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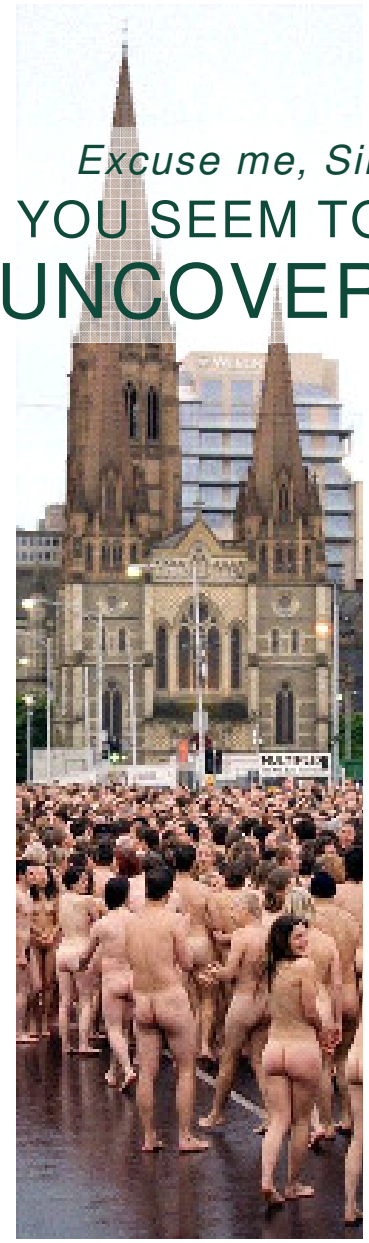

Excuse me, Sir… YOU SEEM TO BE UNCOVERED

We all try to get things right, but now and then we fail. That's why we have insurance cover. We have failed, we get sued, damages are awarded against us, and our insurer pays up.

Public land managers need to recognise two modes of failure. First, that covered by 'Public Liability' insurance; second, that covered by 'Professional Indemnity' insurance.

Public liability (PL) covers you if you have a duty of care to someone, that person suffers an injury or loss, and the injury or loss is attributable to you having failed in your duty of care. It's a risk that needs to be interpreted in the light of Part XII of the *Wrongs Act* 1958.

Professional Indemnity (PI) covers someone claiming special expertise (an engineer or a lawyer perhaps) who gives advice or makes a decision which turns out to be faulty, and which consequently causes someone else to suffer loss or injury.

Councils are required by law to hold insurance against both types of claim. The *Local Government Act* (section 76A) mandates PL cover of $30 million and PI cover of $5 million.

Now we come to the bare bum (our legal colleagues call it a "demonstrable insurable gap"). Councils acting as councils are covered for both PL and PI, but councils acting as committees of management of Crown reserves are covered only for PL.

Nearly every council in Victoria has its cover provided through the MAV's Liability Mutual Scheme. This policy is subject to various exclusions, exclusion 14 relating to councils acting as or on behalf of Crown land committees of management or trustees. In these cases it is assumed that cover will be provided by DSE. But it's not.

DSE's insurance cover is for PL only. If a council gets sued because its engineer has mis-calculated the size of the stormwater drain at the recreation reserve, or because its in-house lawyer failed to get the right approvals for a Crown Land (Reserves) Act lease – then excuse me sir/madam, you are uncovered.

DSE insurance officers assure us they have this matter under active consideration.

Meanwhile, check your sun-block.

Committees of Management other than councils need not be so concerned: under the DSE policy they are covered for both Public Liability and Professional Indemnity. ■

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Questions and Answers

Keep those questions coming in. If they're of general interest, we'll share them with our 6000 readers

Q1 What's the difference between the Secretary for DSE and the Parliamentary Secretary?

Question which wasn't asked (but should have been) by someone who should have known the difference (but didn't).

The Secretary for DSE is a corporate entity created under the *Conservation Forests and Lands Act* 1987. It (note, bodies corporate are gender-neutral) has power to enter into contracts, sue and be sued, buy and sell property and so forth.

Simultaneously, the Secretary for DSE is an actual bloke by the name of Greg Wilson. He's responsible for the Department of Sustainability and Environment.

The Parliamentary Secretary for Sustainability and Environment is a Liberal Member of Parliament by the name of Mrs Donna Petrovich. Parliamentary Secretaries are sometimes called junior ministers – but they are not members of Cabinet and have no formal executive responsibilities. Senator Andrew Bartlett calls them 'winners of the booby prize.'

I'm sure that if you were mis-directed to one, they would politely re-direct you to the other – but officers of agencies dealing with the public really shouldn't get them confused. ■

Q2 How do we transfer a freehold reserve into Council's name?

Question asked by a General Manager of a Rural City Council

Reserves are often created in subdivisions, and it is usually intended that they become Council property. Under current legislation (the *Subdivision Act* 1988) this is straightforward, but reserves created in pre-1988 subdivisions may still be in the name of the original owner – whether that owner wants them or not.

Section 24A of the 1988 Act provides a mechanism for bringing these pre-1988 reserves into Council's name. It requires the council to issue itself with a planning permit (which in turn opens the possibility of exhibition, objections and review by VCAT) but it does not require Council to purchase the land from its nominal owner – the theory being that subdividers must expect to relinquish ownership of reserves and roads.

Why would a council want to do this? There must be thousands of pre-1988 reserves out there still in the name of somebody long departed – normally without any unwanted repercussions. Well, one reason is that by changing them into Council's name, they become 'Council land' as defined by section 7B of the *Limitation of Actions Act* 1958, and are therefore safe from adverse possession claims. ■

Q3 Can freehold land revert to being Crown land?

Question arising in the course of consolidating a mixed-status site for urban redevelopment.

Yes, freehold can be changed into Crown land – but first, why would you want to do it?

If freehold land is to be added into a National Park, say, then it must at some stage become Crown land – but in most cases public policy objectives can be served even though the land

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remains freehold. In fact, we wonder whether the freehold land / Crown land dichotomy is still meaningful in the Twenty-first Century – but that's another matter…

Still, there may be good reasons for converting Crown land to freehold. One method is under section 22A of the Land Act 1958, which allows freehold to be 'surrendered' to the Crown. Trouble is, the only entities entitled to use 22A are bodies corporate created by statute, so we might first have to bring the freehold into the ownership of, say, the Secretary for DSE.

A second method acceptable to the Registrar of Titles is a transfer to Queen Elizabeth the Second under section 45 of the Transfer of Land Act. Trouble is, this method is available only for full parcels, whereas 22A of the Land Act can be used for part-parcels. Interestingly, it seems that transfer to QE2 can happen without anyone needing to actually knock on the door of Buckingham Palace. ■

Q4 Aren't we protected against encroachments?

Question asked by the Assets Manager in a rural council

In this case the Council's asset manager knew that Council land has been protected from adverse possession since 2004 – and was surprised to find a neighbour's lawyers claiming that their client had acquired common law rights to part of a Council property.

The question goes to the difference between adverse possession and easement by prescription, also known as easement of long user.

The former is the common law doctrine that changes of ownership can result from 15 years of possession; the latter is the common law doctrine that rights in the way of an easement may be acquired by 20 years usage. In the case of most (but not all) council land adverse possession has been done away with by legislation, but easement by prescription is still alive and well.

Maybe it's time for a further amendment to the *Limitations of Actions Act* 1958. ■

Q5 Why, suddenly, can't I find some of my favourite regulations?

Question asked by a senior policy officer in DSE

Our questioner was quite alarmed. She knew that regulations sunset after 10 years, and when she couldn't find them on the web, feared that they had sunk into the west. "*Without these regulations we will have no enforcement powers whatsoever – as opposed to the very few enforcement powers we previously had…*"

Well, we're pleased to see she wasn't relying on regulations in hard copy. There's only one place for hard copy Acts and regulations – and that's in the bin.

The website where you find up-to-date State legislation (and indeed copies of superseded versions) is Victorian Law Today. So why couldn't our questioner find regulations made under the *Land Act* 1958, and regulations made under the *Crown Land (Reserves) Act* 1978?

First we need to understand that although all regulations are called 'subordinate legislation, not all of them are 'statutory rules' within the meaning of the *Subordinate Legislation Act* 1994. That's the Act which imposes the 10-year sunset, and sets up Regulatory Impact Statements and so forth. It tells us that a statutory rule is a form of subordinate legislation made by the Governor in Council.

The website shows only Acts and statutory rules – not regulations made by Ministers.

So why are there no *Crown Land (Reserves) Act* regs on the website? Because they are made by the Minister, not by the Governor in Council. There are all sorts of reasons why they should be elevated to the status of statutory rules – but that's another story.

And what about regulations under the *Land Act* 1958 – which are made by the Governor in Council. Perhaps our questioner couldn't find them because in 2006 they changed their name – they had been called the *Land Act Regulations* 1996; now they're just the *Land Regulations* 2006. ■

Introducing some of our Course Presenters

Astrid Di Carlo

LLB, ML, BA, Postgraduate Dip Policy and Law

Astrid is a Special Counsel with the law firm Russell Kennedy

She specialises in water law, local government law, planning environment & heritage, and property law.

Astrid presents two courses for The Public Land Consultancy:-

- **Land Law for Service Utilities**
- **Easements and Restrictive Covenants**

Dr David Mitchell

PhD, B App Sc, Grad Dip Land Data Mgmnt, Grad Cert Urban Development

David is Director of the Land Centre at RMIT University

He is a Licensed Surveyor with extensive practical experience in Victoria and internationally. He is a sessional member of Planning Panels Victoria

For The Public Land Consultancy, he presents the course -

- **Land Law and Subdivisions**

David Yarrow

BSc , LLB, LLM, MSc

David practices at the Victorian bar and lectures at Monash University .

He has extensive experience in the law relating to Indigenous Australians, both in Victoria and Queensland.

His areas of practice include Human Rights, Native Title, Planning and Local Government, Property Law and Tenancies law

For The Public Land Consultancy, he presents the course -

- **The Land, its Traditional Owners, and the Law**
  (The law governing Native title and aboriginal heritage)

Andrew Walker

LLB, BSc Law Institute Accredited Planning and Environment Law Specialist

Andrew practices at the Victorian bar and lectures at the University of Melbourne

His specialist areas include Planning and Local Government law, Property Law, Environment Law, and Administrative Law . He was previously in-house Corporate Counsel with the City of Melbourne.

Andrew presents two courses for The Public Land Consultancy:-

- **Land Law for Managers of Roads, Streets and Lanes**
- **Planning Law – A Strategic Overview**

Michael Beasley

LLB, B Econ

Michael is a Special Counsel with the law firm Russell Kennedy.

Michael specialises in local government law, and the law relating to risk, insurance, negligence and breach of contract.
Previously he was in-house legal counsel for Jardine Lloyd Thompson insurance brokers.

For The Public Land Consultancy, Michael presents the course -

- **Risk Management and the Law**

To set up an In-House presentation, or to book into one of our scheduled presentations, contact Lesley Simons at lesley@publicland.com.au or on (03) 9534 5128.

Client Feedback

"Having attended a previous session with you I will highly recommend your training to my team."

CEO for a rural municipality

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