



Environmental
Justice Australia

Toward a Yarra River Protection Act

Beginning a journey of community design

Summary

The Victorian government has committed to enacting a new law for the Yarra – a Yarra River Protection Act. Environmental Justice Australia (EJA) and the Yarra Riverkeeper Association (YRKA) have joined to work on getting the best outcomes from this commitment for the environment and the community. EJA and YRKA are inviting community and environment groups together in a conversation around the proposed Act. In this paper we suggest a series of issues, themes, and potential directions to consider in development of a legal and institutional framework for Melbourne’s iconic river.

The Victoria Government’s legislative intentions (Yarra Act, Yarra Trust/institution)

In the lead up to the 2014 State election the ALP committed to enactment of a Yarra River Protection Act and Yarra River Trust, as measures to improve the management of the Yarra River corridor. Little more was included in the election commitment. It had arisen after concerted lobbying from the Yarra Riverkeeper Association (YRKA), among others, for greater protection of the River corridor, including from overdevelopment.

On coming into power in November 2014, the ALP government pursued this legislative agenda. Toward the end of 2015, the Government made announcements concerning interim planning controls and Ministerial advisory arrangements. The Government also then established a Yarra River Protection Reference Group (YRPRG), comprising municipalities, public agencies, and Environmental Justice Australia (EJA) and YRKA, to advise the Planning and Environment Ministers on future directions for the proposed Act. The YRPRG first met in December 2015. It will meet throughout 2016.

This project

Seeing the potential in the Government's commitment to a Yarra River Protection Act, EJA and YRKA collaborated on an initial brief report on issues to be addressed under such a framework and then hosted a very successful Community Forum in February 2015. Our organisations proposed a legislative 'co-design' process to the Planning Minister which would bring community, NGO and environmental actors directly into the legislative design process. While this proposal was not adopted by the Minister, EJA was successful in obtaining the assistance of the Lord Mayor's Charitable Fund to establish a participatory design process which would bring together the ideas and voices of community organisations. This process is the essence of the current project. Its focus is to bring together community organisations with established interests in the Yarra and key parts of the catchment into a 'Community Committee' which can guide the work and advocacy of EJA and YRKA in their dealings with Government. The project also aims to assist those participating organisations in their own advocacy with State and Local Government around the proposed Yarra River Protection Act.

What is the purpose of this paper?

The discussion and points below are intended only to guide your thinking about directions for a Yarra River Protection Act and Yarra River Trust. This paper may not canvass all or even most of the issues you want to bring to the discussion. Bear in mind, at this stage we are looking to develop ideas and models at a rather general level, rather than responding to detailed management issues or particular local concerns. Some of the detail may be worked through in later workshops or through subsequent discussions among ourselves (whether at planned workshops or in other ways).

If there are particular legal or policy questions which you think would be valuable for EJA to follow up and provide research or information on to the whole group, please feel free to raise these in the course of discussions or at a later time.

After resolving what we think are key issues and directions for the Act, it may be that subsequent workshops begin to consider options in greater detail and then preferred outcomes. This paper hopes to get that journey started.

Considerations for the development of a Yarra River Act

The Yarra River and its catchment

The Yarra River is one of major waterways draining through urban Melbourne. The Yarra catchment comprises an extensive area of urban and peri-urban Melbourne, in addition to swathes of largely uncleared forests in the upper part of the catchment significant in the protection of Melbourne's water supply. For much of Melbourne, then, the Yarra River forms the primary natural feature and it is strongly identified with the city.

Although large sections of the upper catchment retain strong natural values and processes, the Middle and Lower sections of the Yarra have been affected by extensive modifications and impacts on the River corridor, in-stream ecology, and catchment. In some sections this has included diversion of the river itself. Elsewhere it has included the extensive drainage of surrounding wetlands, impervious infill associated with development, industrial and urban pollution, almost total clearing of native vegetation, and controls on water flows through dam-building.

The special circumstances of Yarra River governance

Establishing rules and management arrangements for waterways is, obviously, not a new exercise. There are many and varied circumstances and models around the world. Early canal and navigation Acts in the UK or US formed the basis of contemporary waterways laws in those countries. Managing waterways across State or national boundaries, for instance among the US State or in Europe, has the subject-matter of international treaties and inter-state agreements going back to the 19th century. In Australia, problems with governance of our largest river system – over-extraction of water in the Murray-Darling – led to Federal legislation in 2007 to manage this vast river basin.

The circumstances of the Yarra River are not as geographically extensive as Europe or the UK or the Murray Darling Basin. However, there is, arguably, a unique set of circumstances to reformed governance of the Yarra River. These circumstances will likely be important in devising legislative arrangements for the river. They include:

- the Yarra River is a landscape-scale feature and it is amenable to landscape-scale management and governance.
- governance arrangements for the Yarra River are unlikely to operate at the basin or whole-catchment scale, as the catchment encompasses a large part of urban Melbourne. Legislative models based on basin-wide management may be of limited use of developing a model for a Yarra River Protection Act.
- the Yarra River is, for the most part, an urban waterway, albeit with important sections of its upper reaches retaining high natural values.

Indigenous values

The Yarra River has been a natural, social and cultural feature of the landscape for thousands of years. The river is part of [Wurundjeri Country](#) and its indigenous history and status are key foundations of the River. For the purposes of establishing a Yarra River Protection Act, Wurundjeri are represented on the Ministerial Reference Group and will advocate indigenous approaches and priorities to governance through that forum.

The Indigenous values of the river include cultural and spiritual values and, historically, its being a source of livelihood and sustenance – values that continue today. Additionally, as the work on Wurundjeri elder William Barak testified, the river was also a key route for passage and communication.

The recognition of Indigenous values, uses and concepts in river systems and wetlands can be facilitated and achieved through the law. There are various important examples of Indigenous models and frameworks being incorporated into governance arrangements. For instance, recognition and consideration of Indigenous values and uses is part of the development of the Murray-Darling Basin Plan. In New Zealand, under Waitangi Treaty Settlement arrangements, the [Whanganui River](#) is recognised as a legal personality, with a distinct Maori (indigenous) status and character, and represented by a corporate body (with both Maori and Government representatives on it). Under this arrangement, that river is governed as both a legal person and with special relationships to Maori.

Natural values

Despite extensive modification, the Yarra River retains important natural values and through greater conservation practices over the past four decades the natural values of the River have been progressively protected and improved. The river corridor comprises the single largest ‘green’ space within urban Melbourne. Substantial areas of parkland and habitat have been retained within the corridor and these have been protected through public ownership and/or statutory planning controls. In-stream values, such as water quality and aquatic ecology, make key contributions to Melbourne’s urban and peri-urban environment and environmental indicators have improved over time. Considerable environmental challenges remain for the river, especially in its urban reaches and by extension its impacts on Port Philip Bay. Those challenges include water quality and sediment loads, management of flows, and restoration of in-stream and riparian habitat, and protection of remnant habitat.

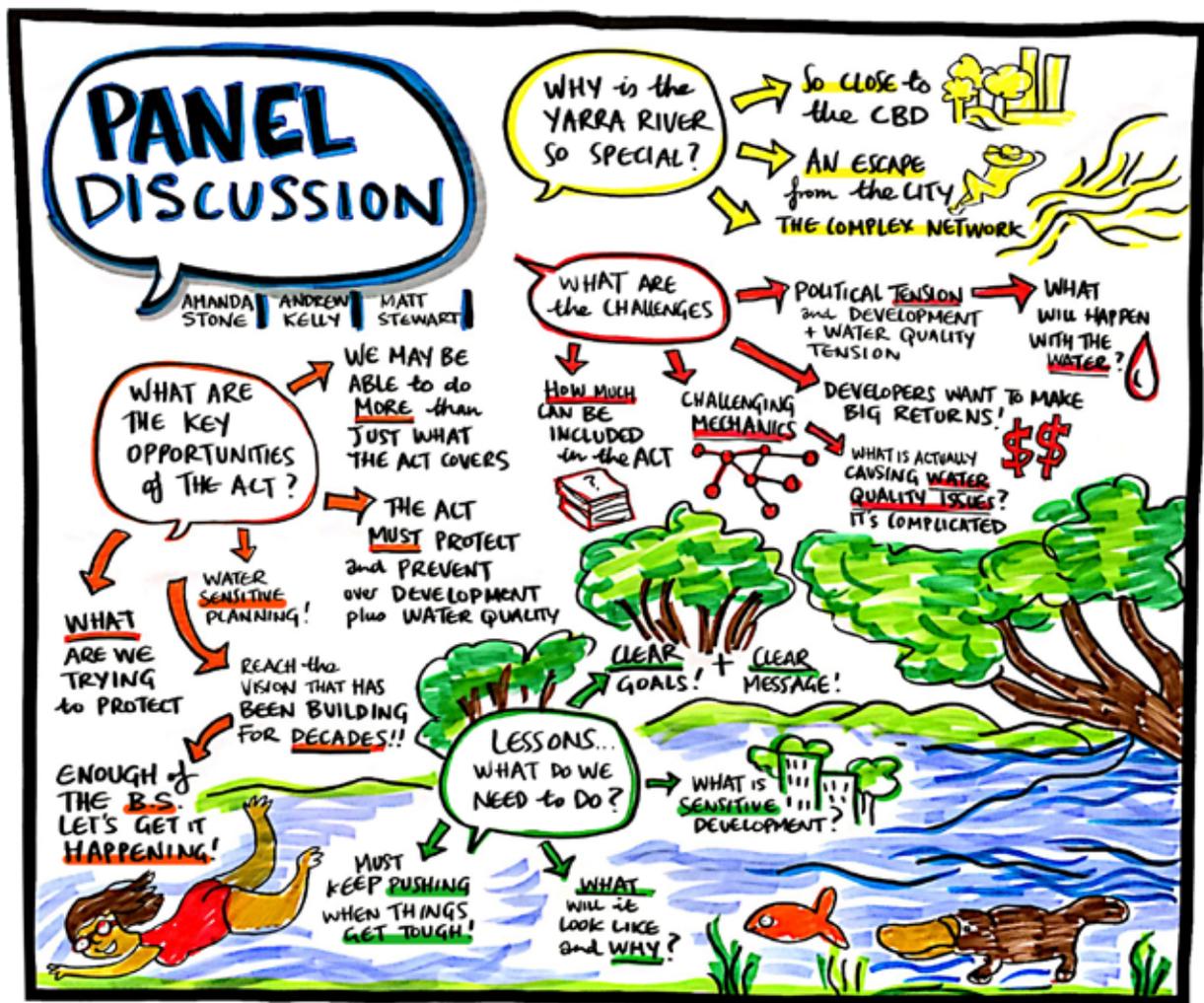
Social, economic and industrial values

The natural systems of the Yarra River are intimately connected with human systems, pressures and management. There has been a long-term historic shift from treatment of the urban river as a de facto drain to a landscape and environmental feature. Major non-indigenous impacts on the River included industrial and residential pollution, as well as the clearing of in-stream and riparian vegetation. Some adjacent, floodplain wetlands have been retained but these are a small remnant of pre-existing wetlands, swamps and billabongs.

The European history of the Yarra River has included, variously, its use for urban and rural water supply, industrial discharge, and, in the lower reaches, transport and port facilities. It has always had recreational uses and values as well, such as swimming, fishing, boating and leisure. These values continue today.

Management of the Yarra (land use planning, biodiversity, water quality, water quantity)

The legal and policy frameworks for management of the Yarra River are presently multi-layered, fragmented and complex. EJA and YRKA have previously written on and discussed these [challenges of governance and past efforts to meet them](#). There are discrete, but inter-related, laws and policies for land-use planning, public lands management, water quality, and water flows and extractions. Developing models and systems of governance for a significant, urban waterway such as the Yarra perhaps requires a certain amount of unavoidable complexity and compromise. Calls for greater coherence and integration in river management are warranted, but tendencies to fragmentation of responsibilities and powers among public agencies, not to mention the challenge of existing development, uses and rights along the river corridor and in its vicinity, are unavoidable realities to greater or lesser degree. Greater coherence and integration of river management can help improve management and practical outcomes, while not necessarily being a panacea for all land-use, planning and water governance issues.



What would we like you to consider?

With these points in mind, we think that there are a number of initial, key questions we need to turn our collective minds to in formulating a legislative model for the Yarra River Protection Act. They are not comprehensive but they may get this exercise started. They include:

- what should be the scope and ambition of the Act and the Trust?
- what should be the main objectives of the Act? What should it seek to achieve?
- what would be the main tasks and functions of the Trust?
- what principles, if any, should guide the Act and the work of the Trust?
- what should be the geographic limits of management and governance established under the Act?
- what should be the principal functions, powers and responsibilities established under the Act?
- how might the Act affect, reform, take over or modify the functions or powers of Councils, Melbourne Water, relevant Ministers (e.g. the Planning Minister), or other public agencies (such as the EPA, Parks Victoria or the Victorian Environmental Water Holder)?
- what should be the role of communities or nongovernmental organisations in governance of the river and how might such roles be reflected in the Act?

To develop these questions and points further a number of issues and variables are considered further below. A schematic representation of key issues and themes is also included in **Table 1**. Neither the points below nor the Table are intended to be conclusive of what needs to be discussed or considered. They are starting points.

Models of management

Minimalist – a planning authority?

If the extent of ambition and authority of waterway management under the proposed Act might be considered on a spectrum, at one end it is possible to envisage a ‘minimalist’ model. Under this type of arrangement the purposes of the Act might be to provide for a singular planning authority (presumably the Trust) which would be responsible for land-use planning functions along the river corridor. The Trust might also function as a referral authority under the Planning and Environment Act for development proposals that impact on the Yarra corridor. In this respect, the legislation would give effect to a shift in planning responsibilities from local Councils to the Trust. It would likely be one of several potential referral authorities.

The Trust may be a body established under the Act functioning independently, or alternatively functioning within Melbourne Water. Melbourne Water itself might be the ‘Trust’, or the Minister may assume that function. The principal function of such a body under this model would be receiving and deciding on development applications (within the jurisdiction established) – a statutory planning function. The Act might also give that body strategic planning functions. The latter include amendment and adoption of planning schemes, which may include one or more planning schemes applying to the entire river corridor.

Maximalist – integrated natural resources management?

Potentially at the other end of the spectrum is a more ambitious legislative framework based on concepts of integrated natural resources management, or integrated waterway management. A central distinguishing feature of this approach would be the establishment of functions and powers under the Act allowing for management of a broad range of matters affecting the protection, health, restoration and use of the river and the river corridor. So, for instance, the Act would establish planning powers and responsibilities (as per the ‘minimalist’ model) but in addition powers and duties to manage water extraction, public lands within the river corridor, on-water activities, water flows (including environmental flows), storm water, works and infrastructure, and biodiversity protection. Under this model, the Trust would likely

operate as an independent agency with regulatory powers. It may also possess revenue-raising powers in order to fund its activities and works. As far as practicable, the legislative framework would seek to provide for a single repository of powers over each of the key dimensions of social and ecological management of the river corridor. It would be based on the river functioning as an integrated *system*, including environmental, planning, water, social and economic facets, and be our attempt to design a legislative framework that meets this reality.

Yarra corridor?

A further question for the design of the Act will be the geographic scope of its application. This will include the specific areas over which the Act will establish management responsibilities and jurisdiction. As well as the in-stream area of the river, those riparian areas directly adjacent to the waterway itself would likely be included. But how far should these areas extend? What exactly comprises the 'river corridor'?

There is then the issue of the broad range of activities and influences that occur beyond the immediate river corridor and riparian zone but impact on both, or potentially do so. Some of the more important influences beyond this zone include urban storm water systems and urban run off – aspects of 'water sensitive urban design'. Another example is the planning and management of development (and presumably redevelopment) in the vicinity of the river, which typically adds to or influences impervious surfaces, the nature of run off and surface flows, and hydrology. Indeed, substantial development sites, such as greenfield developments, even a considerable distance from the river could have significant and detrimental impacts on the river and its surrounds. Can a Yarra River Protection Act confer functions and powers that deal with these broader geographic areas? If there are means of doing so, the next question will be: should the Act have these functions and powers?

Finally, managing an area as large as the Yarra River probably requires its division into manageable 'zones'. In an ad hoc way, local Councils play a similar sort of role at the moment. Is there a better way in which the River can be divided into management zones?

Yarra catchment?

In opening up the question of the how widely, in a geographic sense, the Act should apply, there is a next logical step. The Yarra River will be affected by the state and condition of its catchment as a whole, so how much, if at all, should the Act seek to contend with or manage challenges in the wider catchment? These challenges will include urban and peri-urban development beyond the immediate Yarra River corridor. They may include litter, urban run off, agricultural run off and the management of tributaries. Catchment management is currently regulated and managed by [Melbourne Water](#) and the [Port Phillip and Westernport Catchment Management Authority](#).

Perhaps the central issue to deal with in relation to design of the Yarra River Protection Act is the extent to which key tributaries can or should be brought within the scope of the Act and, further, how that would contribute to the desired objectives and purposes of the Act and how inclusion of key tributaries might contribute to or detract from the efficiency and efficacy of the Act.

Another key issue to deal with in this context will be how and to what extent can or should the Act tackle the promotion or establishment of '[water sensitive urban design](#)' (WSUD). WSUD encompass a range of [techniques and methods for the improved management of water and flows in urban contexts](#), leading to both the protection and management of water resources and also the improvement of water quality and reduced detrimental impacts on water ecosystems.

The Trust – a planning authority, a coordinating authority, an advocate?

As noted above, the Government announced the intention of establishing a Trust to protect and manage the Yarra River corridor as well. This raises some important questions, such as:

- what is to be the precise role of the Trust?
- what is its relationship to other public authorities and bodies?
- how should it be legally constituted? What should be its membership?
- what should be its relationship to the Act?

A range of possibilities and options can be envisaged here. For instance, the Trust may simply be a planning authority constituted under the Act and work in the manner of other planning authorities, such as councils. Alternatively, that body might take on a much more coordinating and/or directive role: not acting as a direct planning authority or land and resource manager but coordinating councils and agencies in the exercise of their powers and responsibilities. It could perhaps have, statutory powers to direct those councils and agencies to do things where it serves the overall purposes of the Act and advances outcomes for the river. A variation on this last alternative might be that the Trust also includes in its functions to act as an advocate for the river, its outcomes and benefits.

Depending on what roles and functions are given to the Trust, it may be established and constituted in slightly different ways. While the language of 'trust' is used, it may not be a trust in the strict legal sense but rather a statutory authority established under the Act. Alternatively, it need not be an authority established under the Act, but rather established (by the Government) as a body corporate under the general law, such as a company limited by guarantee. The particular powers and roles envisaged by the Act may influence the best legal model to use.

Community roles?

A final issue that we might want to consider in formulating a preferred Yarra River Protection Act is precisely what role the community, through representative organisations or through citizens directly, is to play in governance and management?

There are a number of issues to be considered here, such as:

- should communities to be represented on a board or governing body? If so, what should this representation look like?
- should communities be engaged in or represented in other ways, such as a standing reference group?
- should the Act contain special provisions to require community engagement in the preparation of plans, standards or policies for management of the river? If so, what should these processes look like?
- should the community be able to seek to have plans or standards or other regulatory arrangements enforced, or should such actions be left to a Trust or other relevant agency?

Table 1: Possible directions and issues for a Yarra River Protection Act

Ambition and vision	Minimalist	Moderate	Maximum
	Minimalist; integrating land-use planning along river corridor; coordination with existing Councils and agencies; advisory role regarding e.g. water and biodiversity management	Moderate ambition; integrated planning control over river corridor; active involvement in water-sensitive urban design (WSUD) and some legal authority over other agencies and Councils; focus on integrated natural resource management but direct control or ownership of resources mostly with existing agencies	Maximum ambition; integrated natural resources and water cycle management; single authority over whole corridor and key parts of surrounding catchments
Legal change required			
	Act establishes legal and institutional framework; most regulatory changes via planning system and planning schemes	Act establishes legal and institutional framework; planning functions and powers integrated with planning system; legal powers to collaborate with and if necessary direct other agencies and Councils.	Act establishes legal and institutional framework; may include amendment to other Acts to facilitate planning, catchment management, and water management powers; vesting of public land management in new agency
Size of governing agency			
	Small, specialised agency, perhaps situated within Melbourne Water	Small, specialised agency, but independent, stand-alone; separate funding	Substantial, stand-alone agency; assuming planning, land and resource management functions related to river and river corridor, incl. water, public lands, water-sensitive urban design
Geographic areas of responsibility			
	River corridor In-stream water and river bed Banks and adjacent land currently covered by existing, Yarra-related planning controls River through Melbourne CBD Entire river from source to mouth Urban and peri-urban river Port of Melbourne areas Public lands Adjacent storm water systems Key tributaries		

Values the Act is seeking to protect and enhance

Biodiversity (riparian, terrestrial, in-stream)
Public open space
Water quality
Recreational
Aesthetic
Landscape and amenity
Geomorphological
Micro-climate (urban)
Appropriate land-uses and development
Commercial or industrial uses/values

Nature of governing agency

Planning authority
Referral authority
Independent natural resources manager
Directive authority
Advocate

Community involvement

Representation on governing body
Community consultative committee
Community engagement in planning or policy-making
Third party review of agency decisions
Third party enforcement of permits, approvals, licences or conditions

Funding

Discrete levy or charge (on whom?)
Quarantined proportion of existing levy or charge (e.g. proportion of Melbourne Water and/or Parks Victoria funds)
Appropriations (ordinary Government budget)
Sources of commercial or administrative revenues (e.g. licences, permits, commercial activities)