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THE DOCTRINE OF ACCRETION

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1 Introduction**1.1 General**

- 1.1.1 In the early days of settlement in Victoria, Crown land was usually sold to the edge of lakes, rivers streams, etc., unless there was a particular need at the time for a reservation along a frontage. Some land was also sold to the shoreline of the sea. Many waterways were sold to the centre of the stream and some entire waterways (especially lakes) were included in allotments that were sold. The government did not have an overall policy of retaining frontages for future use and enjoyment.
- 1.1.2 Although significant parts of the frontages to Bass Strait, Port Phillip Bay and so on were sold, most frontages, both marine and inland, were reserved over the years for public purposes and other purposes. Of more recent times, the marine frontages in many parishes have been permanently reserved for the protection of the coastline.
- 1.1.3 It is common for natural forces to bring about changes in the boundary between land and water along the sea and waterways. Any such change can result in an accretion of land to freehold land or reserved Crown' land with a water boundary, or can cause a loss of land. See paragraphs 2.2 and 2.3 for definitions of the terms involved in these processes, ie. accretion, diluvion, etc.-

1.2 Purpose

The purpose of this guideline is to explain in general terms the affect that alterations in boundaries between land and water can have on land ownership, with particular application to the interests of the Department of Conservation and Natural Reources (CNR).

1.3 References

This guideline is primarily based on recent advices from the Victorian Government Solicitor (VGS) and records from the former Department of Crown Lands and Survey. Some definitions are taken from "Jowitt's Dictionary of English Law, John Burke; Sweet and Maxwell, 2nd Edition 1977".

2 Doctrine of accretion

2.1 General

- 2.1.1 Where a boundary between land and water alters so slowly that the change is not readily noticeable, the process is known to the Common Law as the "Doctrine of Accretion". The doctrine broadly provides that "*gradual accretions of land from water belong to the owner of the land gradually added to and conversely, land encroached upon by water ceases to belong to the former owner*" (VGS). The new owner holds the accreted area upon the same estate or tenure as the owner's other land. An important factor is that an alteration to a boundary must be "gradual and imperceptible" so that the change "*cannot be seen as actually going on, though a visible increase (or decrease) is observable very year*" (VGS). There have been court cases where advances by the water of 5.0 metres and 7.41 metres in a year satisfied the requirements of the doctrine (VGS).
- 2.1.2 It is interesting that there is no minimum time over which a change must take place for the doctrine to apply; each case is decided on its merits. It is interesting also that if during an extended period of time there is gradual change interspersed with "*one or more occasions on which there has been a noticeable or observable movement in the shoreline*", operation of the doctrine need not necessarily be excluded (VGS). The doctrine may also apply despite the fact that a gradual and imperceptible change was caused by artificial means; such as perhaps the construction of a jetty nearby, provided that the change was not the result of deliberate reclamation by landfill or other methods.
- 2.1.3 It is to be expected that over time, the "Greenhouse effect" may cause changes to high-water marks around the world. It is also to be expected that the principles that govern application of the doctrine will apply, despite the fact that the changes will be due to environmental factors.

2.2 Accretion

Accretion of land is of two types: one called "alluvion" where "*sand and earth are washed up by the sea or a river so as to make an addition to existing land*" and the other called "dereliction" where "*land is left dry by the sea shrinking back below the usual high-water mark, or by a river changing its bed*" (Jowitt).

2.3 Diluvion

The loss of land by the encroachment of water is called "diluvion" or sometimes "divulation" and is the opposite of accretion. Land may also be lost by erosion.

3 Application of the doctrine

3.1 Freehold land

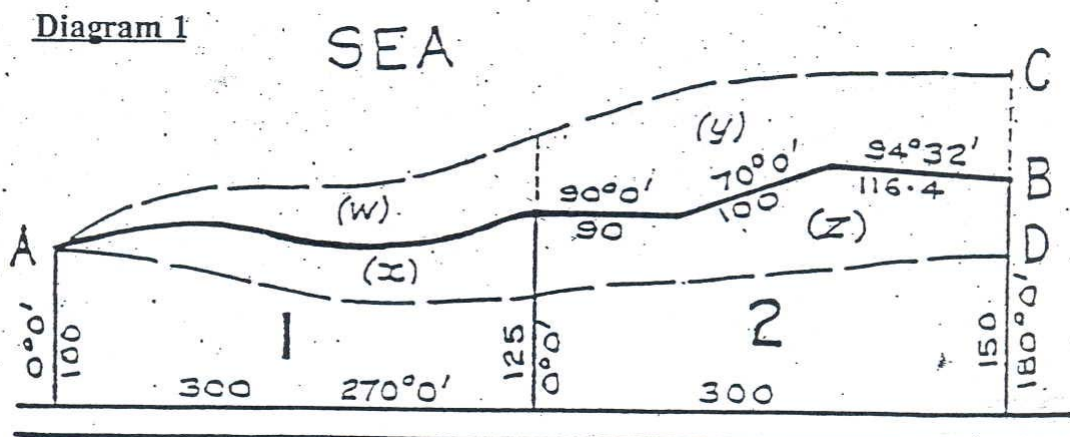
3.1.1 Subject to a clear expression in title documents of a contrary intention, when freehold land has as a boundary the shore line of the sea or a lake, river or stream :

- Any gradual and imperceptible, accretion into the water extends the boundary of the freehold land; and
- any gradual and imperceptible diluvion or erosion of the freehold land by the water diminishes the boundary of that land and extends the area of the body of water.

This is the case whether or not the title documents are "accompanied by a map showing the boundary, or contain a parcels clause stating the area of the land, and whether or not the original boundary can be identified" (VGS). However, the accretion, diluvion or erosion must be of a permanent nature. For instance, "exposure of the bed of a lake on account of a shortage of water at a particular time is not permanent" (VGS). See further 3.4.2.

3.1.2 As a 'refinement of paragraph 3.1.1., where " a boundary can be shown to have been, intended to be the sea boundary, although marked on titles as a 'straight line' or by reference, to metes and bounds, it will be regarded as a boundary in respect of which there may be an accretion or diluvion" (VGS). The converse is also true, in that "if that intention cannot be established by reference to the title documents or other extrinsic evidence, it may be that application of the doctrine will be taken to be excluded" (VGS).

3.1.3 This process can be explained by reference to Diagram 1. If it can be clearly established by reference to title that the boundary marked A-B is the common boundary between the sea and properties 1 and 2; the doctrine will apply. A slow and imperceptible movement of the sea boundary from A-B to A-C would result in the accretion of areas (w) and (y) to properties 1 and 2 respectively. A movement to A-D would result in the loss by properties 1 and 2 to the Crown of the areas shown (x) and (z) by diluvion.



3.1.4 In the event of an accretion or diluvion in respect of which application of the doctrine is excluded for any reason, the title boundaries are unchanged. The result is either that the land owner owns land that is covered by water, or occupies land that belongs to someone else - in the case of a marine frontage, probably the Crown.

3.2 Crown land

It has long been decided that "*the doctrine of accretion applies against the Crown just as it applies against other land owners*" (VGS).

3.3 Reserved Crown land along a marine frontage

3.3.1 Many of the Orders in Council that reserved Crown land along the coast described the boundary between land and water in words or on plans by reference to "high-water mark" or "Bass Strait" or "Port Phillip Bay" or "the ocean" or "the sea" or by some other means that clearly indicated that the boundary was in fact between land and sea. In the following paragraphs this boundary is called the "sea boundary". In most cases the sea boundary is high-water mark.

3.3.2 In the event of an accretion of land to a reserve along the coast, it is the opinion of the VGS that:

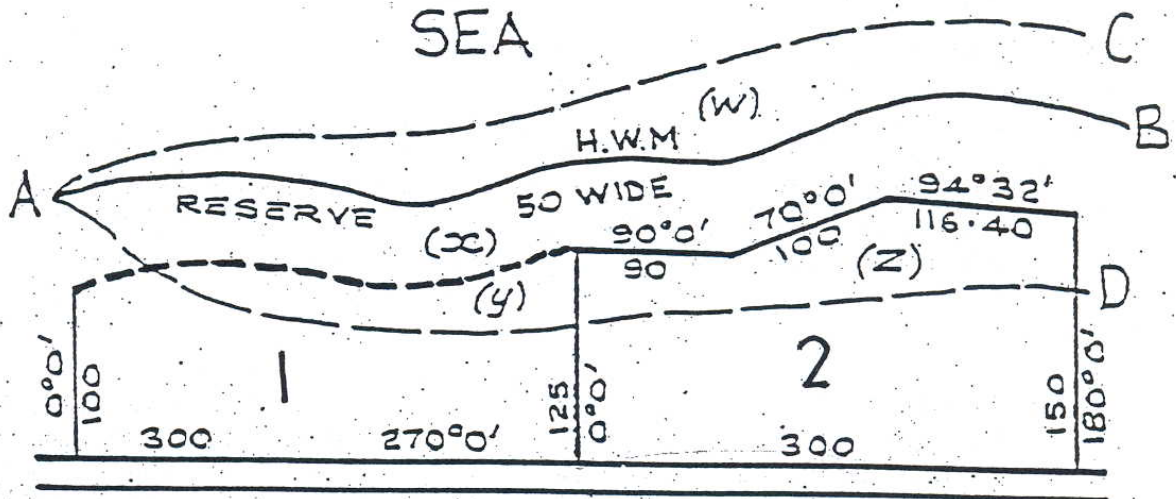
- where the sea boundary is described as in paragraph 3.3.1 or where there is "*a marked or surveyed line that can be shown by extrinsic material to be intended to be the ocean boundary*", the boundary of the reserve will extend out to sea, whether or not the Order in Council stated the area of the reserve; and
- where the sea boundary is not described as in paragraph 3.3.1, or where there is no clear intention by other means that the boundary is the sea boundary, the doctrine may not apply.

3.3.3 The case with diluvion is similar. Where the sea invades reserved Crown land across a boundary of the type described in paragraph 3.3.1 or the early part of paragraph 3.3.2, the area of the reserve is reduced. Where the inundated area is part of a bay or inlet, the land under water, becomes vested in the Crown, although it does not remain part of the reserve. Should the inundated area not be within a bay or inlet, "*it appears the affect of the Coastal Waters (State Title) Act 1980, No. 77 (of the Commonwealth) is to vest right and title to the seabed in the State*" (VGS).

3.3.4 With both accretion and diluvion as outlined in paragraphs 3.3.2 and 3.3.3, the sea boundary of the reserve is altered without further Order in Council. However, in neither case does the process necessarily have an impact on the inland boundaries of the reserve. In particular, extension or diminution of the sea boundary does not of itself cause any change to a boundary between the reserve and any abutting freehold land. However, should the invasion by the sea consume all of the reserved land, it could continue into the abutting freehold land, at which time this land would start to be "*lost to the owner*" (VGS) and to become unreserved Crown land.

- 3.3.5 If as shown in Diagram 2, boundary A - B between the sea and the reserve retreats to A-C the boundary of properties 1 and 2 would not be affected but the reserve would be increased by the area marked (w). If the boundary encroaches to A - D the reserve would be reduced or even last completely to the extent of the area marked (x) although it would remain vested in the Crown. Similarly areas (y) and (z) would be lost to the owners and became unreserved Crown land.

Diagram 2



- 3.3.6 In most cases where Crown land is reserved for protection of the coastline, the reserved area includes the available Crown land above high-watermark, together with Crown land below 600 metres from high-water mark. With these reserves, any change to high-water mark does not affect the seaward or landward boundaries of the reserve. However continued accretion or diluvion could have an affect if the doctrine is deemed to apply
- 3.3.7 If a road on Crown land (a government road) along the coast is lost by diluvion and the doctrine is applicable, the road loses its status as such and becomes unreserved Crown land under the control of CNR.

3.4 Lake abutting freehold

- 3.4.1 Where freehold land is described in title documents as being bounded by a lake on Crown land, or as having a boundary defined by reference to the relevant body of water:
- any gradual and imperceptible alluvion or dereliction (mostly the latter) extends the boundary of the freehold land; and
 - by gradual and imperceptible diluvian of the freehold land by the waters of the lake diminishes the boundary of that land and extends the area of the lake.
- 3.4.2 Where the water in a lake recedes in a time of draught, it is doubtful if the doctrine of accretion would apply. In the opinion of the VGS, it would be difficult to argue that the dereliction was gradual and imperceptible. For the same reasons, a sudden inundation of freehold land by the waters of the lake, perhaps because of heavy rain, will not result in a diluvian to which the doctrine would apply.

3.4.3 The Crown land forming the bed of a lake may be reserved up to a common boundary with freehold land. In many cases, the reserve would be for the protection of the bed and banks of the lake. If the doctrine applies, the boundaries of the lake reserve extend and diminish as the case may be and so does the area of the reserved land. The boundaries of the freehold land other than the water boundary remain unchanged.

3.5 Rivers, streams and watercourses

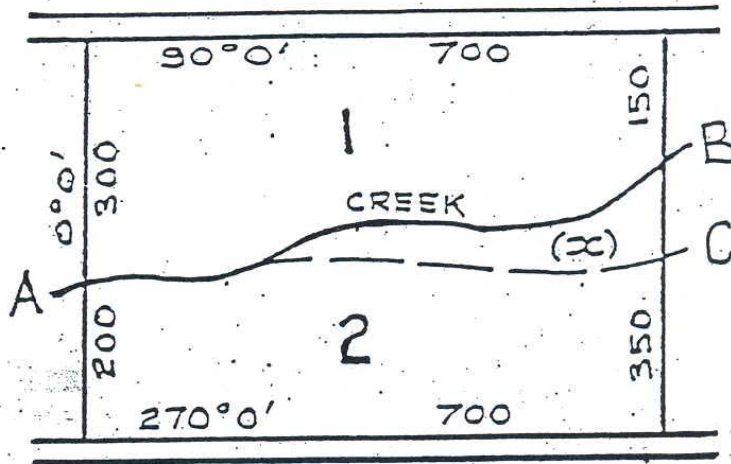
3.5.1 Crown land forming the beds and stated 'distances from each bank of over 300 watercourses and bodies of water in Victoria were permanently reserved for public purposes in 1881. The most common width of frontage reserves is 20.12 metres. By 1881, some frontages had already been withheld from alienation and since then, others have been reserved for public purposes or other purposes. As mentioned earlier, some watercourses have freehold land to the edge of the water, or the adjoining land was sold to the centre of the stream. The next paragraphs will comment on known variations on this theme.

3.5.2 Watercourse where the bed and frontage on each bank are reserved and the entire reserve has unalienated, unreserved Crown land on each side, ie. no freehold land is involved. Accretion or diluvion on either bank does not affect the outer boundary of the reserve, ie. the boundary a stated distance from the original bank. However, if the changes to the bank or banks of the watercourse continue to the stage where the outer boundary of the reserve is crossed, some action is warranted. Under Section 11(1) of the Crown Land (Reserves) Act 1978, the Governor in Council is able to permanently reserve the bed and banks of the altered course on Crown land and to revoke the reservation along the old course.

3.5.3 Where an allotment was sold to the edge or centre of a watercourse, probably before the 1881 general reservations (see paragraph 3.5.1). Common Law principles were that, notwithstanding specific measurements, delineations or colourings on a Crown grant, the grantee and his or her successors in title owned to the centre of the stream - "ad medium filum aquae". The Common Law applied until the time came when the bed and banks were "*deemed to have remained the property of the Crown and not to have passed with the land so alienated*" (Section 5, Water Act 1905) where the stream formed the boundary or part of the boundary of alienated land. The retrospective provisions of the 1905 Act thus brought an end to the Common Law in this situation. With such a watercourse, if there is an alteration to the boundary between land and water to which the doctrine applies, there is a gain or loss of freehold land. The Crown land forming the bed and banks of the watercourse fluctuates with the changed boundary of the freehold. These provisions are now contained in Section 385 of the Land Act 1958.

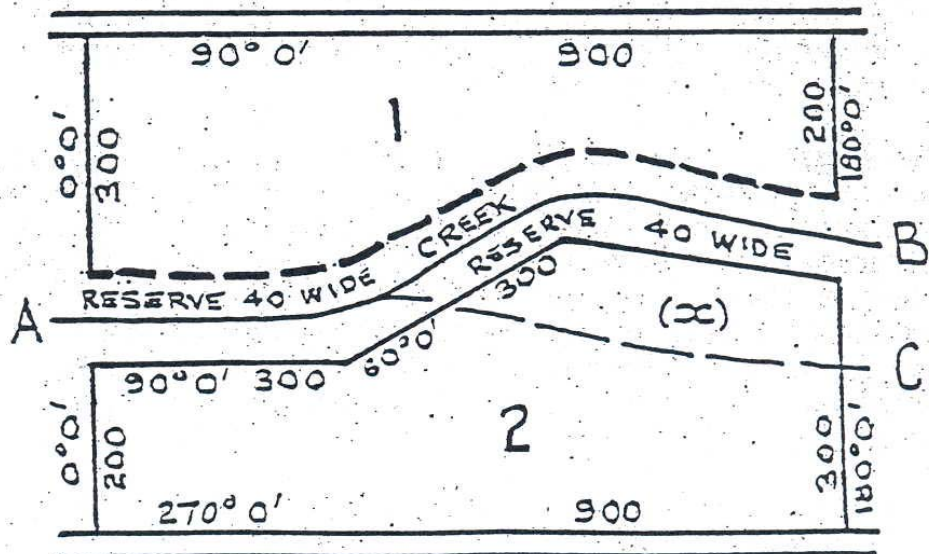
3.5.4 Watercourse with freehold land to the edge of the water on both banks. In this example the principle is similar to that contained in paragraph 3.1.2. If, as shown in diagram 3 the location of the watercourse changes from A-B to A-C, property 1 would gain by accretion the area shown (x) together with the Crown land formerly forming the bed and banks of the watercourse. Conversely property 2 would lose by diluvion area (x) and the area occupied by the relocated bed and banks of the watercourse.

Diagram 3



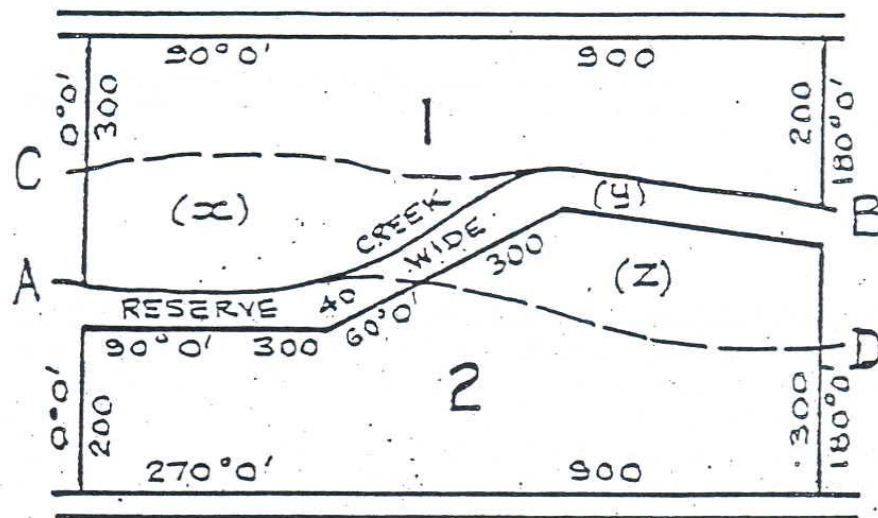
3.5.5 Watercourses with freehold land on both sides where bed & banks and Crown frontage are reserved. If, as shown in diagram 4, the watercourse moves from A-B to A-C the doctrine would not affect the boundaries of either properties 1 or 2 or the reserve as the water does not form a common boundary with either property. For that reason property 2 retains ownership of area (x) and the bed and banks of the of the relocated section of the watercourse.

Diagram 4



- 3.5.6 Watercourse with freehold land on both banks to edge of water or one bank only where bed and banks are Crown frontage is reserved. With movement of the watercourse from A-B to C-B, as indicated in the example shown in diagram 5, property 1 would lose by devolution the area marked (x) and the Crown reserve would be extended by that area. If the watercourse moved from A-B to A-D property 1 would gain by accretion the reserve area marked (y) which would be lost to the Crown. As the watercourse is not the common boundary with property 2, title to that property would not be affected and, as in paragraph 3.5.5, no land would be lost to the bed and banks of the relocated watercourse.

Diagram 5



4 Amendment of title

- 4.1 Where Crown land accretes to freehold land, the land owner may apply to the Registrar of Titles to have the title documents amended to make the boundaries coincide with the land occupied. The application should be accompanied by a survey plan.
- 4.2 The Registrar or the applicant's surveyor or agent consults the Surveyor General, who investigates the case by a comparison of old and new aerial photographs, and an examination of old plans, field notes and reports. A field inspection is made by a Departmental surveyor, who reports on the extent, nature and apparent duration of the occupation. The surveyor may also talk to old residents and look at municipal or water authority records. Based on this advice, the Surveyor General either consents to adoption of the amended boundaries, or refuses to consent, or suggests, amendments in some cases.
- 4.3 If, on the available evidence, the Registrar is satisfied that the application should go ahead, he will direct an amendment to be made to the title documents or will issue a new title to include the enlarged area.

4.4 Just as the doctrine applies against the Crown (see paragraph 3.2), so the Crown could stand to gain in a case of diluvion. In theory, the Crown (probably through CNR), could apply to have titles amended to show that former freehold had become Crown land. There is no record of this ever having occurred. Any such case would need to be investigated along similar lines to those set out in paragraph 4.2.

5 Involvement of CNR

5.1 Sometimes CNR becomes aware of an accretion or is consulted when one occurs, either by the land owner or later by the Registrar or the Surveyor General. Unfortunately this does not happen consistently and, there have been cases where Crown land has been included in title with adjoining freehold without the knowledge of CNR. Even when CNR is aware that an application is to be made to include a Crown land accretion in title, there is little that can be done to prevent this happening. If CNR opposes the loss of Crown land, the best course may be to negotiate with the land owner, who may be prepared to forgo part of the claim. The alternative is to legally challenge the application on the grounds that the doctrine is not relevant for some reason or another.

5.2 When CNR becomes aware of the inclusion of a Crown land accretion in title, the plan and file records in the CNR Area Office should be suitably amended. If the Crown land has been reserved, the fact of the reduction in size should be noted. If the land has been held under licence or a lease not registered under the Transfer of Land Act 1958, amendment is needed.

6 Summary

It is emphasised that this guideline discusses the doctrine of accretion in broad terms only, the facts of each individual case should be considered separately and the proper construction of any relevant instrument of grant. Among the general requirements that must be met before the doctrine can apply, the most important are that the accretion must be "gradual and imperceptible" and must appear at the time to be a permanent condition. It should also be kept in mind that the doctrine is only applicable to boundaries between land and Water.

7 Cross references to other guidelines

7.1E "Watercourses, access to bed and banks"