Special Purpose ‘River Laws’ and Land Use Planning

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Scheme of the *Yarra River (Birrarung) Act*

› Recognition and protection of the river as ‘one living and integrated natural entity’
  • River as ‘entity’ not legal personhood but a form of statutory fact

› Nineteen principles directed to the protection of health and values of the river

› Strategic planning framework, centred on the Yarra Strategic Plan

› New obligations on certain local councils and public authorities

› New institutional oversight:
  • Birrarung Council
  • Commissioner for Environmental Sustainability

Original artwork by Sarah Firth
Land and land–use planning in Victoria, Australia

› Detailed statutory codes and controls over use and development of land (distinct from title or ownership)

› Primarily a State responsibility (in the federal system)

› Important source of environmental protections and controls (where nexus between land–use and environmental matters)

› Control of water as a resource functions under separate and distinct water laws

› Land–use planning does apply to waterways, wetlands, etc insofar as they touch on land (eg land includes ‘land covered by water’)**
Integrated decision–making: legal basis for decision under planning law

› Applies to land–use and development
  • Decisions concerning approvals of use or development of land (permitting)
  • Decisions to amend the planning rules (planning scheme)

› ‘integrated decision–making’
  • Includes environmental, social, and economic objectives (triple bottom line approach)
  • Generally facilitative of development

› ‘net community benefit’ or ‘acceptable outcome’ test
  • Decision–makers are to ‘balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations.’
  • Decisions can include negative characteristics, may only achieve planning objectives partially, or run contrary to others
Interaction between planning legislation and the *Yarra River (Birrarung) Act*

- Two separate statutes covering overlapping subject-matter
- Statutory provisions under planning law can be ‘read up’ where the Act favours such an approach
- Ordinary legal rules on interpretation of statutes apply
Land, land–use planning and the Yarra River

Statutory subject matter: the ‘Yarra River (Birrarung)’
› Wider than land, development, and land use
  • Potentially includes waters and in–stream ecosystems, although uncertain

› Wide and liberal interpretation of subject matter warranted

‘Protection’
› Planning law: usually concerns constraints or negative controls

› As one living and integrated natural entity: broader than protection in planning law
  • Protection includes conservation and rehabilitation?
  • Protection to include resilience?
The Yarra Strategic Plan

YSP provisions expressed to be binding
› Can require a planning outcome or action to be implemented
› Direct application of requirements

YSP provisions and Yarra protection principles are relevant considerations
› YSP, protection principles may apply as mandatory considerations
› Preamble, purposes, or objects may apply as relevant considerations
An enhanced legal test for land-use and development decisions in the Yarra River corridor

› Planning decisions to be read in light of rules, principles and intentions of Yarra River law

› ‘acceptable outcomes for the Yarra River (Birrarung)’ test
  • Actions or policies should achieve a *net gain for the environment* (reflecting section 9(4) of the Yarra River (Birrarung) Act
  • Economic benefits are either not relevant, or diminished
  • Social principles

Photograph: ces.vic.gov.au
Limitations and ambiguities

Geographic

› Geographic reach of the Act: river corridor, wider catchment

› Concept of ‘Yarra river land’ pivotal

› Also ‘Yarra Strategic Plan Area’

› Main force is confined to the public land corridor
  • Not exclusively the case

Political and bureaucratic procedure

› High-level, convoluted bureaucratic & political support required for YSP to pass

› Possible outcomes:
  • May constrain substantive outcomes
  • Consensus endorsement and approval providing significant institutional and political authority
What can or will ‘river laws’ do?
Wider considerations and questions for design of protective ‘river laws’

› What is the effect of legislative ‘recognition’ of natural places or entities?
  • What enhanced or greater protections apply under this type of law?
  • Can this model drive *paradigmatic* change (ie how rivers are perceived and experienced?)

› How can the law best overcome the fragmented management of land, water, biodiversity, culture in relation to rivers, especially in urban areas?
  • Can ‘river laws’ drive restoration/rehabilitation agenda (eg urban greening and ‘re-wilding’)?

› Multiple emerging legal strategies for river protection and/or restoration – which are preferable? Feasible?