CROWN LAND, ACQUISITION: DEVELOPMENT AND PLANNING

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INTRODUCTION

Surveying work concerning Crown land can require careful consideration and should trigger some caution. Many surveyors may only encounter Crown land when assisting a Council with survey work, a road closure or boundary re-establishment near Crown land. Likewise public acquisition frequently involves government survey work and its private application to individual sites. Recent case work at Kellehers Australia, within the context of development and planning, highlight some intriguing issues concerning both Crown land and acquisitions that provide both warnings and guidance.

CROWN LAND RESERVES

> "By the doctrine of the common law, all the land in England is either in the hands of the king himself, or is held of him by his tenants *in capite*[3].

This sovereignty doctrine applies to land in Australia. Land not granted in possession to a subject is in the legal possession, as well as the ownership, of the Crown[4]. This grant is the basis on which freehold and other interests in land have been granted by the Crown since the earliest days of Australian settlement. It is also the basis of the elaborate body of legislation relating to Crown Leases.

There is Commonwealth Crown Land and State Crown Land. In Victoria, the Crown Land (Reserves) Act 1978 (Vic) (CLRA) provides for the reservation of Crown Lands[5] for certain purposes and for the management of such reserved land. The public purposes for which this power can be exercised are detailed, in wide terms, in s4 CLRAct. They

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[3] Co.Litt.65a Challis, *Real Property*, 3rd ed, p4.

[4] *The Attorney-General v Brown* (1947) 2 SCR (NSW) App 30 (FC).

[5] The Act does not specify whether only State Crown Lands can be reserved, or Commonwealth Crown Lands as well, but an attempt to reserve Commonwealth land would likely be unconstitutional: see below note 10.

cover a range of public purposes including public baths & swimming pools, infrastructure such as ports, wharves, drainage and roads as well as more general conservation and preservation including, eg, protection of the coastline. A reservation may be permanent or temporary[6]. Permanent reservations can only be revoked by an Act of Parliament. S14 CLRA creates committees of management for Crown Land.

Certain types of reservation are also subject to additional regulation. So, a reservation for the protection of the coastline is also subject to the Coastal Management Act 1995 (Vic), which imposes additional consent requirements and also sets up a structure for coastal-specific policy setting.

PLANNING

Planning controls in Victoria involve both zones and overlays and these comprise maps and textual controls. Obviously, public uses and Crown lands occur across all zones[7], but the zones that specifically address public use are the Public Parks and Recreation Zone (PPRZ), Public Use Zone (PUZ), Public Conservation and Resource Zone (PCRZ) and the Road Zone (RDZ).

In addition, where land is to be acquired or a new reservation is proposed, a Public Acquisition Overlay (PAO) will apply. The Land Acquisition and Compensation Act 1986 (Vic) (LACAct) prohibits any land acquisition, with several exceptions[8], unless the land has been reserved under a planning instrument for a public purpose[9].

Commonwealth Crown land is exempt from compliance with Victorian planning controls[10], although frequently in government decision-making there is internal attention to those requirements. It is also possible that a Commonwealth-State Bilateral Agreement may involve the Commonwealth in some agreed manner.

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[6] *Crown Land (Reserves) Act 1978* (Vic) s 4.

[7] Planning on Crown land can also interweave with other regulatory schemes such as the *Liquor Control Reform Act 1998 (Vic) (Liquor Act)* which prohibits the issue of a licence if the use breaches the planning scheme and imposes a condition of every licence, including a BYO permit that the use of the premises does not contravene the relevant planning scheme (s16). There is concern about the overlap between liquor and planning issues that remains unresolved: LIV Submission to the Department of Justice and Regulation Review of the Liquor Control Reform Act 1998 (23 December 2016). In our experience, the Commission prefers to 'skirt' around any involvement in planning, generally relying upon a Council decision, even if potentially technically flawed. See, for example, *Win Win Investments Pty Ltd at Bushy Park Café premises (Liquor internal review)* [2017] VCGLR 20, [67]:

> 'the Commission is of the view that any enquiry by it concerning the lawfulness of the Premises' underlying use would be inappropriate'.

[8] Except where the Governor in Council certifies that a reservation would be 'unnecessary, undesirable or contrary to the public interest: s5(3) LACAct.

[9] S5(1) LACAct.

[10] The *Commonwealth Constitution* s52 gives '*exclusive power*' to the Commonwealth Parliament to make laws with respect to '*all places acquired by the Commonwealth for public purposes*'.

State Crown land may be regulated by a Planning Scheme[11] and all Victorian Ministers and government departments, agencies and councils are bound by Planning Scheme provisions, unless otherwise gazetted by order of the Governor in Council[12].

PUBLIC USE CONTROLS

It is necessary to separately consider the zones and the overlay control specific to public use. Overlay provisions always apply in addition to the land's zone.[13]

Overview

Zones

A brief overview reveals differences between each of the public use zones.

The purpose of the PPRZ is to recognise areas for '*public recreation and open space*, *appropriately protect and conserve significant areas and, where appropriate, provide for commercial use*'[14]. By contrast, the PCRZ purpose is narrower, being *to conserve the natural environment and provide facilities that* '*assist in public education and interpretation of the natural environment*'[15]. The purpose of the more infrastructure-oriented PUZ is to '*recognise public land use* for *public utility and community services and facilities*': and to '*provide for associated uses consistent with the intent of the public land reservation or purpose*'[16] with seven discrete public land uses:

PUZ 1	Service & Utility
PUZ 2	Education
PUZ 3	Health & Community
PUZ 4	Transport
PUZ 5	Cemetery/Crematorium
PUZ 6	Local Government
PUZ 7	Other public use

Diagram 1: Table of Public Land Uses, Cl 36.01-6 VPP

Finally, the RDZ focuses on road infrastructure, with its purpose simply to '*identify significant existing roads*' and '*identify land which has been acquired for a significant proposed road*'[17].

Apart from their purposes, the key difference between these public use zones is that the more restrictive PUZ requires virtually all uses[18] to be '*by or on behalf of the public land*

[11] s46 *Planning and Environment Act 1987* (Vic) (PEAct).
[12] s16 PEAct. [Note: several such orders currently exist, eg, Eastern Arterial Road and Ringwood By-pass for Road Construction Authority (Government Gazette G11, 15 March 1989), Wellington Parade/Punt Road Intersection for Roads Corporation, (Government Gazette G12, 21 March 1990), Swanston Walk, for Roads Corporation, Public Transport Corporation and Melbourne City Council (Government Gazette G3, 22 January 1992)].
[13] Victorian Planning Provisions Cl 41.
[14] Victorian Planning Provisions Cl 36.02.
[15] Victorian Planning Provisions Cl 36.03.
[16] Victorian Planning Provisions Cl 36.01.
[17] Victorian Planning Provisions Cl 36.04.

manager'. By contrast, the PPRZ permits some commercial uses, eg '*Office*' and '*Retail Premises*', provided they are '*associated* with the public land use' (italics added). The PCRZ places importance on the Incorporated Plan[19] and allows a wide range of uses, provided they are '*by or on behalf of' the public land manager*'.

The PPRZ, PUZ and PCRZ also require the '*public land manager*' to consent to the making of any permit application, although this does not require a consent to the actual use or development proposed[20].

In the case of Crown land reserved under the *CLRA*, the public land manager is defined under the Planning Scheme as the Minister, rather than the committee of management[21]. The public land manager could otherwise be the Minister administering the Crown land legislation (the Minister for Planning), Parks Victoria or a local council, but the term could include any other public authority, including an authority to which the power has been delegated[22]. It is possible that there could be more than one public land manager for the same land[23], in which case it seems that any public land manager can give the consent to the making of a permit application[24].

Aside from the RDZ, the public use zones have many similarities. Subdivision requires a permit and involves a mandatory pre-condition requiring consent from the public land manager to the making of any permit application. There is also a right to comment and object for the relevant Minister or other public land manager and the Responsible Authority must take such comment into account in determining any permit application. Any schedules to the PPRZ, PUZ and PCRZ will likely be unique to each municipality and can reshape or refocus key requirements. The RDZ has no schedules.

Public Acquisition Overlay

The PAO, because it is an Overlay and <u>not</u> a zone, operates alongside the land's zoning controls. The 'underlying' zoning provisions always apply in addition to the Overlay controls.

The purpose of a PAO is to identify and reserve land required for future acquisition and designate the relevant authority that will function as the formal Acquiring Authority. An Acquiring Authority is the authority that becomes liable for payment of compensation under the *Land Acquisition and Compensation Act 1986* (Vic).

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[18] Except Railway,Tramway, Railway Station and uses specified in Cl62.01 VPP.
[19] Contained in a PCRZ schedule and which will contain most of the land use controls.
[20] Victorian Planning Provisions Cls 36.01-3, 36.02-3, 36.03-3.
[21] VPP cl 72 (definition of 'public land manager').
[22] In *Regal Hotel Pty Ltd v Port Phillip CC* [2007] VCAT 1526, VCAT held that one public land manager could delegate its power to another, but a tenancy agreement was not, by itself, enough to do so.
[23] See, for example, *Central Highlands Water v Ballarat CC (No 1)* [2006] VCAT 1297, where a water authority applied for a planning permit and, when Council refused, it tried to argue that it was a public land manager. VCAT held that there could be more than one public land manager, but the water authority was not a public land manager.
[24] Ibid.

A PAO will always have a schedule that includes the name of the Acquiring Authority liable for the compensation payment.

More Detail on Public Use Planning Controls

As the public use zones involve particular technical requirements, we include a short description of the detail zone by zone.

PPRZ

Within the PPRZ, various uses, including the innominate use clause, require no permit but are subject to a condition that the use be '*conducted by or on behalf of the public land manager*' or as '*specified in an Incorporated Plan*'[25]. Some uses require no permit if conducted by or on behalf of a public land manager or Parks Victoria, provided this is 'under the relevant provisions of' various listed statutes[26]. Various commercial uses, for example '*Retail Premises*', '*Office*', '*Store*', '*Contractor's Depot*' and '*Heliport*' can be granted a permit, subject to the condition that the use '*must be associated with the public land use*'[27].

A permit is required to subdivide land and also for building and works, which does not apply to the public land manager or to some exceptions such as '*planting and landscaping*'.

VCAT cases indicate that it is rare for a private landowner to be able to rely on the public land manager provision. For a use to be '*by or on behalf of the public land manager*', it is not enough that the public land manager approves of the use, but rather that the use must be conducted for the public land manager in the exercise of their functions of care and management of the land. Two VCAT cases, *Regal Hotel* and *Central Highlands Water*[28], concern attempts by an authority to construct infrastructure without a permit, relying on the 'as of right' provisions available to public land managers. These were successfully challenged before VCAT, because the constructing authority was not a 'public land manager', being without responsibilities of care and management.

Compliance with the formal technical consent requirements within this zone is fraught with error and confusion at both State and local government levels. In a recent case, a café on Crown land operated by a for-profit private company lessee required no permit (according to Council) because Council considered the café to be operated '*by or on behalf of the public land manager*'. There was no connection (beyond a lease) between the private café operation and the public land manager and no evidence that the café

[25] Cl 36.02-1.
[26] Local Government Act 1989, Reference Areas Act 1978, National Parks Act 1975, Fisheries Act 1995, Wildlife Act 1975, Forest Act 1958, Water Industry Act 1994, Water Act 1989, Marine Act 1988, Port of Melbourne Authority Act 1958, and Crown Land (Reserves) Act 1978.
[27] Cl 36.02-1, Section 2.
[28] *Regal Hotel Pty Ltd v Port Phillip CC* [2007] VCAT 1526; *Central Highlands Water v Ballarat CC (No 1)* [2006] VCAT 1297.

bore any of the '*care and management*' responsibilities of the public land manager[29]. Council considered that an *endorsement* by the 'public land manager', without any further evidence, was sufficient. This approach appears, without more, to be incorrect.

PUZ

All uses in the PUZ must be 'by or on behalf of' the public land manager', aside from the as of right uses of '*Tramway*', '*Railway*' and '*Railway Station*'.

A permit is required to subdivide land. No permit is required for building and works, with controls on such being covered by the highly restrictive use controls.

The potential inappropriateness, of some PUZ zonings was highlighted by VCAT in *Lin v Monash CC*[30], where a developer applied for a permit to build residential houses on land partly zoned PUZ. The development was clearly inconsistent with the PUZ which would ordinarily mandate its refusal, but because the land was not actually needed for a public use, VCAT held that the PUZ should not require refusal of the permit[31]. VCAT found that the relevant public land manager took on its role 'with some degree of reluctance' and that Council should review the zoning to determine if it was any longer appropriate.

PCRZ

The PCRZ's use controls include a lengthy table of 'as of right' recreational uses such as '*Jetty*' and '*Open Sports Ground*', but such uses must be either '*by or on behalf of the public land manager*', or '*specified in an Incorporated Plan*'. To determine what uses are allowed and restricted, the Incorporated Plan is crucial. Each PCRZ site will have its own Incorporated Plan in a zone schedule.

A permit is required to subdivide land and for building and works, except for building and works '*shown in an Incorporated Plan*' or '*by or on behalf of the public land manager*'.

RDZ

The RDZ's use controls are very sparse. As of right uses include '*Minor Utility Installation*', '*Tramway*', and '*Railway*', in addition to the innominate use clause[32].

Subdivision and all other uses require a permit, as does any building and works. The relevant road authority can comment on any permit application.

There is very little VCAT consideration of subdivision, building or works applications within an RDZ with most VCAT decisions being concerned with access or roadside advertising.

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[29] Cl 72 VPP defines '*public land manager*'); *Regal Hotel Pty Ltd v Port Phillip CC* [2007] VCAT 1526.
[30] [2015] VCAT 1246.
[31] *Ibid* [25]. However, a permit was refused on other planning grounds.
[32] Cl 62, which sets out a range of miscellaneous uses for which no permit is required.

Public Acquisition Overlay (PAO)

The PAO provides that all otherwise allowable uses – including uses that would otherwise be 'as of right' – require a permit. A permit is required to subdivide land and for building and works. These requirements do not apply to the Acquiring Authority where the relevant use or development is consistent with the purpose of the acquisition.

Land within a PAO must not be '*spoiled or wasted*'[33]. The ordinary notice requirements for permit applications do not apply, as the Responsible Authority is not required to notify potentially affected landowners. All permit applications must be referred to the Acquiring Authority. The PAO exempts the Acquiring Authority, after acquisition, from any permit application requirements, provided any use, construction, demolition, vegetation removal or subdivision otherwise requiring that a permit is '*consistent with the purposes for which the land was acquired*'[34].

An exemption from these permit requirements applies to an application by '*an authority*' or '*a municipal council*', provided the Responsible Authority consults with the '*acquiring authority for the land*' and thereafter '*is satisfied*' that such would be '*consistent with the purpose for which the land is to be acquired*'.

In considering any permit application, the Responsible Authority '*must consider, as appropriate … the effect of the proposed use or development on the purpose for which the land is to be acquired as specified in the schedule to this overlay*'[35].

PAO and Surveyors

Disputes concerning a proposed Planning Scheme Amendment creating a PAO are decided by Planning Panels Victoria (PPV), not VCAT.

PPV decisions emphasise the importance of a sound strategic justification for any new PAO. The exact purpose of the proposed PAO must be clear and align with the articulated community need for that purpose[36]. There is consistent abhorence to any unjustified deprivation by the State of private property.

> '*(D)epriving citizens of their legal connection to their land is a very serious matter and should only occur through careful, deliberate and transparent actions by the acquiring authority [and]… (i)t must not be (or appear to be) an arbitrary, casual affair that lacks conviction when examined closely.*'[37]

This approach arises from established case law requiring a clear, defined and sufficiently justified 'public purpose' that is not arbitrary or intended to achieve an ulterior purpose, even though such purpose might be worthy. The case of *Municipal*

[33] Cl45.01-2.
[34] Cl45.01-1.
[35] Cl45.01-4.
[36] See *Mildura C56 (PSA)* [2011] PPV 133; *Greater Bendigo C161 (PSA)* [2016] PPV 20.
[37] *Mildura C56* PPV Decision 2001 PPV 133 (28 December 2011) 6 (Jennifer Moles Chair, Neil Longmore Member).

Council of Sydney v Campbell[38] concerned a Sydney City Council proposal to acquire land for the stated purpose of '*extending Martin Place*', when in fact it was intended for another purpose. The Privy Council held that:

> *'A body… authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the courts will interfere…'.*[39]

So, in a subsequent High Court case, *Council of the Shire of Werribee v Kerr,* an acquisition was stated to be for a road purpose, but was, in fact, for drainage. The Court found this to be an 'ulterior' object.

> '*For the Council's power to take the strip of land is not general: it is limited to the particular purpose stated in the Act … there is no power apart from the purpose – the purpose is vital to the power.'* [40]

Thus, the boundaries of a proposed PAO must not be too expansive or the area too large for Council's stated purpose.

In setting an acquisition boundary, the law requires this to be strictly limited to what is reasonably necessary for the public purpose. Thus, where Council attempted to resume more land than was required for a road, the High Court found it had not acted in good faith[41]. The land acquired must be only what is needed for the advancement of an identified public purpose – and no more.

> '*An executive power to deprive a citizen of his property by compulsory acquisition should be … confined within … the clear meaning … of the words by which it is conferred … [and] confined to land which is, of its nature, likely to have characteristics that designate it as being 'required' or 'suitable' for an identified public purpose.'*[42]

PAO and Watercourses

Where a boundary is a watercourse, interesting issues can arise particularly when the position of the watercourse has changed over time. The bed and banks of any '*watercourse*', pursuant to the *Water Act*[43], become Crown land. The term '*watercourse*' is defined as '*any river, creek, stream, watercourse, lake, lagoon, swamp or marsh*'. In one proposed amendment[44], careful surveying evidence presented to PPV revealed that large segments of the area proposed for inclusion within a PAO reservation could not

[38] [1925] AC 338. Followed consistently, for example in 2007 in *Melbourne Water Corporation v Domus Design Pty Ltd* [2007] VSC 114.
[39] *Campbell* [1925] AC 338, 343 (Duff J).
[40] [1928] HCA 41 at [30] per Higgins J.
[41] *Thompson v Council of the Municipality of Randwick* (1950) 81 CLR 87.
[42] *Clunies-Ross v Commonwealth of Australia & ors* (1984) 55 ALR 609, 612.
[43] S5 *Water Act 1905* (Vic), now contained in s385 *Land Act 1958* (Vic).
[44] *Nillumbik C108 (PSA)* [2017] PPV 8.

validly be included because they were Crown land being the bed or banks of a past or existing watercourse. With these gaps removed, considerable alteration was required to the reservation's shape and content.

Further, in notating a Re-Establishment survey, it is the line representing the parts of the land over which water '*normally flows*'[45] that must be shown, not '*top of bank*'. This correction can be extremely important for development setbacks.

Before leaving watercourses, the doctrine of accretion provides that, as watercourses change over time, where the change is only imperceptibly slow, such gradual changes will change the boundaries of a landholding[46]. However, where sudden changes occur to the watercourse alignment or shape, the boundary still remains at the original watercourse location, as if the sudden changes did not occur. This requires some attention by the surveyor during field work as to the likely speed of any observed change.

Exempt Public Projects

Where government undertakes major projects such as a major transport construction or the current Melbourne Metro Tunnel project, particular legislation will often 'fast track' the process. Ordinarily, a project on Crown land, particularly with a Crown Land reserve, requires a strict consent and approvals process. However, 'fast track' legislation can, via the *Major Transport Projects Facilitation Act 2009* (MTPFA), revoke any reservation, crown grant or title and, thereby result in, land being deemed to be unencumbered unalienated Crown land.[47]

The Minister can also recommend that Crown land in a project area be designated for the purposes of an 'approved project' and, from that designation the land is taken to be temporarily reserved for the public purpose of the approved project[48].

PURPOSE OF THE CROWN'S RESERVATION

As described above, the public use planning controls all variously require consideration of some or all of the terms '*public land use*', the powers of '*the public land manager*' and/or '*the purpose for which the land was*' or '*is to be*' '*acquired*'. A key 'live' issue concerns the applicability of the gazetted reservation purpose under the CLRAct is to be applied within the planning system.

This arose in *Teasdale*[49], a VCAT permit appeal decision concerning a longstanding permanent reservation of Crown land for the purposes of '*protection of the coastline*'. The case noted the ambiguity around the phrase '*associated with the public land use*' -

[45] *Land Act 1958* (Vic) s 384.
[46] *Hazlett v Presnell* [1982] 149 CLR 107.
[47] S141.
[48] S142A MTPFAct
[49] *Teasdale v Surf Coast SC* [2016] VCAT 1224.

undefined in the planning scheme or legislation. '*Protection of the coastline*' also was not defined. It was argued that the use '*associated with the public land use*' must be tied to the gazetted purpose of a Crown land reservation, because s46 *Planning and Environment Act* (PEAct) states:

> '*If a provision of a planning scheme is expressed or purports to deal with land that has been permanently reserved for any purpose under the Crown Land (Reserves) Act 1978 or any part of that land in a manner which is inconsistent with the purpose of the reservation, the provision does not take effect until the reservation of that land or part is revoked by or pursuant to an Act of Parliament.*'

The case. The particular reservation in this case relied upon a Land Conservation Council recommendation that private occupation of coastal public land should be phased out. The argument relied upon s46 *Planning and Environment Act* (PEAct) which states:

Given this, it was argued that the issue of any permit was *ultra vires* as being inconsistent with the purpose of a permanent Crown land reservation.

The proposed use was a high-intensity commercial use (a licensed pop-up bar) on an area of land containing a public viewing platform, a Lifesaving Club, an angling club and a small café with associated car parking and access areas. Some residential land and a bowling club were nearby.

VCAT approached the matter from a planning paradigm,placing less emphasis on the gazetted reservation purpose and more emphasis on the zone purpose that, in its view, '*overtly anticipated possible commercial uses such as this*'[50]. It took into account '*how the locality is already publicly used day-to-day*'. It concluded that a broader approach was appropriate, and the use restrictions should be primarily governed by the zone rather than the Crown land reservation.

It adopted a broader reading of '*protection of the coastline*', finding that the purpose of protecting the coastline from '*environmental damage or excessive community usage impacts*'[51] would be consistent with using parts of the coastline for more intensive uses.

VCAT also found that, even if a more restrictive reading of '*associated with the public land use*' were adopted, the use would be permissible because the proposed use would '*assist*' the purpose of the reservation because the subject site already had '*considerable human presence*', and was located at an existing '*activity node*', where clustering uses kept them away from the natural coastal landscape.

[50] *Ibid*, [18].
[51] *Ibid*, Appendix B, [6].

CROWN LAND (RESERVES) ACT APPROVALS

Crown land reserved for public purposes is regulated by the *Crown Land (Reserves) Act 1978* (Vic). Reservations, whether permanent or only temporary, can only be developed after the formal grant of specified approvals by designated public authorities, generally a committee of management. That may be Parks Victoria, Melbourne Water, a local council or another public authority. These often take the form of licences to enter and use the land[52].

General Licence and Licensing Powers under CLRA

The committee of management of reserved Crown land is given the power to grant licences to enter and use the land, enter into agreements to operate services and facilities, and enter into tenancy agreements, if those licences and agreements are consistent with the purpose of the reservation[53].

The committee of management also has a separate power to allow the above uses of the land in a manner that is not related to the purpose of the reservation[54].

Coastal Management Act

If land is Coastal Crown land, licences or agreements which are not consistent with the purpose of the reservation must be authorised through notice by the Governor in Council or Ministerial approval[55]. Ministerial approval is required for any use or development[56]. Failure to obtain such approval can lead to a fine. In determining whether to grant approval, the Minister must have regard to the Victorian Coastal Strategy, any Coastal Action Plan, any relevant coastal recommendation, and the purpose for which the land was reserved[57].

The Victorian Coastal Strategy[58] is developed by the Victorian Coastal Council, another public authority with responsibility over the coastline. The Strategy is the primary guide for Ministerial decision-making on permit applications. The primary objectives of the Strategy include protection of significant environmental and cultural values and ensuring the sustainable use of natural coastal resources. The Strategy strongly discourages construction and development near the coast, recommending such only where 'functionally necessary' or if it 'significantly contributes to the social values of the area'[59].

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[52] s17B CLRAct.
[53] S17 CLRAct.
[54] s17B(1) CLRAct.
[55] s17B(2) CLRAct.
[56] s37 *Coastal Management Act 1995* (CMAct).
[57] S40 CM Act.
[58] Victorian Coastal Council, *Victorian Coastal Strategy 2014* (Department of Environment and Primary Industries, July 2014).
[59] *Ibid* 65.

Coastal Action Plans are regional policies for development along the coastline to 'identify strategic directions and objectives for use and development in the region',[60] thereby setting the context in which Ministerial decisions are made. These policies are developed and managed by regional coastal boards. Typically a Coastal Action Plan provides for environmental, cultural and scenic values and seeks to juggle these with tourism and economic goals. Some Plans formulate approaches to 'suitable' coastal development. All Coastal Action Plans must be consistent with the purpose of the Crown land reservation[61].

OTHER

Other issues of more peripheral linkage to Crown land include the distinction between restriction and acquisition, heritage and taxation.

Reservation v Restriction

Sometimes, highly restrictive planning controls are imposed on private land, often for environmental and conservation purposes. Such controls can, in effect, amount to a *de facto* reservation for public purposes by preventing virtually any future development or changed land use, with the 'restriction' imposed solely for the public good. The High Court[62] determined that an acquisition, which attracts compensation rights, requires that an Acquiring Authority actually gains a property right in land and that it is insufficient if property rights or rights to use land are merely taken away. This contrasts to US caselaw that recognises 'regulatory takings' as creating a right to compensation[63].

In these cases, the distinction between reservation, acquisition and restriction/planning control or restriction is extremely fine, if not entirely blurred. However, unless the PAO is applied, no right to compensation appears to currently apply.

A recent Australian Law Reform Commission Inquiry[64] considered the need for law reform in this area. It highlighted the plight of farmers prevented from clearing land to achieve a public conservation good but who were, thereby, unable to properly operate their agricultural enterprise.

Restrictive land use controls raise fundamental questions about the rights of private landowners and the relationship between the citizen and the state.

Heritage

Surveying work enabled location of the position of the first Gold Commissioners' Camp on the Ballarat Goldfields. This early and hugely influential Crown Land public purpose had immense heritage significance, but its location was in dispute. The first Ballarat

[60] S23 CMAct.
[61] *Ibid*.
[62] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[63] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)
[64] *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129) (2016)

surveys, by William Urquhart, were retrieved and carefully scrutinised to compare them with current survey data. From this, the precise location became known and this significant Eureka and Australian heritage site became identified.

Taxation

It is important not to overlook the taxation implications of correcting old surveying errors. Where land has high value, it is possible that the Taxation Commissioner may interest himself in the final choice of any land to which the error is 'added'. Potentially, Capital Gains Tax might apply from the date of the original survey 'error' to the lodgement date of the 'correct' survey. Where this could potentially impact abutting land, a deed executed by all registered proprietors may be required confirming the absence of any benefit or any detriment to any of them. Tax issues might also need consideration within strips and slivers or adverse possession applications.

CONCLUSION

Controls impacting Crown land, particularly reserved Crown land and public acquisition, always come with a host of associated tricky legal issues. Extra controls and strict formal consent procedures exist within State planning controls. Watercourses require extremely careful attention. The formal gazetted purpose of any Crown land reservation should be extracted and understood. Such gazettal can restrict the grant of a lease or licence and may restrict its subdivision, use and development. Committees of management and Ministerial involvement are often required.

Failing to fully consider the implications of a Crown land reservation, Crown land controls, public use zones and the public acquisition process can have severe financial and practical repercussions for a landowner or developer and their surveyor. When in doubt about this complex topic, specialist legal advice can generally be helpful.

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