

Surveyor-General's Direction No. 6: Water as a Boundary – The Process of Review

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ABSTRACT

Surveyor-General's Direction No. 6, commonly known as 'Water as a Boundary', has been in its current form since 1993 with only minor updates to accommodate legislation changes. There are rumblings within the industry calling for riparian reform. However, before reform there should be review, i.e. a serious review of why the current processes seem to be inadequate. This paper outlines how this review has gone back to basics in order to consider the fundamental principles of water boundaries, asking difficult questions such as: What is a water boundary? What is the doctrine of accretion and erosion, and how should it be applied? Where did the definition of the 'bed' come from and what do the words mean? There are many other questions that appear to be of mythical origin. It has been an illuminating journey down many platypus burrows (rabbits have an aversion to water), and the answers found will indeed require an adjustment into the future. There does need to be reform, but not reform as we know it.

KEYWORDS: *Water boundaries, banks, bed, Mean High Water Mark, doctrine of accretion and erosion.*

1 INTRODUCTION

The review of the current Surveyor-General's Direction No. 6 'Water as a Boundary' (DCS Spatial Services, 2016) has been requested, discussed and required for several years. In the past year, the review has commenced in earnest. This is no small task due to the complex nature of the subject.

Water boundaries are among the most complex boundaries to define and are most likely the least understood as most surveyors do not regularly work on projects or plans that require water boundaries to be defined. If a surveyor's client requires that a property be surveyed, the water boundary is not generally the primary objective. Therefore, water boundaries are often dealt with as an inconvenience. Waterfront land is some of the most valuable land in the cadastre. Having clear guidelines as to how this land is to be dealt with is essential, which is the aim of the revised document. This paper outlines how this review has gone back to basics in order to consider the fundamental principles of water boundaries, asking the difficult questions along the way.

2 WHY REVIEW?

According to the Oxford Dictionary, "epistemology is the theory of knowledge, especially with regard to its methods, validity, scope, and the distinction between justified belief and opinion."

The Oxford Dictionary also states that “opinion is a view formed about something that is not necessarily based on fact or knowledge” and “knowledge means facts, information, and skills acquired through experience or education; the theoretical or practical understanding of a subject”. How do we know what we think we know is correct and true? What is the value of a document that is not correct and true? This review aims to provide a definitive and authoritative factual understanding of ‘water as a boundary’.

Water boundaries have been around as long as there has been land ownership. Lord Hale wrote about water boundaries in the mid-1600s. However, there seems to be no consensus within the available document resources to explain how water boundaries are to be dealt with by surveyors. There are many opinions as to how to define a water boundary and what constitutes a water boundary. This is a symptom of the lack of consensus within the documented resources. There have been many legal opinions sort over time, yet there appears no definitive answer.

Because there is no definitive answer, people try and interpret individual words, and extract the meaning out of the existing documentation. The danger of this approach is that the words are not always interpreted within the context of the document. The concepts and context contained within the documentation need to be interpreted, not the words. The Hon. Justice John Middleton once said when describing statutory interpretation: “The starting point should always be to look at the words, their context, and the purpose of the legislation, then applying that to produce a result that is both fair and workable in the particular fact situation you have before you” (Middleton, 2016). The same also applies to common law.

The aim of this review is to consider all the facts and information and form a definitive justifiable view to provide consistency when water boundaries are being defined. Without consistency and a definitive understanding of what is being defined, there is no certainty within the titling system. The purpose of a Surveyor-General’s direction is to provide guidance as to how to interpret and what complies with the *Surveying and Spatial Information Regulation*. As discussed, there are many ways to interpret a single document, and the direction explains the intended interpretation.

3 REVIEW COMMITTEE

The review committee was formed from all four government authorities that review and approve water boundaries. It consists of officers from the Office of the Surveyor-General, the Office of the Registrar-General, DPIE Crown Lands and Transport for NSW (TfNSW). It consists of 11 people, including 3 lawyers and 8 surveyors (two surveyors from each government department). Consultation with the wider surveying profession will occur before the document is finalised, allowing for industry input.

4 REVIEW PROCESS

The review started with 13 questions being posed within the committee, revolving around the core concepts of water boundaries. These questions were aimed at clarifying some of the misunderstandings that seem to exist but are not documented anywhere and included the following: When does a water boundary move? What is the effect of the common law? Where does Mean High Water Mark (MHWM) exist as per the Crown grant?

There were also questions about the definition of the bed, leading to in-depth discussion that raised questions about how to interpret the doctrine of accretion and erosion. While it was not our original intention to review the doctrine of accretion and erosion at this point, this discussion became pivotal in understanding the application of the law with regard to water boundaries. Having the ability to ask questions directly of a lawyer and being able to provide background surveying concepts within the discussion has allowed a better understanding of how the law relates to surveying for both the lawyer and the surveyor.

The intended outcome is a transparent path from the case law and legislation to the practical application of the methods described within the document. This will allow the transfer of knowledge, not opinion, and provide consistency and confidence to the profession about the processes used to define water boundaries.

To achieve this real-world application, there has been the need to use real-world problems. It is all well and good to discuss an example that is simple in nature. However, finding an issue that causes conflict allows much greater insight into what may occur and what needs to be considered. Where possible, the outcomes agreed upon are tested against real-world situations where they can be found.

5 SCOPE OF THE REVIEW

The review is required to consider all water boundaries as they are all linked by the same essential concept, i.e. they are all-natural features bounded by water. However, there is a surprising array of differences within these boundaries. There are the common elements such as the doctrine of accretion and erosion, which has since 2003 had an added complication for those properties in the coastal zone, being the modified doctrine of accretion and erosion.

Then there are unique differences relating to both tidal and non-tidal waterways. In the non-tidal environment, there has been a long and ongoing debate about the definition of the bed. However, there are also questions about how to undertake a first definition of a lake or Intermittently Open and Closed Lake or Lagoon (ICOLL) and when a lake or lagoon becomes an ICOLL.

There also seems to be a poor understanding within the profession as to why the Crown grant is so important when undertaking a water boundary survey. This is evident by the fact that the Crown grant is rarely supplied with the report and when it is requested is usually followed by questions such as ‘Where do I get that from?’ or ‘How do I get one of those?’

These issues lead to what was the origin of the Crown grant, what was granted and what was not. To understand this, we need to understand the case law and legislation that govern surveying. These set out the principles and definitions that we all use. But how well do we understand these and their origins?

The definitions require review to ensure they are correct, complete, current and unambiguous. This sounds easier than it is because most of us believe we know the correct way things should be done. But surveying is not about belief; it is about evidence and justification. The definitions need a transparent link to their origins but also need to be written in a modern context.

From a tidal perspective, there are the issues of mangroves and mud flats and where the MHW is for these features. There needs to be clarity about tidal limits, where to find them and what to do if there is more than one. There are also the methods used to define MHW, what is acceptable and whether there are other acceptable, more modern processes that make it easier or more reliable. For example, what is the accepted or approved method to define MHW on a beach?

Furthermore, there are questions that have not been previously considered in the document, such as documenting the rules for One Hundred Foot Reserves, where they apply and what to do if the grant excludes a One Hundred Foot Reserve and a road, and in what order these exclusions are applied. All surveyors are expected to know how to deal with these situations, yet none of this is documented.

Another issue that is being reviewed is the issue of bridges. What occurs when a road crosses a river? The cadastre is full of intersections of roads and rivers. How does the legal road network function, which has precedence and who owns the bed? This makes it clear that reviewing this document is not an easy task.

6 CONCLUDING REMARKS

Surveyor-General's Direction No. 6 'Water as a Boundary' aims to provide a consistent approach to dealing with water boundaries. The Direction being the guideline to defining water boundaries, the updated version also aims to provide the historical reasoning as to why the boundary is defined a certain way. The owner of land that has a water frontage should be able to ask any registered land surveyor to define their water boundary, and the owner should be confident that the answer they get is consistent regardless of which surveyor defined the boundary at that point in time.

This paper has outlined how the current review of Surveyor-General's Direction No. 6 has gone back to basics in order to consider the fundamental principles of water boundaries. It is hoped that the new version will provide much needed clarity and consistency in regard to water boundaries.

ACKNOWLEDGEMENTS

It takes a team of people with different views of the world to create a balanced document that is justified and acceptable to the profession. All members of the review committee are gratefully acknowledged for their valuable contribution.

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