

IF ONLY...

If only we could turn the clock back.

Imagine Victoria at the time of Major Mitchell's 1836 incursion into the lands of the Jardwadjali people (that's the country we now call the Western District), or Lieutenant Collins' attempt in 1803 to settle the lands of the Boonwurrung (that's the Mornington Peninsula).



The Murray River as seen by Major Mitchell

If we turned the clock back, what land would we retain in public ownership? Would today's portfolio of public land look very much different? We'd certainly have a few extra National Parks – one on the basalt plains around Camperdown and Mortlake, conserving some of the native grassland ecosystems that have been overtaken by introduced pastures. There'd surely be a National Park north of Westernport, conserving the thriving wetlands that the pioneers saw as snake-infested swamps, whose only purpose was to be drained.

Some things we would do the same as our forefathers, although our reasons might be different. They kept the mountains and the deserts as public land – not because of their conservation value, but because they were unsuitable for settlement. Relatively late in the 19th Century they reserved those river frontages that had not already been alienated – not for conservation or recreation, but to ensure that travelling stock had access to water.

If we had our time over again, maybe we'd retain those peri-urban hilltops now being desecrated by McMansions. Maybe we'd retain those once-forested alpine valleys where grazing has proved unviable. Maybe we wouldn't need Green Wedge

legislation, because Melbourne would have its outer limits defined by a band of magnificent parks and reserves.

What's the point of idle speculation? Because, if we don't imagine what could have been, we'll have a very limited vision of what might still be. And we won't recognise that we are locked into second-best outcomes by serious deficiencies of public policy.

There are several ways of bringing land into public ownership, but each has its limitations. There's the Trust For Nature, with a limited budget for purchases from sympathetic vendors; there's the planning system, which creates reserves – but only when land is being subdivided; and there's even the tail-end of the Hamer-era buy-backs in the Dandenongs and Phillip Island. But we don't have any objective, systematic, coherent apparatus for bringing land back into the State's public property portfolio.

The body best suited to fill the gap is probably the Victorian Environmental Assessment Council (VEAC), the successor to the Land Conservation Council and the Environment Conservation Council. But under its Act, VEAC is prohibited from considering private land – even if it's the last known habitat for some endangered species; even if it's a Ramsar-listed wetland.

If only VEAC had the power to recommend which land should be brought back into the public estate. If only Treasury actually put some cash into a prioritised acquisition program.

IF ONLY... ■

Crown Reserves Assets or Burdens?

The Government's plan to transfer certain Crown reserves to councils is being viewed with some dismay around the State.

34 municipalities have already booked into our half-day workshops to hear each other's views and express their concerns.

In the next edition of TP we'll provide a full analysis of the feedback that's come our way, and our own views on how to resolve the issue.

- Further workshops scheduled*
- Fri 25 July – Horsham
 - Fri 1 August – Wangaratta
 - Fri 5 Sept – Melbourne

Page 2 – *Reforming the Torrens title system*

Page 3 – *Reserves so small you can step right over them*

Page 4 – *Forthcoming Training Courses and Workshops*

Problems? Consider our retainer-based advisory service

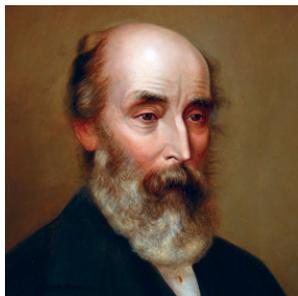
Reforming Torrens

The Property Law Reform Alliance is working towards a uniform national Torrens title Act. Here's our submission...

Over the past 14 years The Public Land Consultancy has dealt with a wide range of legal and policy issues relating, as our name implies, to public land – including Crown land and all types of road reserve. Many of these issues reflect serious systemic deficiencies, often with major repercussions for nearby private freehold land.

1 Pre-1988 freehold roads

Perhaps the best-known systemic anomaly is the proprietorship of pre-1988 subdivisional roads. Statutory law causes any such road which has become a public highway to vest in fee simple in the relevant municipality, but the title continues to show the erstwhile landowner as registered proprietor. The 1999 case *Calabro v City of Bayside* highlighted the gulf between this state of affairs and the concept of indefeasibility. As Balmford J commented 'I do not wish to suggest that this is a satisfactory situation.'



Torrens himself.

If Her Honour's remark was intended to prompt the parliament into legislative reform, it did not succeed. Over the subsequent 15 years we have seen many cases where the anomaly has led to serious misunderstandings and disputes, some even requiring police intervention. For further background on this issue, see [Terra Publica, January 2007](#).

One repercussion of this anomaly is the inability of the true owner (*i.e.* the council) to create easements over the road in favour of utility services. As it stands, the *Transfer of Land Act 1958* allows easements to be created by the registered proprietor who, in the case of many pre-1988 freehold roads is no longer the true owner and, what's more, is long

dead. In one case we dealt with, this caused costly and unnecessary delays in construction of a multi-million dollar suburban shopping complex. For further background, see [Terra Publica, April 2008](#).

2 Section 32 and associated Crown land

Many rural properties consist of both freehold land and Crown land occupied under licence. This Crown land may be a water frontage or an unused government road, licensed under the *Land Act 1958*. These properties change hands as complete units, but only the freehold portion is subject to section 32 of the *Sale of Land Act 1962*. This can lead to inadvertent misrepresentations by vendors and misunderstandings by purchasers. For more detail, see "*Why Weren't We Told?*" and "*But We Were Told...*" in [Terra Publica, November 2012](#).

We believe that relatively simple systems could be introduced within Land Registry to establish links between freehold parcels and corresponding Crown land parcels which, without altering any property rights, would allow a section 32 statement to describe the entire property being transferred.

Unfortunately, we seem to have missed the boat with this one. The *Sale of Land Amendment Act 2014* has already been passed by parliament.

3 Road discontinuation procedures

In Victoria, there are at least four Acts under which roads may be discontinued – and there is little or no consistency between them. Indeed, the inconsistencies may well be described as policy contradictions. We find significant, inexplicable and illogical differences regarding the rights of abutting owners, avenues of review and appeal, and compensation for the devaluation of affected properties. For a brief overview of these inconsistencies see [Terra Publica, February 2011](#).

If the Torrens system is supposed to support the integrity of titles, it is undermined by at least one of these mechanisms for discontinuing roads. The *Local Government Act 1989* allows a road abuttal shown on title to be erased without the consent of the landowner (or other parties with an interest in the land), without avenues of appeal, and without compensation.

We believe a major review should be conducted into the desirability of a single, uniform statute or code for road discontinuations. Our submission to any such review would be that the removal of a road abuttal without the landowner's consent is a form of compulsory acquisition, and hence compensable.

This is a question on which we have written to the Victorian Attorney General – to no avail. See '*Dear Attorney-General*' in [Terra Publica, Nov. 2012](#). ■

Got Questions? Consider our retainer-based advisory service

Readers of Terra Publica should not act solely on the basis of its contents which are not legal advice, are of a general nature, capable of misinterpretation and not applicable in inappropriate cases. The Public Land Consultancy can, if necessary, arrange legal advice for clients from its various legal associates.

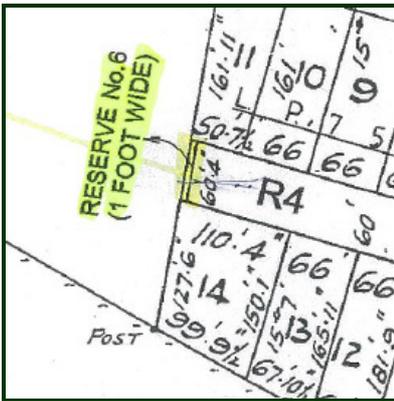
Q
&
A

What's a Revenge Strip?

Question asked by a student at our 'Subdivisions' course

Let's say I'm subdividing my land, creating lots and reserves and roads. Some of the roads abut your land. You (my neighbor) are looking at my roads and thinking that you're going to piggy-back on my investment: you're going to subdivide too, linking into the roads and utility services that I've paid for. No way!

To prevent you from reaping a benefit from my work I ensure that my road does not actually abut your land. I put in a *revenge strip*.



On the ground you won't even be able to distinguish it from the land either side – but now you get to subdivide your land only on my terms! Nice? ■

How to get rid of a Revenge Strip?

Question asked by a council considering an application to develop land abutting a revenge strip

Freehold reserves can be vested in a council and then removed altogether using the procedure set out in section 24A of the *Subdivision Act 1988*. This provision in turn requires a planning scheme amendment or a planning permit, and thus provides opportunity for public inputs.

At the end of the process the reserve becomes an ordinary lot vested in council,

which (here we're thinking about a 1-foot wide revenge strip) may then declare it to be a road, or sell it to be consolidated with the abutting land.

In a recent case (*Architectural Plans & Permits v Moreland CC*), VCAT considered whether a revenge strip was an impediment to the issue of a planning permit. Council had rejected one aspect of the application, basing its view on the continuing existence of the strip. The Tribunal, however, ruled that the permit should issue, on the basis that the strip could be brought into Council's name and removed, and did not therefore constitute a fatal impediment. ■

Q
&
A

What's a Tree Reserve?

Question asked by another student at our 'Subdivisions' course

This is also a narrow reserve, but with a different purpose. It ensures that adjacent lots do not have an abuttal to nearby roads and therefore have no rights of direct access to those roads.

The one illustrated below is 0.3m wide, and was inserted as a condition imposed by the relevant council. ■



That's 0.3 m wide – could you actually plant a tree in it?

More Questions? Consider our retainer-based advisory service

Our Program of One-Day Training Courses – July-Dec 2014

Cost: \$495 including GST, course notes and working lunch.

Land Law for Managers of Roads, Streets and Lanes <i>David Gabriel-Jones, Principal</i>	Thursday 7 August Thursday 28 August	Melbourne Colac
Re-Imagining Urban Public Land <i>David Gabriel-Jones, Principal</i>	Tues 28 Oct	Melbourne
Crown Land Law, Policy and Practice <i>David Gabriel-Jones, Principal</i>	Wed 3 Sept Tues 14 Oct Tues 25 Nov	Melbourne Shepparton Warrnambool
Planning Law – a Strategic Overview Referral Authorities – <i>Doing it better</i> <i>Grant Arnold, Associate</i>	Thursday 23 October Wed 17 September	Melbourne Melbourne
Land Law for Managers of Rivers and Lakes <i>David Gabriel-Jones, Principal</i>	Wednesday 30 July Tues 16 September Wed 19 November	Melbourne NCCMA Sale
Land Law and Coastal Adaptation <i>Richard O'Byrne, Associate</i>	Wed 8 Oct Wed 22 Oct	Warrnambool Melbourne
The Law and Subdivisions <i>Dr David Mitchell, RMIT (or Grant Arnold, Associate)</i>	Thurs 11 Sept	Melbourne
Leases and Licences of Public Land <i>Karen Hayes, Property Coordinator, City of Yarra</i>	Tues 18 Nov	Melbourne
Managing Volunteers and Grants Programs <i>Richard O'Byrne, Associate</i>	Fri 10 Oct Wed 15 Oct	Horsham Melbourne
Native Title and Aboriginal Heritage <i>David Yarrow, Victorian Bar</i>	(date to be fixed) Thurs 9 Oct Wed 15 Oct	Horsham Melbourne Traralgon
Environmental Law for Councils as Land Managers <i>Grant Arnold, Associate</i>	Tuesday 22 July Tuesday 19 August Wed 8 Oct	Traralgon Colac Melbourne
Easements and Restrictive Covenants Land Law for Service Utilities	Wed 10 Sept Wed 12 November	Melbourne Melbourne
Risk Management Law <i>Michael Beasley</i> Land Information and its Interpretation <i>Scott Jukes, LS</i> Building Law – a Strategic Overview <i>Tom Vasilopoulos</i>	Dates to be fixed	Melbourne

Our Program of Half-Day Workshops – July-Dec 2014

Cost: \$330 including GST, course notes and morning coffee.

Unused, Little-Used and Discontinued Roads <i>David Gabriel-Jones, Principal</i>	Friday 12 September	Melbourne
Encroachments onto Council-Controlled Land <i>David Gabriel-Jones, Principal</i>	Fri 29 August Fri 19 Sepy	Horsham Melbourne
Crown Reserves – Assets or Burdens? <i>David Gabriel-Jones and Grant Arnold</i>	Friday 25 July Friday 1 August Fri 5 Sept	Horsham Wangaratta Melbourne
Understanding the Coastal Cadastre <i>Richard O'Byrne, Associate</i>	Friday 22 August	Sale

Enquiries and Registrations: Jacqui Talbot – jacqui@publicland.com.au – phone 9534 5128

In addition to our scheduled presentations, you can engage us to present our training courses in-house at your own offices. Discounts for course hosts.