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YES, BUT…

What can we say? It's great news, despite being several years late.

DELWP has announced that it is working towards the implementation of certain recommendations made by the Victorian Environmental Assessment Council (VEAC) back in 2016, and accepted by the Government in May 2017.

The paper just released by Minister D'Ambrosio points in the direction of some highly desirable reforms, even if they took four years to emerge.

Ah well, many failings of Victoria's public land legislation can't be measured in years, or even decades, but in centuries. That's right – when we look at the principal Acts of Parliament relating to Crown land, we find administrative systems, social concepts, and legal principles dating back to colonisation, the gold rush, the squatters, and the myth of *terra nullius*. Between them, VEAC and DELWP are finally dragging the statute book into the 21st Century.

Looking more closely into the discussion paper, we find some undoubtedly positive (but very broad-brush) propositions. Hidden in between these propositions are plenty of gaps and uncertainties. So we offer our support – with reservations.

Simple and clear public land categories
We respond: YES!

We have no problems with land categorised 'National Park' or 'Road Reserve' – but how about land permanently reserved for '*recreation of elderly people and underground drainage*' or '*for the rehabilitation of female inebriates.*' Believe it or not, there are 1300+ sub-statuses of Crown land reserves, many changeable only through site-specific Acts of Parliament. So our response here is YES! Let's have some rationalisation! Which brings us to the BUT…

BUT… The discussion paper purports to address *public land*, although the legislation in question relates only to *Crown land*. They are not the same. There's plenty of public land which is freehold, and therefore beyond the remit of VEAC, and (it seems) beyond the scope of this discussion.

BUT public land doesn't work like that: look at any school, or hospital, or playground, or plantation: it could be Crown land, or freehold land, or a bit of both. Perhaps this doesn't matter, perhaps it does – but no fundamental review of such questions can just ignore the difference.

Replace 'temporary/permanent' with a new system for further designating the significance of individual reserves.

Here we would respond YES! but here comes the BUT… This recommendation is missing!

In 2016-17 VEAC recommended (and Government accepted) that the archaic 'temporary / permanent' designation be scrapped, and '*a process be established to designate a class of reserves into*

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EOFY looms…

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27, 28, 29 April	**Leases and Licences of Public Land**
4, 5, 6 May	**Roads Governance**
18, 19, 20 May	**Property Law for Planners**
25, 26, 27 May	**Statutory Approvals on Public Land**
31 May;1,4 June	**Rivers and Riparian Land**
1, 2, 3 June	**Crown Land Governance**
8, 9, 10 June	**Working with Owners Corporations**
8, 9, 10 June	**Land Law for Referral Authorities**
22, 23, 24 June	**Roadsides and the Law**

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YES, BUT (continued)

which individual reserves could be nominated that would retain Ministerial, Governor in Council approvals processes and a parliamentary role if warranted by their state or strategic significance…'

As we see it, such a system could be used to differentiate between reserves of state significance and reserves of local significance. And that in turn would inform the principles of their governance. BUT… the discussion paper fails to address these questions.

A modernised land manager framework
We respond: YES!

The paper envisages land managers having sufficient autonomy and direction to manage public land in the best interests of the community, commensurate with risk. YES! Why should a municipal council have power to manage one public hall (which it owns) and a second public hall (where it is Committee of Management) but not a third (where half a dozen citizens are the Committee of Management)? The three halls serve the same community, have the same risk profile, and at the end of the day are funded by the same body of ratepayers.

The origins of this system predate the incorporation of municipalities, back when the only available land managers were volunteer trustees (preferably with fine handlebar moustaches). Now we come to the BUT…

BUT… Will we see local councils having real autonomy over their public land portfolios? If one of the three public halls is deemed superfluous, will the municipality be able to sell it, and reinvest the proceeds in other community assets? Now that would be autonomy! The same goes for land vested in utilities, and cemetery trusts, and statutory authorities.

That brings us to the heart of the problem. Department of Treasury and Finance (DTF) controls the Crown estate as if it were an investment portfolio held by some private landlord. Here's news for DTF: it's not.

DTF's Sale of Land Guidelines fail to recognise that Crown land in Victoria was not purchased, it was stolen. A slab of the equity now rests with the Native title holders, even if there's no agreement under the Traditional Owner Settlement Act. And, we would argue, most if not all the remaining equity in land of local significance should be attributed to local communities. **In short, Crown land of local significance should be gifted (not sold) to the local council and the relevant Traditional Owners**.

A streamlined framework for tenures
We respond YES!

The current framework for leases and licences, as found in the *Crown Land (Reserves) Act 1978*, is, convoluted beyond belief, virtually incomprehensible and quite unfit for purpose. The discussion paper offers one example: a licence to operate a food truck in the car park of land reserved for a public park is subject to Parliamentary disallowance which, according to the paper, could take 'four to six weeks.' (And the rest: try four to six months!)

So, YES – let's have a better framework for tenures. The paper floats a series of considerations, all to do with the impact of the tenure on the land, rather than the choice of tenant or the terms and conditions of the tenure. Good, BUT… There are a few more matters to think about: who should be the landlord entity; when should tenancies be awarded by competition, and how should rentals be set. And here is a great big BUT: How about taking a long-overdue look at tenures for unused government roads and Crown water frontages?

Modernised compliance, enforcement and regulation… We respond YES!

Last time we checked the regulations for Lincoln Square Carlton (a Crown land reserve) they prohibited the singing of obscene ballads. Offenders could be apprehended by a police constable, brought before a magistrate and fined two shillings and sixpence.

What's going on here? The sorry fact is that Crown land regulations do not sunset when they reach the age of 10 (as do other subordinate legislative instruments), in order to go through a process of exhibition and review. So we say – YES!

BUT… Even here there's a BUT… How about abandoning Crown land regulations in favour of Local Laws made under the *Local Government Act 2020* – especially on public land of purely local significance. Surely Melbourne City Council is competent to deal with obscene balladeers in any part of the municipality – including Lincoln Square, Carlton.

Recognition of Traditional Owners…
We respond YES!

A major theme of the paper is facilitation of Traditional Owners' involvement in public land management. It's already happening through the *Traditional Owner Settlement Act 2010*, so we are not sure that this recommendation is really necessary. Nevertheless, it's a YES! The only BUT we offer is: BUT why did it take so long? Back in 2003 we told a DSE conference (click here) "*The Land Act 1958 is a legislative bastion of the discredited doctrine of terra nullius, and is therefore a standing insult to Aboriginal Australians.*"

So What's Next?

Sticking with the positive view, let's turn back to the VEAC 2016 report and the Government's 2017 response. VEAC had recommended that there be a discussion paper; the response tweaked the singular into the plural, and promised discussion papers. So there are more to come. Great! BUT… not in another four years, please. ◆

Welcome to some new presenters

Anoushka Lenffer

PSM, BSc (Hons),
M Env St, Accredited Mediator (NMAS),

Anoushka will be presenting our course

Native Title and Aboriginal Heritage

Anoushka Lenffer has over twenty years public sector experience in native title, Traditional Owner recognition and Aboriginal cultural heritage in Victoria and New South Wales. She is on the Federal Court's Native Title List of Mediators.

This course provides an introduction to the legislation and policy for staff of local government and statutory authorities in Victoria

Johanna Slijkerman

BSc, BA(hons)(Melb)
Principal Scientist
Waterways and Ecology, Water Technology

Jo will be presenting our course

Rivers and Riparian Land

Jo Slijkerman has over 16 years' experience in waterway management and policy, including time with DELWP's Water Policy Division. She is closely involved with the River Basin Management Society and Aust Stream Management Conferences.

This introduction to riparian governance in Victoria provides a sound background on existing law and policy and explores the potential for reform.

The Public Land Consultancy acknowledges that our core work relates to the lands of Victoria's Traditional Owners. We promote recognition of Indigenous rights through study, policy and the law.

Q & A

How do we add or remove roads from our road register?

Question from a municipal engineer recently arrived from NSW

In Victoria there are two criteria for roads being listed on a Council's Road Register. Firstly, the thing we're talking about must be a road within the meaning of the *Road Management Act 2004*. Secondly, the Council must have made a decision that it is 'reasonably required for general public use.'

Is the thing we are considering a 'road'? We saw a case recently where a Council had listed someone's living room on the register, in the mistaken belief that their house was built on a road reserve. It wasn't. In such cases, the custodian of the register should just delete the entry at the first opportunity, perhaps inserting a footnote to explain what had happened.

The second criterion can also be misunderstood. In the case of municipal roads, this is a subjective test, not objective. Section 17 of the RM Act does not refer to roads which are 'reasonably required for general public use,' but to roads where the authority '*has made a decision* that it is reasonably required for general public use.'

Here we have a subtle but vitally important difference. If the test were objective, a disgruntled member of the public could challenge the road register in a court. The subjectivity of the test will not deter the disgruntled citizen, but it means they have to pursue their complaint by other means. And, needless to say, in applying the test a Council may be *subjective* but should not be *arbitrary*. Perhaps section 17 should be reworded: '… roads where the authority has made a *reasonable* decision that it is reasonably required…'

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	**Statutory Approvals on Public Land**	Tues 25 May, 10am to 12pm Wed 26 May, 10am to 12pm Thurs 27 May, 10am to 12pm
	**Rivers and Riparian Land**	Mon 31 May, 10.30am to 12.30pm Tues 1 June, 10.30am to 12.30pm Friday 4 June, 10.30am to 12.30pm
	**Crown Land Governance**	Tues 1 June, 10am to 12pm Wed 2 June, 10am to 12pm Thurs 3 June, 10am to 12pm
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	**Working with Owners Corporations**	Tues 8 June, 1pm to 3pm Wed 9 June, 1pm to 3pm Thurs 10 June, 1pm to 3pm
	**Roadsides and the Law**	Tues 22 June, 10am to 12pm Wed 23 June, 10am to 12pm Thurs 24 June, 10am to 12pm

Cost: $440 per three-session course, including GST, course notes and certificate of attendance

Accreditation:
These courses are eligible for CPD points for lawyers and FPET points for surveyors

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