TERRA PUBLICA
VOL 12 NO 9 NOVEMBER 2012

Developments at The Public Land Consultancy

The Public Land Consultancy is pleased to welcome Richard O'Byrne as a Senior Consultant.

Richard comes to us from Parks Victoria, where he managed the Bays and Maritime Division. For the past four years he has been a member of the Central Coastal Board.

We believe Richard's extensive expertise in coastal planning and management will be invaluable for our many coastal clients.

His first consultancy in his new role is to advise City of Bayside on options for repair and governance of a problematic boat ramp.

Richard will also be developing and presenting some new training courses. 'Managing Volunteers and Grants' will be the first, followed early next year by a new course on Climate Change and Coastal Adaptation. Contact Richard at Richard@publicland.com.au

The role and future of Citizens' Committees for Australian Local Government

Here at The Public Land Consultancy we're pleased to be making a contribution to some long-overdue research, currently being conducted by the Australian Centre for Excellence in Local Government (ACELG).

The research project examines the role and future of citizens' committees such as Committees of Management (COMs) as sites of public engagement in local government. It will study how citizens' committees are currently being used in three councils in Victoria, and consider how they might be strengthened in view of citizen engagement principles including inclusion, representation and deliberation.

The three partner councils are Nillumbik Shire Council, Surf Coast Shire Council and Wyndham City Council.

Our contribution has been to draw the researchers' attention to the irrational duplications resulting from Victoria's parallel systems of engaging community land managers – one under the Crown Land (Reserves) Act 1978, the other under section 86 of the Local Government Act 1989. ◆

A New One-day Training Course from The Public Land Consultancy

Managing Volunteers and Grants Programs

- *100,000 Victorians are voluntarily involved in natural resource management*
- *Their value to DSE alone is estimated at $180 million p.a.*
- *They require and deserve competent professional support*

This one-day course gives a comprehensive guide to the law under which volunteers may be engaged, organised, inspired, protected, insured and funded…

First Presentation: Wed 5 December

Venue: Law Institute of Victoria, Melbourne

Presenter: Richard O'Byrne, recently of Parks Victoria

Who should attend?

Staff of councils, CMAs and other land management agencies who believe in their land and their community

Cost - $495 including GST, course notes and working lunch

Maximum class size: 10

To enrol, contact our Training Coordinator, Lesley Simons at lesley@publicland.com.au .

WHAT'S WRONG WITH SECTION 32 STATEMENTS?

In this edition:- If you buy or sell property you'll know about "section 32 statements" – but what you may not realise is that for property which abuts public land they may be seriously deficient. Stories: page 2 and 3.

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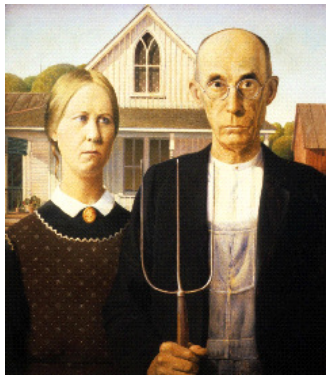
Why weren't we told ?

Question asked by a retired couple who imagined they'd bought all the land enclosed by their fenceline.

One third of the farm we bought turns out to be Crown land. Why weren't we told?



Well, as the lawyers say, *caveat emptor*. Buyer beware. Don't go buying a property without engaging a surveyor to compare the fenceline to the title documents.

If our retirees had checked, they would have discovered why their title shows 20 ha, but their riverside farmlet appears to be closer to 30 ha. The remainder comprises an unused government road and a Crown water frontage – each virtually indistinguishable from the abutting freehold.

Section 32 of the *Sale of Land Act* 1962 requires a vendor to disclose all sorts of information to prospective purchasers: details of mortgages, easements, planning controls, rates and taxes and notices from government departments.

But not the fact that a significant slab of the property is Crown land.

It was five years until our questioners found out that one third of 'their' new farm wasn't theirs at all. They received an unexpected letter from DSE, requiring them to accept transfer of two Crown licences from the vendor. The vendor was equally surprised to learn that DSE still regarded him as their tenant, responsible for controlling weeds and rabbits on land he'd long ago 'sold.'

Part one of the problem is section 32 itself. It requires information to be divulged about 'the land being sold.' The Crown land is not the land being sold, so there is no requirement to divulge anything about it – no matter how intimately it may be associated with the land being sold.

Part two of the problem is DSE's internal systems – or lack of them.

The ignorance in such cases is threefold. Incoming purchasers don't know that they've become Crown tenants, departing vendors don't know that they are still tenants of land they no longer occupy, and DSE as landlord doesn't know what's happening to the land supposedly in its custody.

At least one part of DSE doesn't know. Where does the vendor (or vendor's solicitor) get the information to include in the Section 32 statement? Largely from DSE. But the relevant part of DSE (Land Registry) doesn't recognise that the information being sought relates to freehold associated with an unused road or water frontage, and so can't tell the other part of DSE (Public Land Services) that their tenant is thinking of selling up.

Required by DSE – a competent systems designer ◆

But we *were* told…

A related question recycled from Terra Publica November 2009

As vendors and their agents surely know, it's against the law to misrepresent a property that's up for sale.

As it says in section 12 of the Fair Trading Act 1999:- *"A person must not … make a representation that is false, misleading or deceptive in any material particular. Penalty: 600 penalty units, in the case of a natural person; 1200 penalty units, in the case of a body corporate."*

Nevertheless, there are many utterly fraudulent property descriptions currently on the web:-

- *40.47 hectares (100 acres) freehold plus approximately 4.8 ha (12 acres) which is a former road reserve along two boundaries and is covered by a fully-paid 99 year lease which expires in 2102. The leased land is within the boundary fence.*

In this case the vendor is misrepresenting a *licence* as a *lease*, a *road reserve* as a *closed road*, and an ephemeral arrangement terminable at 3 months' notice as something set in concrete for 99 years.

There are plenty more examples, albeit less blatant:-

- *Approx 24 acres of mainly cleared grazing ground, plus approx 6 acres of leased unused roads on 99 year lease starting 1-10-1994.*
- *One owner three bedroom home set on approx 1.5 acres plus a further 1 acre on a 99 year lease.*
- *4.2 acres plus 99 year lease on 3 acres of unused roadway…*

Right now we are dealing with three cases where such misrepresentations have resulted not only in the land being overvalued, but purchasers actually constructing houses in the wrong place. In each case, the purchaser falsely believed that 'their' land extended to the fence-line, whereas 20 metres of that land was in fact a road reserve liable to be re-opened to traffic at any time.

In one case, a 35-metre wide buffer around a new house was suddenly reduced to 15 metres; and in another case a 20-metre buffer was reduced to Sweet Fanny Adams.

Failing to use an accredited estate agent is no excuse for the vendor – but using an agent is hardly a guarantee against error. In fact some of the examples above come from estate agents, who should know better. ◆

Dear Attorney-General

Robert Clark MP
Attorney General

14 April 2012

Dear Sir

INDEFEASIBILITY OF TITLE

I write to you as Minister responsible for both the *Transfer of Land Act* 1958 and the *Victorian Law Reform Commission Act* 2000.

My purpose in writing is to inform you of serious deficiencies in the operation of the *Transfer of Land Act* 1958, as revealed by a particular decision made by the Shire of Yarra Ranges. I believe the deficiency is so serious as to warrant its referral to the Law Reform Commission under the *Victorian Law Reform Commission Act* 2000.

Section 42 of the Transfer of Land Act purports to guarantee indefeasibility of title, and as such is a cornerstone of the Torrens system. In general, purchasers of land can rest assured that they are acquiring land as described on the title documents.

There are of course exceptions. Some are listed in section 42 – for instance, reservations exceptions conditions and powers contained in the original Crown grant of the land.

The Shire of Yarra Ranges has now resolved to expunge a road abuttal from a Torrens title. The parcel in question is owned by my clients Robert and Christine Dove, who purchased the land in 2000 in the innocent belief that they could rely on the title offered by the vendors. It seems that this belief was misplaced.

The road concerned was created on the original Parish Plan and had been shown as an abuttal on various Crown grants. It could reasonably be inferred that titles created in subdivisions carry with them not only the 'reservations exceptions and conditions' of the original Crown grant, but also the rights and benefits conferred by that grant. Again, it seems that such a belief would be misplaced.

Apart from throwing further doubts on the reliability of sec 42 of the Transfer of Land Act, the case also illustrates deficiencies in several other Acts falling within other Ministers' portfolios. Any reform clearly requires a whole-of-government approach.

The discontinuation was effected under the *Local Government Act* 1989. It could not have been effected under the *Land Act* 1958 without the Doves' consent. Had it been discontinued by Planning Scheme Amendment the Council's decision would have been subject to review by an independent panel, and the Doves would have been entitled to financial compensation. As it is, the removal of their only practical road abuttal will devalue their farming property by perhaps half a million dollars.

The case also illustrates deficiencies in the *Sale of Land Act* 1962. Section 32 requires vendors to warn prospective purchasers *inter alia* that their usage of the property may be constrained by the relevant planning scheme, and that in an agricultural area they may have to put up with agricultural practices and processes.

In the light of this Yarra Ranges case, one might be forgiven for thinking that section 32 should be further amended to include a warning to the following effect:

> 'Important notice to purchasers: If the property has an abuttal to a road reserve, that road may be discontinued by your local council without your consent, without you having any avenues of appeal, and without due compensation.'

However, I think the more responsible approach would be to refer the matter to the Law Reform Commission. I am sure the legal profession would embrace an opportunity to redress this most unsatisfactory situation and restore faith in the notion of indefeasibility of title.

I would be pleased to be of whatever further assistance I may.

Yours truly,

David Gabriel-Jones
Principal

Reply from the Attorney-General, 24 September 2012

The Government is not contemplating referring this matter to the Law Reform Commission at this time… Thank you for drawing the matter to my attention…

Robert Clark MP
Attorney General ◆

For the full text of this correspondence go to www.publicland.com.au/pro_bono.html

Our Course Calendar
November-December 2012

NEW COURSE

Managing
Volunteers and Grants

Wed 5 December

Presenter: Richard O'Byrne

Crown Land
Law, Policy and Practice

Mon 26 November

Easements
and Restrictive Covenants

Mon 3 December

Risk Management Law
for Managers of Public Land and Roads

Wed 28 November

Leases and Licences
of Public Land

Fri 7 December

Native Title
and Aboriginal Heritage

Thurs 29 November

(* at Holiday Inn, Spencer St Melbourne)

Environmental Law
A Strategic Overview

Tues 11 December

Subdivisions
and the Law

Mon 3 December

Land Law for Managers of
Roads, Streets and Lanes

Wed 12 December

Cost $495 per student
including GST, Course notes and working lunch.
Discounts for host organizations

Enrolments and Inquiries – Lesley Simons –
lesley@publicland.com.au

Unless otherwise noted, all courses are at
Law Institute of Victoria,
470 Bourke Street Melbourne

All courses are of one-day duration;
starting time 9:00 am, finish 4:30 pm

For details of all these courses go to www.publicland.com.au/professional_development

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