Victorian River Health Strategy (above at 3.3) provides a framework for managing riparian land, the Victorian River Health Program coordinates programs to improve the condition of riparian vegetation. The program adopts the ISC – the first complete and comprehensive study of the environmental condition of rivers anywhere in Australia. The ISC is completed every five years.

3.7 Native Vegetation Management

Victoria's Native Vegetation Management – A Framework for Action was released in 2002. It was developed to implement various State and national biodiversity strategies. The Framework focuses on catchments as a whole, and identifies riparian land as rating 'very high' on its 'land protection hazard for net gain outcomes'.

3.8 Relevant guidelines

Australian and New Zealand Guidelines for Fresh and Marine Water Quality, 2000

The Australian and New Zealand Guidelines for Fresh and Marine Water Quality ('ANZECC 2000') is a National and State endorsed guideline for applying a risk based approach to marine and fresh water quality. The guidelines provide 'trigger values' for potential water contaminants, to assess the health of ambient water. These trigger values are required to be considered as a part of a

greater water management framework, which provides nutrient water quality guidelines for the protection of aquatic ecosystems, primary industries, recreational water quality and aesthetics and drinking water.

Guidelines for aquatic ecosystems have been devised on the basis of the levels of the biological and physico-chemical components needed to protect water ecosystem food webs. The guidelines recognise the need to monitor and regulate nutrient increases in rivers and catchments. While the guidelines are not mandatory, State are encouraged to use them to develop their own water quality objectives. Where a water quality objective is not specifically described within the SEPP WoV (see below at 4.1), values derived from ANZECC 2000 are to be used as the objective.

EPA Guideline for Environmental Management

The *Guideline for Environmental Management: Risk-Based Assessment of Ecosystem Protection in Ambient Waters* (EPA Publication 961) is a guideline catchment management authorities, coastal boards, water authorities, and other resource managers to undertake the decision framework for risk based assessment in accordance with the SEPP WoV. One of the key indicators signifying a potential risk for ambient aquatic ecosystems, as stated in the guidelines, is excessive phosphorus concentrations leading to algal blooms in rivers and streams. Further, as shown in the Upper Loddon Concept Model example, agricultural run-off and erosion are identified sources, among others, that can lead to excessive algal bloom concentrations and in turn detrimentally affect river ecosystems and also human health.

3.9 Sydney Water Inquiry – First Interim Report

Finally, in the Sydney Water Inquiry's *First Interim Report* into the 1998 potable water contamination outbreak, one of the contaminating organisms was found to be *Cryptosporidium*. According to the report it is well known that only a low number of these organisms are required to cause disease and can cause death in those with suppressed immune systems.

4. Statutory context

The following section sets out the legislation relevant to riparian land, including possible penalties arising out of breaches of that legislation.

4.1 State Environment Protection Policy (Waters of Victoria)

The State Environment Protection Policy (Waters of Victoria) ('SEPP WoV') is a statutory policy which provides a framework for the protection of the uses and values of Victoria's fresh and marine water environments. SEPPs are pivotal to the performance of the Environment Protection Authority's ('EPA's') functions and have the effect of law.

The SEPP WoV (Policy Impact Assessment) identifies the discharge of animal waste into water through grazing as one of 'the most imminent threats to Victoria's water environments'. The SEPP WoV sets out various measures for addressing this and other threats through its 'attainment program'. Relevantly, the DSE is required to work with the EPA, CMAs and other public authorities to develop frameworks for monitoring and evaluating the implementation of regional catchment strategies, regional targets, the attainment of environmental quality objectives and the protection of beneficial uses (cl 19).

4.2 Environment Protection Act 1970

The *Environment Protection Act 1970* (**EP Act**) requires that any discharge or deposit of waste into water be in accordance with relevant SEPPs (s 38). As noted above, under the Act the EPA can take enforcement action for breaches of SEPPs. It also creates an indictable offence for polluting waters, so that the condition of the waters is so changed as to make or be reasonably expected to make those waters noxious or poisonous, harmful or potentially harmful to human health, wildlife or vegetation (s 39).

4.3 Water Act 1989

The *Water Act 1989* can give rise to a civil liability in damages where a person pollutes water, whether authorised to do so or not, and by that act causes injury, property damage or economic loss to another person (s 15(1)(c)). This provision is generally binding on the Crown (s 5(a)).

4.4 Catchment and Land Protection Act 1994

The *Catchment and Land Protection Act* imposes a general duty on the part of land owners to take all reasonable steps to, among other things, avoid causing or contributing to land degradation; conserve soil; and protect water resources (s 20(1)). The Act also creates a civil liability on the part of the Authority for anything done or omitted to be done (even if in good faith) in the performance of its functions under the Act (s 19).

4.5 Health Act 1958

The *Health Act 1958* regulates, among other things, nuisance abatement, the protection of water supplies and infectious disease control. Under the Act local councils are responsible for preventing diseases, prolonging life and promoting public health through organised programs including the prevention and control of environmental health dangers, diseases and health problems of

particularly vulnerable population groups. The failure of the council to investigate a nuisance in a timely manner creates the right by the complainant to take the complaint to the Magistrates' Court (s 45).

The Act gives rise to a breach where a person causes a nuisance or knowingly allows a nuisance to exist or emanate from any land owned or occupied by or in the charge of that person (100 penalty units or \$11,342.00). Knowingly or recklessly infecting another person with an infectious disease is also an offence and amounts to 200 penalty units (\$22,684.00).

4.6 *Wrongs Act 1958*

The *Wrongs Act* creates a statutory duty of care for public authorities (see ss 48 generally and 83 specifically). In determining negligence, it is necessary to consider:

1. the functions required to be exercised by the public authority, and the financial and other resources that are reasonably available to them in the exercise of these functions;
2. the functions required to be exercised by the public authority, which should be determined by a broad range of activities and not just those functions to which the proceeding relates; and
3. the public authority's compliance (or lack thereof) with the general procedures and applicable standards for the exercise of its functions.

While these considerations are a helpful first step, liability of a public authority will generally be established on a case-by-case basis by reference to the legislation empowering the organisation and setting limits on its liability (see part 5 below for the common law tests that have developed around this area).

It is notable that the *Wrongs Act* imposes a specific duty on the Crown, where it is the landlord of premises, to give the same duty of care to persons on those premises as it would owe if it were a subject, and is liable accordingly (s 14C).

5. Common law context

Where a waterway is polluted by grazing stock and so causes damage to individual(s) or their property, it may be possible for them to pursue a cause of action in negligence, nuisance or breach of statutory duty to recover damages for, or make good, the damage.

State bodies as well as individuals can be sued in tort. Under the *Crown Proceedings Act 1955* the victim of a tort can sue the Crown, who can be vicariously liable for the tortious acts or omissions of the Crown's servant, agent or independent contractor, acting in the course and scope of the employment or engagement. The DSE, DHS or a local council could be pursued in this context.

5.1 Negligence

The general test for establishing negligence at common law requires that the plaintiff establish that the defendant ought reasonably to foresee that his or her conduct may be likely to cause loss or damage to the plaintiff. The alleged negligence does not need to involve (breach of) a statutory power or conduct.

A public authority may be liable in negligence regardless of whether the alleged negligence involves a statutory duty, a statutory power or conduct which does not require statutory authorisation at all. The alleged negligence must be proven to amount to a failure to take reasonable care, in all of the circumstances, to protect the plaintiff from injury. Before there can be liability, first there must be an established common law duty to take reasonable care to protect that injury. The existence of the ability to prevent injury on the part of the public authority is indicative (though not decisive) in determining a duty.

There are three established categories of cases where public authorities have been found, by their conduct, to have placed themselves in a position where they attract a duty of care to exercise their statutory powers, for example, where:

1. the public authority creates a danger in the exercise of its functions;
2. the particular circumstances of the public authority's occupation of premises or its ownership or control of a structure in a highway or public place attracts to it a duty of care; or
3. the public authority places itself in such a position that others reasonably rely on it to take care of their safety.

Where a claim does not fit into one of those three established categories of cases, although there are no definitive tests, several factors are relevant. These include:

1. reasonable foreseeability that the public authority's act or omission would result in harm to the plaintiff;
2. the public authority's power to protect a specific class of persons (including the plaintiff) because of its statutory or assumed obligations;
3. the plaintiff's vulnerability;
4. the public authority's knowledge (actual or constructive) of the risk of harm to the specific class of persons (including the plaintiff);

5. whether the duty would impose liability on the public authority's exercise of core policy making or quasi-legislative functions; and
6. whether there are any policy reasons to deny the existence of a duty.

The control that public authorities have over the safety of people or their property is also of fundamental importance.

In addition to establishing that a statutory authority has breached a duty of care which it owes, the plaintiff must also establish that, on the balance of probabilities, the public authority's negligence caused or materially contributed to the injury or damage suffered by the plaintiff. In general, causation is established if it appears that the plaintiff would not have sustained his or her injuries had the defendant not been negligent (the 'but for' test).

However this test is just a first step and is not always helpful. Depending on the circumstances, 'common sense' and policy considerations are also relevant. For example, where there are two or more distinct causes for the damage (in this case multiple sources of contamination in rivers), without any one of which the particular damage would not have been sustained, each/all can be causally responsible if it can be shown on common sense or policy grounds that they materially contributed to the damage.

Further, where there is dispute about attributing causation for particular damage, it is arguable that this only increases the likelihood that a plaintiff would pursue the department responsible for the administration of (in this case) the waterway.

Finally, it is worth noting that a public authority is sometimes required to take positive steps to protect another person from a reasonably foreseeable risk of injury (even if it did not create the risk of injury), for example where the relationship between the parties is occupier of land and neighbour or occupier of land and entrant. Such relationships exist in the present case. Beyond the scope of statute, occupier's liability is governed by the general law of negligence. The touchstone of the existence of a duty of care is that there must be reasonable foreseeability of a real risk of injury to the entrant or to the class of persons of which the entrant is a member. Where entry on the premises is lawful, the relationship between the occupier and the entrant, in itself, is generally sufficient to establish, on the occupier's part, a duty to take reasonable care to avoid a foreseeable risk of harm from occurring.

5.2 Nuisance

Nuisance is the unlawful use or interference with the enjoyment by a person of his or her rights in land. A public nuisance is substantial and unreasonable interference with rights common to the public at large, including by endangering the life, health, property, or comfort of the public or obstructing or interfering with the public's ability to exercise or enjoy public rights. A public nuisance is a criminal offence at common law and as a misdemeanour is punishable by indictment. The pollution of a public waterway and acts which endanger public health may constitute a public nuisance.

As noted above at 4.5, the *Health Act* provides the statutory framework for dealing with nuisances which are dangerous to health or offensive.

6. Conclusion

On the basis of the above:

1. There is strong policy support for the removal of grazing licences on riparian Crown land. The State of the Environment Report is the most recent example of a growing, and increasingly vocal, body of evidence in support of the phasing out of uncontrolled grazing of domestic stock. The government is aware of these policy arguments but has not to date followed them up in any meaningful way.
2. There is also strong legal support for the removal of grazing licences on riparian Crown land. The statutory regime around the use of Crown water frontages and human health create legal risks for the State government, which are likely to increase as time goes on. For example:
 - o the *Water Act* creates a civil liability for a person who pollutes water, whether authorised to do so or not, and by that act causes injury to another person.
 - o the *Health Act* creates a breach where a person causes a nuisance or knowingly allows a nuisance to exist or emanate from any land owned or occupied by or in the charge of that person.
 - o The *Wrongs Act* gives rise to a right to damages where the act or omission of the public authority breaches its duty of care. This may arise where the public authority fails to comply with general procedures and applicable standards for the exercise of its functions.
3. Finally, there is a real risk that any injury to a person or their property arising out of uncontrolled stock access on riparian land could give rise to an action in either common law or statutory negligence. It is not far-fetched to envisage a situation in which the Crown possessed the requisite duty of care, knowledge (or 'foreseeability') and control to satisfy the negligence 'test'. Water contamination as a result of grazing on riparian land may also give rise to a claim in public nuisance. Although there are many matters that would need to be considered to determine whether such a liability arose in any individual case, it would clearly be better to avoid such a situation arising in the first place.