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Environmental  
Justice Australia

# A new deal for the rivers and waterways of Melbourne's west

Law and policy reform for waterway protection and  
new models of urban design



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**Contents**

Executive Summary.....	4
Introduction.....	5
The Rivers of the West project.....	5
Urban rivers and creeks in Melbourne's west.....	5
A new urban geography.....	6
What can law and policy reform do to protect urban rivers and waterways?.....	6
Legislative reform: a framework for legislative protection and recovery of the waterways of the west.....	7
Architecture: nested and collaborative.....	7
Purposes and principles.....	7
Waterway Strategic Plans.....	8
Obligations to prepare and integrate 'country plans' into waterway strategic plans.....	9
Who will be the 'voice' of rivers and waterways?.....	9
Waterway governance and the delivery of 'green infrastructure'.....	10
At the same time, how do we make existing laws and programs work better?.....	12
Planning policies and tools.....	12
Precinct Structure Planning.....	12
Urban stormwater management.....	12
Statements of Planning Policy.....	12
Reforms to the Water Act.....	12
Conclusions.....	13

## Executive Summary

This report proposes legislative and policy reforms for the protection and repair of the rivers and creeks across Melbourne's west. These reforms emerge from a series of collaborative workshops considering issues and visions for change in urban (and peri-urban) waterway protection – a process building on a campaign for protection of the Yarra River and consequent legislative reform.

The proposals contained in this report focus on potential legislative arrangements across a complex geographic and policy landscape, tied together by clear preferences for

strengthened protection and deepened resilience of urban green spaces in Melbourne's west, of which waterways are the focal point. These waterways are essential, but not isolated, *green infrastructure*, which unfortunately continue to be degraded and neglected.

These proposals contribute to a new way of seeing how Melbourne and surrounding towns can better care for waterways, with the aim of mechanisms contributing to the emerging, greener and more human approaches to urban waterway management.



## Introduction

We need more room for nature and wild places in our cities.

We need this for the health of communities, for the health of our environment, and for the ongoing project of reconciliation.

In this report, we set out proposals for law and policy reform directed to the rivers and waterways of Melbourne's west. Cities across the developed and developing world insist on new methods of urban design sympathetic to nature and are experimenting in 'green' infrastructure, re-wilding and 'greenspace' initiatives. Examples are legion of urban and cultural renaissance, founded on nature, out of industrial and urban histories. This extends to the restoration and even re-discovery of streams and waterways once hidden.<sup>1</sup> We need Melbourne to do the same.

The proposals in this report derive from a project building on legislation protecting the Yarra River. We now need innovative legislation for Melbourne's western rivers and streams.

The proposals in this report (as was the case with the Yarra) are an attempt to establish a more integrated basis on which 'river law' functions, one that is additionally sympathetic to the ecological and Aboriginal approaches which treat these waterways as 'single, living entities' – 'entities' through which we can better revive life and, through care and connection, our own souls.

### The Rivers of the West project

In late 2017, EJA, in partnership with Friends of Steele Creek (FoSC) and the Werribee River Association (WRA), embarked on a project to bring community organisations in the west of Melbourne into a conversation about the future of protection and restoration of regional rivers and waterways. This was the 'Rivers of the West' project.

The Rivers of the West project emerged from the success of a similar partnership undertaken by EJA with the Yarra Riverkeeper Association for improved legislative and institutional protections for the Yarra River. That effort contributed to passage of the *Yarra River Protection (Wilipin Birrarung murron) Act 2017*.

The Rivers of the West project comprised two main features:

- a deliberative process directed to the questions of law and policy reform; and
- development of a considered set of proposals for reform.

The following focuses on the second of those tasks.

This report is a consequence of the participatory design method, pioneered by EJA and conducted in partnership with community leaders.

1 See eg David Cox 'A river runs through it: the global movement to "daylight" urban waterways' *The Guardian*, 29 August 2017, <https://www.theguardian.com/cities/2017/aug/29/river-runs-global-movement-daylight-urban-rivers>

### Urban rivers and creeks in Melbourne's west

In the west and the north of Melbourne, the natural geography is influenced by basaltic (newer volcanic) plains, bounded by coastal areas and northern ranges. Toward what is now the CBD, creeks and rivers merged at one time into the large wetlands systems of the Yarra delta.

Generally, the undulating plains landscape is dissected by two classes of streams: deeply incised streams and basaltic plains streams. The former include more spectacular gorges and escarpments, rising in the ranges; the latter are less well defined, influenced by groundwater, and accompanied by seasonal and ephemeral wetlands.

The waterways considered in this report include: the Maribyrnong River and tributaries, the Werribee River and tributaries, and the plains streams situated between and adjacent to these rivers.

Aboriginal communities managed this landscape for hundreds of generations. There is ancient connection to the land, especially along waterways. On British invasion and colonisation there were rapid impacts, as pastoralism and urban settlement spread over what would become Melbourne's west. In the last half-century, urbanisation included a high degree of industrial activity. Over the last decade the west has been affected by very high rates of population growth, residential subdivision and urban redevelopment.

The challenges to urban waterways are well-known. These are in general highly degraded systems,<sup>2</sup> historically abused, ignored and used as functional drains or sources of domestic and industrial water. From a hydrological point of view, stormwater management in urban areas, rural run-off, land-use change and interception activities are among the most important sources of adverse impacts.<sup>3</sup>

From social and amenity viewpoints, in addition to impaired ecology, access to waterways, contamination, public open space provision, encroaching development, and opportunities (or lack thereof) for community custodianship and education are major concerns.

The 'natural infrastructure' of Melbourne's west lags well behind the metropolitan average.<sup>4</sup>

Rivers and creeks are key natural assets in urban areas and they are important public spaces that communities care deeply for. Community organisations advocate for waterways. However, planning and management

2 Juan Carlos Covarrubia, Scott Rayburg and Melissa Neave 'The influence of local land use on the water quality of urban rivers' (2016) 11 *International Journal of Geomate* 23 2155

3 See eg Christopher Walsh, Alex Leonard, Anthony Ladson and Tim Fletcher *Urban Stormwater and Ecology of Streams* (CRC for Freshwater Ecology, 2004).

4 Casey Furlong, Kath Phelan and Jago Dodson *Greening the West: Assessment of the Functioning and Implications of Collaborative Efforts to Achieve Urban Greening in Melbourne's West* (RMIT Centre for Urban Research, 2017), [https://cur.org.au/cms/wp-content/uploads/2017/10/greening-the-west\\_online.pdf](https://cur.org.au/cms/wp-content/uploads/2017/10/greening-the-west_online.pdf)





arrangements for waterways in the west were largely neglected until very recently (in the last 10–20 years). Production of plans or strategies was not necessarily accompanied by action.

Nature is largely residual in our urban design. The ecological and cultural benefits of nature in cities are lost to formulaic models of suburban development, land use and infrastructure (especially functioning around cars). This paradigm is now particularly evident in Melbourne's west.

A counterpoint to this model is required.

A central challenge is how to shift norms – how to shift models of urban design from those in which environmental or cultural values are peripheral to those in which urban design positively contributes to healthy ecosystems and cultures. This is not the current model. A new normal is required, because the current approach is not healthy, sustainable, fair or especially enjoyable.

### A new urban geography

There is an emerging, if still nascent, shift to view rivers, waterway and natural places as 'entities' – or more specifically single 'living and natural entities'. This is a term now recognised in Victorian law as characteristic of the Yarra River (Birrarung).<sup>5</sup> Elsewhere it is consistent with taking the powerful step to recognise natural places, notably rivers, as legal persons.<sup>6</sup> As 'entities', we can recognise in waterways qualities of ecological health, integrity, and their bearing on our own wellbeing. How are rivers, creeks and wetlands more than drains, development features or impediments, water sources or discharge points? Melbourne's west has been poorly served by decisions to ignore, destroy or neglect waterways and wetlands. As with the fate of grasslands in the west, propensities to 'hard' engineering, industrialisation and urban development fronts unravel the natural fabric of waterways as well as the community's relationships with them.

<sup>5</sup> *Yarra River Protection (wilip-gin Birrarung murron) Act 2017, Preamble, s 1*

<sup>6</sup> Erin O'Donnell and Julia Talbot-Jones 'Three rivers are now people but that's just the start of looking after them' *The Conversation* 24 March 2017, <https://theconversation.com/three-rivers-are-now-legally-people-but-thats-just-the-start-of-looking-after-them-74983>

How many young children now can easily wander down to a local creek or swamp and spontaneously look for frogs, dragonflies or lizards? And be made aware to the dangers of tiger snakes? And come home wet and covered in mud? And idly draw pictures of this the next day at school?

It is possible to understand certain waterways in the west still as living and natural entities, although in need of care. Others have disappeared under concrete. But these natural features and their natural processes can be protected and recuperated. That is a question of values and priorities. Communities are engaging in that work and have been for many years. These proposals aim to work towards a new intentional geography of the west.

### What can law and policy reform do to protect urban rivers and waterways?

Protection and repair of waterways requires action on many fronts, over an extended period of time. It requires method, patience and application. Law and public policy provide one key set of tools among several. What law and policy supply include:

- setting norms and paradigms for action;
- creating legal powers, authority and responsibilities directed to the agenda of protection and restoration;
- setting standards and expectations for management and planning;
- establishing operational rules and controls;
- creating spaces for structured community involvement in the management and governance of waterways as 'public goods'; and
- enabling, through legislation, greater transparency and accountability in the management and fate of urban waterways.

Law and policy reform can take on the ambition of a new generation of aligned, transparent, effective and fit-for-purpose 'river laws'.

## Legislative reform: a framework for legislative protection and recovery of the waterways of the west

We propose a new statutory framework for protection and long-term restoration of the rivers and waterways of the west. This legislation would take the form of a *Rivers and Waterways of the West Act* ('RWW Act').

These proposals below build on measures established under the *Yarra River Protection (wilip-gin Birrarung murrn) Act 2017*.

We propose here a form of legislation intended to apply to the west of Melbourne but, recognising the growing movement for legislative protection and support to other urban waterways, could be replicated in protection of other significant urban waterways. There are candidates for such protections, such as Merri and Darebin creeks in the north or Dandenong, Mordialloc and Koornung creeks in the south-east.

### Architecture: nested and collaborative

Waterway management is context-dependent, complex and dynamic, and human-influenced.<sup>7</sup> Taking those features into account river or waterway legislation needs to respond by enabling decision-making to:

- occur at multiple, but aligned, geographic levels;
- include multiple interests and actors in governance; and
- allow review and adaptation to change over time.

A RWW Act would seek to better align law, policy and practices within overarching plans that produce clear, ambitious goals and methods for protection and restoration.<sup>8</sup>

### Purposes and principles

The policy behind urban river legislation is to protect and restore green spaces, their ecological function, and the benefits they provide to communities. This will be enabled by the way in which we understand rivers and waterways – as living entities, to which communities are connected and for which, in partnership with government, they are responsible.

### Healthy waterways

The law should genuinely contribute to achieving healthy waterways. This requires restoration, to the maximum degree practicable, of biological diversity, hydrological function and natural processes.<sup>9</sup>

<sup>7</sup> Bradley Karkkainen 'Collaborative ecosystem governance: scale, complexity and dynamism' (2003) 21 *Virginia Environmental Law Review* 189

<sup>8</sup> The *Yarra River Act* has this type of approach, as does the Commonwealth Water Act 2007, which governs water management in the Murray Darling Basin (through the Basin Plan and subsidiary water resource plans for regions within the Basin).

<sup>9</sup> Restoration does not need to imply or be measured against a pre-urban baseline of natural condition; rather restoration can refer to re-establishment of effective degrees of ecological function, process and diversity against appropriate reference points.

### New urban design directions

The laws need to enable trajectories of urban development and design to be re-calibrated. Greater weight and priority needs to be given to natural 'assets' and their function – a focus we termed in the Draft Proposals 'green infrastructure'. Waterways provide essential, core 'green infrastructure' in this region.

### Collaborative governance

The law can implement emerging models of governance based on diverse voices, combining methods of 'top down' as well as 'bottom up' decision-making and participation. Effective collaboration for good waterway governance requires community organisation and advocacy operating within the space of governance, alongside government and agencies, in a confident and mature public space.

### Respect

River law can contribute to reconciliation and truth-telling. These waterways are ancient places. Aboriginal sovereignty<sup>10</sup> over them was never ceded and law can contribute to its re-establishment. It is preferable that places, connections, and restoration of the western waterways (as for the Yarra) should progressively assume a bi-cultural identity and character. This can occur not only through naming or interpretation of places but contributing to cultural practices such as recognition and care for significant places and to revitalisation of language.

### Protection and restoration principles

Protection principles from the Yarra River Act can be translated to management of the western waterways.<sup>11</sup> The Yarra protection principles are a broad set of imperatives guiding management of the Yarra River. We additionally propose the inclusion of 'landscape connectivity' principles and a principle of 'guardianship' for the western waterways.

Guardianship proposes both an ethos for waterway management and, in arrangements proposed below, a diversity of voices and actors in that management, which contributes to accountability and effectiveness of outcomes.

Connectivity seeks to overcome ecological fragmentation of waterways as well as re-building *human* connection to

<sup>10</sup> See Uluru Statement from the Heart (2017):

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a *spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.*

<sup>11</sup> Yarra River Protection (wilip-gin Birrarung murrn) Act 2017, Part 2

these places. Connection is a basis for restorative processes for the west's waterways. Given the degraded character of these urban streams, we draw on concepts and models of ecological restoration<sup>12</sup> that assert restoration as a process and objective of repair, not necessarily to pre-existing pristine or natural state..

### Waterway Strategic Plans

Waterways need strategic plans that identify actions and establish obligations relating to them as single entities. These are legally binding tools for the integrated management of waterway systems. The purpose of such instruments is to set out a program of actions, delivered over a fixed timeframe, reasonably capable of achieving protection and repair of those waterways.

In our view, each key waterway system across the west must have a strategic plan prepared for it. This work would build on the Healthy Waterways Strategy, as well as other strategic planning documents.<sup>13</sup>

12 Society for Ecological Restoration Australasia National Standards for Ecological Restoration (2017), <http://www.seraustralasia.com/pages/standards.html>; see also M Palmer et al 'Standards for ecologically successful river restoration' (2005) 42 *Journal of Applied Ecology* 2 208; Christopher Walsh et al 'the urban stream syndrome: current knowledge and search for a cure' (2005) 24 *Freshwater Science* 3 706; Rachel May "'Connectivity" in urban rivers: conflict and convergence between ecology and design' (2006) 28 *Technology in Society* 4 477

13 Such as the Kororoit Creek Regional Strategic 2005-2030 and the City of Wyndham's Forest and Habitat Strategy (2018). On other waterways, see eg Merri Creek and Environs Strategy 2009-2014 (2009) or Darebin Creek Management Plan (2017).

There is value in providing legislative foundations to these waterway strategic plans for multiple reasons:

- the Act would stipulate a broad, standard set of matters (content) that need to be incorporated into waterway protection and restoration strategies;
- strategic plans would function as the key, framing 'river law' instruments at the local scale and thereby serve to integrate or align other laws, policies or programs affecting each waterway; and
- the Act would provide waterway or landscape-scale strategies with an enhanced legal status and thereby force and effect.

The effectiveness of such strategic planning instruments will rely significantly on the more robust legal status, as well as precise drafting directed to achieving measurable protection or restoration outcomes.<sup>14</sup>

The best planning tools and principles in the world are only as good as their implementation. There are already some important strategic planning measures in place for parts

14 The critical issue of the drafting of planning instruments in an environmental, planning or resources context is considered in eg Bruce Lindsay and James Trezise 'The drafting and content of threatened species recovery plans: contributing to their effectiveness' (2016) 33 *Environmental and Planning Law Journal* 3 237. On the requirement for measurable outcomes, the obligation to include performance objectives for waterway health, parklands amenity, landscape amenity, and environmental cultural and heritage values is included in the Yarra River legislation. This obligation applies to content required to be included in the Yarra Strategic Plan.

**These proposals have been developed over a series of collaborative workshops, part of an innovative 'participatory design'**





of the western waterways network, such as the Lower Kororoit Creek Regional Strategy, Wyndham's City Forest and Habitat Strategy and Melbourne Water's Healthy Waterways Strategy.

Once prepared and approved, a strategic plan for a western waterway should be binding on relevant public agency or municipality, other than where specified, to the extent they must take all effective steps to implement it. The default position in effect would be that a strategic plan is a binding instrument.

### Obligations to prepare and integrate 'country plans' into waterway strategic plans

More than 300 registered Aboriginal cultural heritage sites exist on or near to the rivers and waterways of the west.<sup>15</sup> These waterways were and continue to be places of great cultural and practical significance to Aboriginal people. This is the case for Wurundjeri and Wathaurong. The extent and knowledge of Wurundjeri clans' customary estates, religious attachments, trade and ways of life associated with these waterways prior to European colonisation and settlement is not fully known but those communities maintain attachment and custodianship over these places and continue to revitalise culture in respect of them. The extensive archaeological record in places such as the Maribyrnong River valley suggests not only many thousands of years of occupation, spanning major changes in natural systems, but possibly substantial settled communities, consistent with emerging evidence of Aboriginal societies and ways of life elsewhere.<sup>16</sup>

Preparation and delivery of 'country plans', subject to consultation and consent of Wurundjeri and Wathaurong, should be part of strategic planning. This approach would provide a more proactive and positive framework for protection and revitalisation of Aboriginal culture than currently occurs under Aboriginal heritage laws.

### Who will be the 'voice' of rivers and waterways?

It has become clear that rivers and waterways need voices – that is, advocates and organisers. These are essential tasks in effective governance.

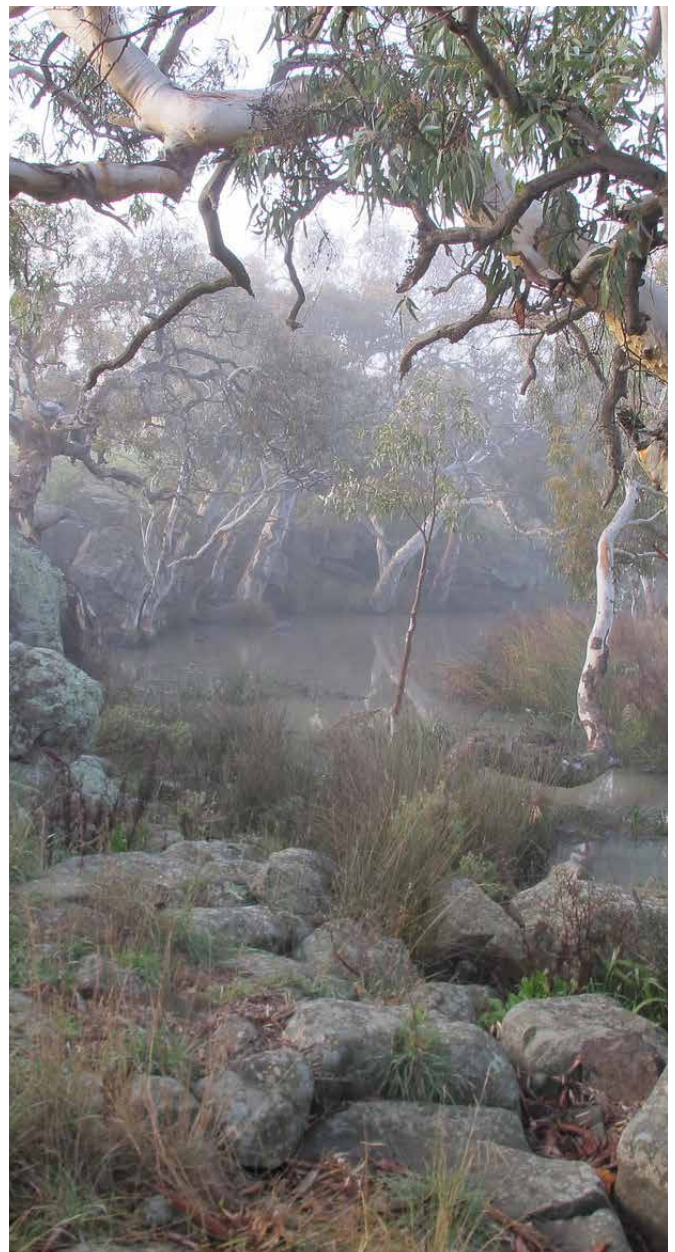
There is the need for a strong 'bottom up approach' to advocacy for waterways, alongside strong 'top down' institutional approaches and safeguards for those places. The RWW Act should include legislative recognition and support to community-based waterway 'protectors', or 'guardians' within a networks of 'protectors'.

We propose a hybrid approach to waterway advocacy:

- legislative provisions that the Minister must appoint

a body corporate to act as a 'guardian' or 'protector' of each designated waterway protected under the Act;

- legislative recognition of Wurundjeri and Wathaurong cultural connections and obligations to waterways and their advocacy for these attachments;
- the appointed body must include 'Friends', 'a riverkeeper' or other community organisations with an established interest in the waterway and local government representatives engaged in protection and restoration of the waterway. This model is similar for example to that of the Merri Creek Management Committee;
- the body corporate may receive and expend funds and employ staff in order to achieve its purposes; and
- the body corporate may be part of and contribute to a networks of similar waterway 'protectors'.



<sup>15</sup> EJA *Rivers of the West Act: Draft proposals to protect and restore Melbourne's western rivers and waterways and to defend the liveability of the West* (2018), 4

<sup>16</sup> Bruce Pascoe *Dark Emu, Black Seeds: Agriculture or Accident?* (Magabala Books, 2014)

## Waterway governance and the delivery of 'green infrastructure'

### A 'land and water trust'?

We need to overcome fragmentation of ownership and responsibility for waterways. This can be achieved via a 'land and water trust' approach. We propose Melbourne Water taking on such a trust role, leading to the following outcomes:

- vest ownership and management of all Crown lands within and adjacent to these waterways in Melbourne Water, other than where in existing national or state parks;
- establish those lands and waters as singular entities in accordance with the geography of the relevant waterways (Maribyrnong River Parklands, Werribee River Parklands, Skeleton Creek Parklands, etc);<sup>17</sup>
- progressively bring riparian lands into the public estate, by way of public acquisition programs, and/or achieve comparable public interest outcomes (such as conservation management, recreational benefits or waterway improvement) by other means;
- better enable the delivery of Strategic Plans, as well as Melbourne Water's functions under Part 10 Division 2 of the Water Act 1989 (including ss 188A and 189); and
- bring all of these Crown lands within Melbourne Water's water management district, including for the purposes of s 188A or for any other relevant purposes.

### 'Green infrastructure' institutions

The RWW Act should, in a discrete Part of that legislation, establish a 'green infrastructure' model that underpins future protection and repair of Melbourne's western waterways.<sup>18</sup> This approach is imperative in any moves toward giving Melbourne the qualities of a 'green' city.<sup>19</sup>

<sup>17</sup> That is to say, establish each waterway as an integrated, single management unit, subject to potential zonation arrangements as appropriate, and with relevant lands vested in Melbourne Water as the public landowner. Relevant water management functions pertaining to flows, such as through bulk entitlements, can either continue to be managed by Melbourne Water, subject to any adjustments to flows, storage or access provisions sufficient to deliver on strategic plans or regional waterway strategies, or should be vested in Melbourne Water where not otherwise managed by Melbourne Water. This approach may require the repeal of or amendment to section 175A of the Water Industry Act 1994.

<sup>18</sup> See Victorian Government *Yarra River Action Plan* (2017), Actions 24-25

<sup>19</sup> Compare London's desire to become a 'national park city': Paul Jepson 'London wants to become a national park city – is that a contradiction in terms?' *The Conversation*, 25 July 2018, <https://theconversation.com/london-wants-to-become-a-national-park-city-is-that-a-contradiction-in-terms-99909>; Daniel Raven-Ellison 'Why Greater London should be made into an urban national park' *The Guardian*, 27 May 2018, <https://www.theguardian.com/local-government-network/2014/may/27/greater-london-national-park-city>

'Green infrastructure' is a strategic and planned system of measures intended to protect, restore and enhance natural values and processes<sup>20</sup> One could equally talk of 'blue-green infrastructure' in relation to waterways, where the approach is to protect, restore or mimic the natural water cycle.<sup>21</sup>

The green infrastructure model is intended to place natural protection and repair on par with other major programs of urban design and planning, such as major transport infrastructure. Human and citizen's connections, care and enjoyment of nature is no less important than (and in some ways exceeds in importance) transport geographies and the circulation of goods and people.

There would be pillars to the green infrastructure model:

- a 'Green Infrastructure Authority', as a delivery arm of waterway protection and repair;
- declared green infrastructure projects, enabling strategic plans;
- a 'Green Infrastructure Standard', by which we set 20–30% of the urban and peri-urban west and north of Melbourne as functioning, biodiverse green space over the 50-year horizon of the Act;<sup>22</sup> and
- a 'future fund' for waterway protection and conservation.

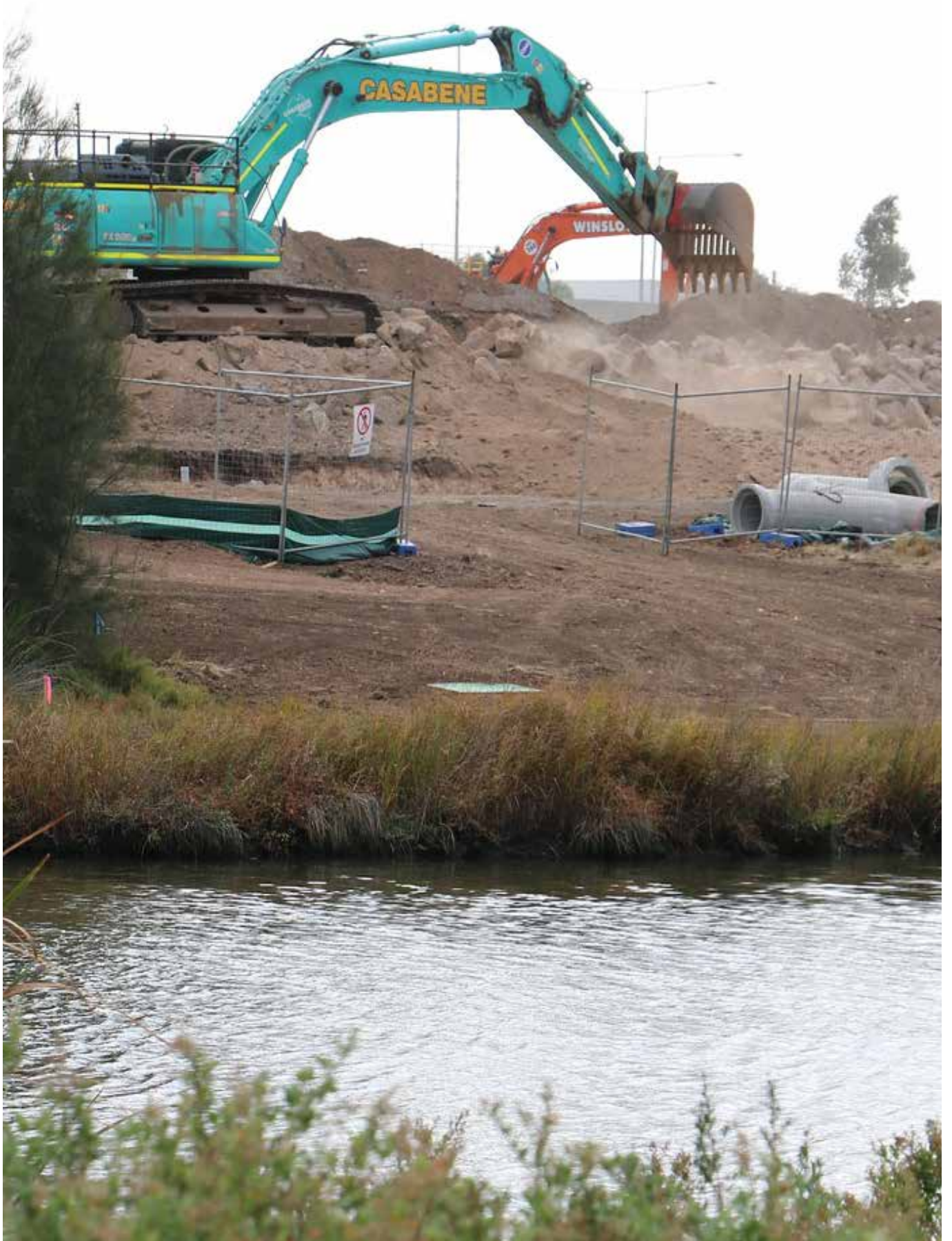
Green infrastructure reforms would serve to counter-balance, and shift progressively, cultures of 'grey' infrastructure design and delivery.

<sup>20</sup> Or, in perhaps more technocratic language, deliver ecosystem goods and services: American Rivers 'What is green infrastructure?' <https://www.americanrivers.org/threats-solutions/clean-water/green-infrastructure/what-is-green-infrastructure/>. The green infrastructure approach should be used in concert with narratives of conservation science and Indigenous science and culture: See eg George Nicholas 'It's taken thousands of years but western science is finally catching up to Traditional Knowledge' *The Conversation*, 15 February 2018, <https://theconversation.com/its-taken-thousands-of-years-but-western-science-is-finally-catching-up-to-traditional-knowledge-90291>. This intersection in the urban setting is also an opportunity to revitalise culture.

<sup>21</sup> Tim Fletcher, Geoff Vietz and Christopher Walsh 'Protection of stream ecosystems from urban stormwater runoff: the multiple benefits of an ecohydrological approach' (2014) *Progress in Physical Geography* 1

<sup>22</sup> Up from around 5–10% in the west now: see Furlong et al, n 4 above, 12. Compare William Lyon 'Setting aside half the Earth for re-wilding: the ethical dimension' *The Conversation* 26 August 2017, <https://theconversation.com/setting-aside-half-the-earth-for-rewilding-the-ethical-dimension-46121>; James Radford, Andrew Bennett, and Lindy MacRaild *How Much Habitat is Enough?* (School of Ecology and Environment, Deakin University, 2004), <http://dro.deakin.edu.au/eserv/DU:30015303/radford-howmuch-2004.pdf>





## At the same time, how do we make existing laws and programs work better?

How do we also make existing tools better servants of waterway protection, contributing to outcomes on the ground (and in the water) and an improved status of the west's waterways? Let's consider a few examples of actions we could take.

### Planning policies and tools

We should strengthen and expand planning controls in relation to ecological, landscape, social and cultural values of specific waterways;<sup>23</sup> and consider new planning tools, such as a novel 'liveability' zone applied to waterways and their environs.<sup>24</sup> Amendments to the Planning Policy Framework can strengthen and extend recognition of the ecological, landscape, social and cultural values of each specific waterway in the west.

### Precinct Structure Planning

Within precinct structure planning, we could establish a much more substantial focus on green infrastructure and a re-balancing of the agenda associated with urban design and development.<sup>25</sup>

### Urban stormwater management

The west could be a model for urban stormwater management, moving in the long run towards the ambition for stormwater management to mimic or approximate 'natural flow regimes'.

The reform agenda for the transformation of urban stormwater management continues to move apace. We need to progress the agenda set out in the recent report of the Improving Stormwater Ministerial Advisory Committee,<sup>26</sup> recognising this agenda will continue to evolve. More comprehensive planning controls, new civil engineering

and building standards, revegetation of riparian lands, an expanded public estate along waterways, and effective community organisations and advocacy will all be essential to this type of transformation.

### Statements of Planning Policy

Recent changes to the *Planning and Environment Act 1987*<sup>27</sup> enable the making of Ministerial declarations of places that are 'distinctive areas and landscapes', accompanied by a Statement of Planning Policy for that area. We should examine whether these tools are an effective and useful component of waterway strategic planning in some circumstances and pre-empt the preparation of a waterway strategic plan under a RWW Act.<sup>28</sup>

### Reforms to the Water Act

'River legislation' should seek to better integrate water law with land-use planning, catchment management, public lands and environmental protection. To put this another way, 'river legislation' should seek to overcome the historic legal separation of water from land use and management.

#### Part 10

Part 10 of the Water Act governs 'waterway management'. It is an attempt to overcome the water-land use distinction. Melbourne Water's Healthy Waterway Strategy is prepared under this Part. Strategic plans in the west would need to be coordinated with the Healthy Waterway Strategy. We need to consider how these functions can best evolve or integrate into 'land and water trust' functions, where Melbourne Water becomes a more integrated land and water manager.

#### Private rights (stock and domestic uses)

The interception and use of water under private rights may be a significant issue for waterway health and the management of conservation reserves (including riparian reserves) in the upper catchments of the Maribyrnong and Werribee rivers. Rural subdivision and changing land use may be leading to more extensive take under private rights, such as through construction of ornamental dams.<sup>29</sup> Further investigation, including cumulative impacts assessments, is warranted. In certain circumstances we should consider capacity to regulate water take or holdings in farm dams in peri-urban areas.<sup>30</sup>

23 Ad hoc or localised responses do occur: eg Brimbank Planning Scheme Amendment C188 Part 2 or Wyndham Planning Scheme, cl 42.01 (Schedule 1) (waterway corridors). For a proposal for comprehensive planning review, see eg Ethos Urban *Protecting the Yarra River Through Better Planning: Punt Road Bridge to the Urban Growth Boundary* (Yarra Riverkeeper Association, 2017), <http://yarrariver.org.au/wp-content/uploads/2018/09/Protecting-the-Yarra-River-Through-Better-Planning-Report-by-Ethos-Urban-1.pdf>

24 This could be a form of zoning specific to urban-periurban waterways and adjacent areas in recognition of the integrated ecological, social and health values of urban waterway environments.

25 To that end, in anticipation of comprehensive western waterways legislation, certain intermediate steps may be taken, such as:

- Issuing of new Directions for the Planning Minister to provide for substantial greater protections and scope for restoration of waterways across western Melbourne under section 36 of the *Victorian Planning Authority Act 2010*;
- Amendment to sections 7- 10 inclusive of the *Victorian Planning Authority Act 2010* to provide expressly for protection and restoration of urban and peri-urban ecosystems, waterway health, and protection and restoration of significant natural and cultural places.
- Coordinating the work of PSP implementation and preparation across the West with planning scheme reforms aimed at providing greater policy and statutory protection for waterways.

26 [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage-files/2415/3990/9632/Improving\\_Stormwater\\_Management\\_Report\\_PUBLIC\\_V4.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage-files/2415/3990/9632/Improving_Stormwater_Management_Report_PUBLIC_V4.pdf)

27 *Planning and Environment Act 1987*, Part 3AAB

28 For example in a similar manner that 'interim' planning controls on the Yarra River in inner urban municipalities has done in anticipation of passage of the Yarra River Act and preparation of a Yarra Strategic Plan.

29 We were informed in detail of take occurring in Mount Macedon and surrounding areas which was impeding flow into minor creeks and tributaries through at least one conservation reserve. While this take may be lawful, this conduct does raise the question of operation and application of civil liability provisions (see section 16(2) of the Water Act) in relation to public land and where damage may be environmental rather than economic.

30 For example, construction and maintenance of farm dams that are solely or principally for ornamental purposes and/or over a certain capacity



### Bringing new sources of water into the water law mainstream?

The urban 'waterscape' continues to evolve from the point of view of water *sources* and water *discharge*. For instance, stormwater was once viewed entirely as a problem of drainage and discharge of water from land (into receiving waters) and now it is also seen as a water supply source. Similarly, water from treatment plants was once entirely a question of discharge (ultimately into the ocean) but is now viewed as a potential source of water supply. Water systems are highly engineered and present novel opportunities to manage water for improved waterway outcomes and long-term restoration. Those regulating water and assessing water resources need to come to terms with this diversifying urban hydrology.

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could be specifically excluded from the definition of 'domestic and stock use' under section 3 of the Water Act 1989. In this manner, farm dams not constructed on drainage lines could be regulated and carved out of the private rights framework operating under section 8.

### Conclusions

The time is here for a new approach to urban rivers and waterways. They are essential, often the only remaining, spaces of nature in cities and towns. We need these spaces to be better protected, recognised, a focus of restoration and re-wilding.<sup>31</sup> We will have neither healthy waterways, nor a healthy relationship to them, if they are merely nice ornamental features in the local precinct development plan.

Rivers, waterways and wetlands must have their own focus, as single 'living entities', and dedicated legislation can help to achieve this outcome.

Our proposals for a Rivers and Waterways of the West Act are the product of collective thinking among groups in Melbourne's west for a new approach. We urge government and other sectors to meet the challenge of re-thinking the urban landscape and, through legislative reform, the place of nature and people in it.

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31 Mihnea Tanasescu 'From New York to Romania, restoration ecology is helping nature heal (and maybe humanity too)' The Conversation 30 June 2017, <https://theconversation.com/from-new-york-to-romania-restoration-ecology-is-helping-nature-heal-and-maybe-humanity-too-80018>



