TERRA PUBLICA
VOL 13 NO 5 AUGUST 2013

Abbott, Rudd, and Public Land

Federal elections provoke a spate of take-over-by-Canberra promises. If it's not hospitals, it's the TAFE system, or aged-care homes, or the waters of the Murray-Darling river system. Too often these promises (or threats) are thrown together as incoherent political stunts rather than as well-considered policies.

There's certainly scope for rethinking federal involvement in public land, but let's hope it happens in a calmer, non-election context.

It all goes back to 1901. Federation saw a bundle of powers ceded upwards from the six colonies to the newly-created Commonwealth. Land was not in the bundle, so Canberra has no power over land – at least not within States. Sure, there's Commonwealth-owned land in Victoria, but it's freehold land sold to the CofA by the State of Victoria. The Crown grants for Puckapunyal and Point Nepean were signed by the Victorian Governor, not by the Australian Governor-General.

Nevertheless, Canberra does intervene in Victorian public land – the most notable recent intervention being into alpine grazing. A successful result certainly, but fortuitous. Its isolation illustrates the overall inadequacy of the legal and policy framework governing this aspect of federal-state relationships.

Federal protection got the cattle out of the Alpine National Park – but it was a fortuitous outcome.

Our national parks are not creatures of national law, but of state law. This is unique to Australia: everywhere else national parks are declared by the highest competent authority of the relevant country. Canberra's intervention into alpine grazing occurred only because the park in question (the Alpine National Park) happened to be a 'National Heritage place' for the purposes of the *Environment Protection and Biodiversity Control* Act 1999 (The EPBC Act).

The Alps and the Grampians are the only national parks in Victoria to be so listed. Croajingolong, Murray-Sunset, Port Campbell and Wilson's Promontory national parks enjoy no such protection.

In due course they may be added to the National Heritage List, but the pace of the nomination process is glacial. And even when they're listed, the protection afforded them will be purely negative: the EPBC Act is framed to prevent bad things from happening, not to cause good things to happen.

This distinction is most dramatically illustrated at another National Heritage listed site in Victoria – the HMVS Cerberus.

Federal 'protection' fails to stop the HMVS Cerberus from rusting away

Once the flagship of the Victorian navy, the Cerberus has become a lethal rust-bucket. The 'protection' afforded it by federal (and state) statutes has proved to be a sham. The hulk continues to collapse, bit by bit, into the waters of Port Phillip. The EPBC Act generously *permits* the Commonwealth to provide financial assistance (and to give him credit, Peter Garrett as Minister did grant $0.5m) but does not *require* the Commonwealth to give any such assistance.

A national list populated on the basis of heritage criteria alone will be pretty impressive – but add to it public land of national significance when measured against recreational, environmental, landscape and strategic criteria. In Victoria that list would commence with the entire ocean coastline.

Health care, education, highways, welfare and telecommunications are all, to some extent, matters of national concern. Canberra puts its hand into its pocket and contributes towards them. The time must surely come when they are joined by public land. ■

Your Questions

- **Q** Access over Crown land ?
- **Q** Projecting Balconies ?
- **Q** Seaward Boundaries of Municipalities ?

"The Road Less Travelled"

Recommendations to the Minister for Roads from our two July workshops

Training Courses

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"The Road Less Travelled"

Our two July workshops – one on urban roads, the other on rural roads – filled the Law Institute of Victoria conference room.

Here's what emerged…

MEMO **Hon Terry Mulder,** Minister for Roads

FROM.. **60 practitioners** from 23 councils and other statutory authorities

SUBJECT **This requires your attention…**

Minister – May we recommend that you go into the next State election committed to sorting out some long-standing defects in road policy and law…

Road-related legislation
- *Existing road-related Acts should be consolidated and/or simplified*

Ownership of pre-1988 freehold roads
- *Should be better defined and accurately recorded*

Encroachments and private uses
- *Better policies and mechanisms are needed to support their authorisation or removal*

Unused Government roads
- *Policy development is needed to define who should be able to use them, and in what circumstances*

Road closures and discontinuations
- *Policy development is required, leading to rationalisation and modernisation of the law on road discontinuations*

Abutting owners' rights
- *A road abuttal shown on title should not be removed without rights of review and appeal*

Ownership of land in roads
- *Contradictory definitions of ownership should be reconciled; Policy development is needed on ownership of land in discontinued roads*

Independent review and appeal
- *An investigation is needed to determine which road-related decisions should be open to independent review* ■

Q & A

Can we allow access across Crown land ?

Question arising in a case brought to us by an outer metropolitan municipality

Both the *Subdivision Act* 1988 (section 6) and the planning provisions (clause 66-01) require referral of subdivision applications to the Minister responsible for the *Land Act* 1958 (*i.e.* the Minister for Environment and Climate Change) if the only access to a lot is over Crown land *"which has not been reserved or proclaimed as a road."*

These provisions imply that the plan should not be certified without the required consent, and they also imply that the Minister has the power to grant that consent.

This situation is not uncommon in the Mildura area, where a Crown land irrigation channel often sits between a road reserve and freehold land proposed for subdivision. DEPI provides a certificate, sometimes conditional, confirming the Minister's consent to access across the channel.

But what standing does such consent have? If the land to be used as access is not proclaimed as a road does the consent provided by the Minister 'run with' the lot/s to which that access relates?

Does that original consent, given maybe many years earlier and the details of which may not be broadly known, limit the Crown land manager's ability to close access or use the Crown land for another purpose?

Without any notation on title, does a future owner of the lot/s to which the consent relates have any ongoing rights? It seems to us that what is done for expediency and practicality at the outset could result in confusion and even litigation down the track (no pun intended).

And while we agree that practical solutions are necessary, it would seem better to resolve the matter through use of property law (proclamation of road, sale of access to subdivider or, maybe more appropriately, creation of specific provision designed for just such a purpose) rather than planning law in the first instance.

We envisage an amendment to the *Land Act* 1958 explaining exactly what rights and obligations are conferred on whom by the exercise of this Ministerial power. ■

For more information, contact Grant Arnold
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Your questions please! consultants@publicland.com.au

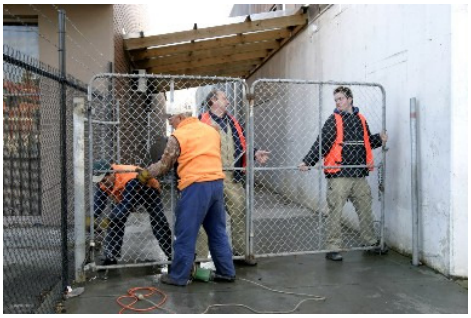
More Qs & As

If balconies project into a road reserve without Council consent, what enforcement measures can we take?

Question asked by the Infrastructure Manager for an inner suburban Council

First – what are the consents which have been evaded? There are probably three: planning, building and consent to occupy – and it must be understood that the first two are insufficient without the third. No number of planning and building permits can authorise the occupation of a road reserve without the owner's consent.

So – who is the owner? It may be the Crown, represented by VicRoads or DEPI. It may be the Council (despite what the title might say) or, in obscure circumstances, it may be some other person or entity. And what form would such consent take? It could be anything from a permit under a local law to full freehold title.



Direct action - Council workers remove an unauthorised gate across a road.

The most difficult question, perhaps, is whether the said unauthorised projection is acceptable and should be granted belated consent, or unacceptable and should be demolished. The best way to establish this may be to require the projection to obtain planning and building consents, thus subjecting it to referral authorities, structural engineers' analyses, and the court of public opinion.

Although such encroachments are clearly illegal, there is little if any case law confirming a council's right to remove them.

Section 188A of the Land Act 1958 is a virtually unused power to enforce removal of unauthorised structures from Crown land – but it seems that the most effective way is direct action: sending in the demolition crew. But remember – the materials in the offending structure may still belong to the encroacher, and you should not foment a breach of the peace. ■

Where exactly is the seaward boundary of our municipality?

Question asked by a coastal planner

Firstly, here's an unpaid promotion for Melway. It isn't the Government Gazette, but for many day to day purposes it's pretty reliable. If you get a counter inquiry about your municipal boundaries, your best initial answer is – check the yellow lines in the Melway.

But even Melway doesn't attempt to define coastal boundaries. Turn to Map 56: it shows a yellow line down the centre of the Yarra – dividing the City of Melbourne from the City of Hobsons Bay – but it just peters out at the river's mouth.

So the answer to our coastal planner's question starts with section 3(3A) of the *Local Government Act* 1989. This reads:-

> *3(3A) If the boundary of a municipal district is described by reference to the sea coast … that boundary is to be taken to be the line for the time being of the low water mark on that sea coast.*

When this definition was first inserted into the Act in 1995 (the capital letter 'A' in the section number flags it as a post-1989 amendment) this provision read 'high water mark.' The amendment to 'low water mark' was made in 1997 – thus giving coastal councils control over the inter-tidal zone.

But as coastal planners know, many planning schemes go well out to sea. The Mornington Peninsula Planning Scheme goes to low water mark along the ocean and Western Port coastlines, but 600m out to sea on the Port Phillip coast. It's an example of councils exercising their functions outside their municipal boundaries – which they may be permitted to do under section 3E(2) of the *Local Government Act* 1989.

It's the same with some other functions – councils may be authorised under the *Crown Land (Reserves) Act* 1978, the *Marine Act* 1988, or the *Port Services Act* 1995, for instance, to exercise powers outside their boundaries.

If you read section 3(3B) of the *Local Government Act*, you'll see that it's possible for a council's seaward boundary to be set at some location other than low water mark. The City of Greater Geelong, for instance, extends 200 metres out to sea along most of the Corio Bay foreshore.

What are the consequences of these sometimes inconsistent boundaries? When a council is dealing with some coastal activity or development, it must know exactly how far its jurisdiction extends. Planning powers may extend 600m out to sea, but Local Laws may terminate at the municipal boundary. ■

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Leases and Licences of Public Land

Melbourne* Tue 8 October

Melbourne* Tue 3 December

Roads Streets and Lanes

Melbourne* Tues 15 October

Traralgon Mon 25 November

Melbourne* Tues 10 December

Rivers and Lakes

Melbourne* Wed 16 October

Melbourne* Wed 27 November

Volunteers and Grants

Warnambool Tue 22 October

Traralgon Tues 13 November

Melbourne* Wed 4 December

Environmental Law and Risk for Councils

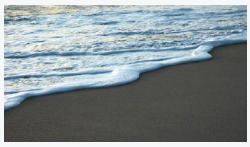
Melbourne* Thur 10 October

Geelong Tue 22 October

Horsham Tue 26 November

Melbourne* Thur 12 December

Coastal Adaptation



Warrnambool Wed 23 October

Melbourne* Mon 11 Nov

Subdivisions Law

Melbourne* Thursday 31 October

Building Law and Regulation

Melbourne* Wednesday 30 October

Crown Land law

Melbourne* Wednesday 20 November

Risk Management

Melbourne* Tuesday 26 November

Land Law for Service Utilities

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Melbourne* Tuesday 19 November

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For details of all these courses go to

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* Our Melbourne courses are conducted either at the Law Institute of Victoria, 470 Bourke Street or at Graduate House, University of Melbourne, 220 Leicester St Carlton

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