TERRA PUBLICA

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It is Timely…

'It is timely now to simplify, strengthen and modernise the legislation…' That's the principal recommendation of the Victorian Environmental Assessment Council (VEAC), in its May 2017 report Statewide Assessment of Public Land.

Here VEAC is talking about the *National Parks Act 1975*, the *Forests Act 1958*, the *Crown Land (Reserves) Act 1978* – and above all, the *Land Act 1958* which 'is widely considered to be a legacy Act dating from the 19th Century and European settlement of the state.'

In recommending the total rewrite of this body of legislation, VEAC is setting the government a massive task. Massive but necessary, and (we believe) feasible. What makes it feasible, above anything else, is its bipartisan genesis.

The VEAC investigation was commissioned in 2014 by the Naphine Government, then expanded by the Andrews Government. The current VEAC Council includes ex-politicians from both sides of the house. The Community Reference Group encompassed interest groups from across the political spectrum. So unless some mischievous pollie tries to link it to the CFA restructure or alpine grazing, the task comes down to resources, process design, and goodwill.

VEAC has now challenged us to imagine a new public land paradigm. We're not sure they've got it entirely right, but that's another story. What matters is that the legislative map needs to be redrawn – a task that can't be accomplished in haste. VEAC suggests 5 years.

Stage one of this task, as VEAC sees it, will be a Consultation Paper. Here we beg to differ – what will be needed is a whole series of analyses and consultation papers.

We are surely looking at a new type of legislative change. Over recent decades, legislative reform has consisted of a series of amendments to Acts, without any clear definition of the end-point of the cumulative process. The *Forests Act 1958* has seen 116 amendments, the *Land Act 1958* has seen 125, and the *Crown Land (Reserves) Act 1978* has seen 110. But relatively few have been substantive reforms.

Any analysis of these amendments will show that many are trivial consequences of administrative change, others are forced responses to unforeseen external events, and yet others are little more than political point-scoring. Relatively few could be described as substantive policy advances.

The *National Parks Act 1975* is significantly different. Many of its 155 amendments have caused an expansion of the parks system through additions to that Act's schedules.

In this context, VEAC has challenged us to imagine a new type of legislative amendment. One which not only rewrites the rule-book for future land-use decisions, but retrospectively reforms the legacy of a few thousand past decisions. An amendment which (thinking of the *Crown Land (Reserves) Act 1978* alone) enables new purposes to be assigned to thousands of Crown land reserves; enables a thousand or more Committees of Management to be reconstituted, and enables the rewriting of we-don't-know-how-many sets of regulations.

Let's imagine a three-part *Crown Land (Reserves Rationalisation) Act (2018?)*. One part deals with reserve purposes, one with Committees of Management, and one with tenures and regulations. It would rewrite the relevant parts of the Act, set up a process for transposing the legacy onto the new framework, and then go out of existence – leaving us with the 21st century public land governance regime which VEAC has so perceptively envisaged. ■

Friday 26 August **The Future of Public Land**

A review of the VEAC recommendations, why they have been made, and where they lead…

To register your interest, contact Jacqui@publicland.com.au

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How hundred-million-dollar developments have been seriously delayed by misunderstandings about public land law

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But Nobody Told Me (x3)

It's a complaint we've heard at least three times. The developer who, having cleared the planning scheme hurdle, and the building regulations hurdle, and the finance hurdle, suddenly faces the public land hurdle. 'What, I need yet another consent? My project managers didn't tell me…' Oh dear: the developer's time-line has just suffered a major blow-out.

1 *Martha Cove canal development ($650 million)*

This rather controversial canal-based residential development at Safety Beach, Dromana was ten years in gestation – requiring a planning scheme amendment and an environment effects statement. The planning permit ran for 67 pages, and the 173 agreement needed a shopping trolley to cart it around. But that wasn't the end.

The main canal extends beyond the developer's freehold, above Marine Parade (a VicRoads arterial road), across the beach (freehold owned by Mornington Peninsula Shire) and out into Port Phillip Bay (unreserved Crown land). Three types of public-land status in the course of a hundred metres – and therefore three different leasehold tenure arrangements.

So our developer ended up with a lease from VicRoads under *Road Management Act 2004* (Schedule 5, Clause 9), a lease from the Shire under the *Transfer of Land Act 1958*, and a lease from DELWP under of the *Land Act 1958* (sec 134)… and a delay of almost 12-months.

2 *CBD Office-to-residential conversion ($50+ million)*

Here we had a 24-storey office block being converted to apartments. The developer's architects wanted to add balconies to three facades, projecting into the airspace over the abutting roads.

Planning permit, yes. Building permit, yes. Finance in the bag. But now the developer is on the phone: What's this? No authority to occupy the road reserve? My project manager didn't warn me that the airspace is part of the road reserve… Don't tell me I need yet another consent to occupy it !

Sorry sir. A planning permit can't authorise you to step outside your title boundary. And although the Building Regulations may condone certain projections over roads, they don't (and can't) authorise them.

Where do we turn for authority to occupy airspace over a government road? The answer is a bit obscure: you'll find it in section 138A(11) of the *Land Act 1958*. Which leads us to the Governor in Council *via* the Valuer-General. Yes, this airspace has a dollar value!

And where do we turn if the airspace is over a freehold road? The easier answer is section 173 of the *Planning and Environment Act 1987*, perhaps hybridised with section 121 of the *Road Management Act 2004*. We have doubts about such agreements providing secure tenure – but they seem to be well-accepted. If we want greater security of tenure, then we'd have to think about a road discontinuation at strata, and consolidation of the airspace into the title which it abuts.

3 *Supermarket / residential complex ($110 million)*

Site purchased, titles consolidated; structure plan and planning scheme amendment; planning permit refused, plans amended, planning permit granted; and then no fewer than four trips to VCAT…

In this case it wasn't a building projecting across the title boundary, but certain reticulated services. At an earlier stage the utility in question had been a referral authority, and had offered no objection – but when the time came to dig the trench and connect, they simply refused.

The issue here was the ownership of the right-of-way along which the reticulated services were to be laid. It was still in the name of someone who, as we ascertained, had been alive in 1873. Only he, or his heirs, could sign the Title Office form creating an easement in favour of our utility.

The developer set about getting the right-of-way transferred into Council's name – the alternative being a redesign of the complex so the services took a different route.

It took us several months – but in the end the right of way was transferred into the name of the council, and an easement created in favour of the reluctant utility. Along the way, all the neighbours who had objected to the development at an earlier time were delighted to find they had another opportunity to re-voice their dissent – but the council made it clear that it was not about to revisit matters already dealt with by VCAT.

What's the take-home message here? Check your title boundaries. If your development wanders across them, consult us first! ■

Questions and Answers

Q: What's the difference between a footpath and a roadside?

It's a question which has recently exercised Victorian Courts – even though 'pathway' and 'roadside' are defined terms in the *Road Management Act 2004*. Trouble is, the definitions in the Act are open to interpretation.

Pathway means a footpath, bicycle path *or other area* constructed or developed by a responsible authority for use by members of the public other than with a motor vehicle… 'Or other area?' How much elasticity does this phrase offer?

Roadside means any land that is within the boundaries of a road (other than the shoulders of the road) which is not a roadway or a pathway…

Initially, the case was brought against the Greater Shepparton City Council by a pedestrian (Clarke) who had tripped over a stormwater pit and suffered serious injuries. It involved an area within the boundaries of a road, and which the various parties described as a reserve. Pedestrians traversed it, and it was maintained by Council. So was it a pathway?

Photo courtesy of Michael Beasley

The Supreme Court concluded that it was a pathway, and therefore Council could not rely on the defence offered by section 107 of the Road Management Act – which is available for roadsides.

On appeal, the Supreme Court of Victoria Court of Appeal decided that the area (pictured above) was a roadside, not a footpath – so in that respect the section 107 defence was indeed available. But this finding was of little value to Council: the higher court went on to ratify a separate finding of the lower court – namely that in managing the pit Council was acting as infrastructure authority rather than as road authority, and therefore section 107 did not apply.

So the unfortunate Mr Clarke's pay-out of $360,000 was confirmed. From where we stand, we have every sympathy for him. It's a shame that he had to be the guinea-pig upon whom the Victorian legal system conducted its experiments. ■

Cases referred to…

- Greater Shepparton v Clarke – VSCA, May 2017
- Bass Coast v King – VSC, 1997
- Fenelon v Dove – VSCA, July 2010

Q: Must I get a Land Act licence to use a government road for access to my property?

The questioner owns a property abutting a wide government road reserve. The reserve contains a physical roadway, maintained by the local shire, and some significant stands of native vegetation. Our landowner wants to gain access from his property, across the roadside, to the actual roadway.

Somehow, someone in DELWP has formed the view that he needs a licence under section 138 of the *Land Act 1958*.

Licences are necessary if you want to make use of Crown land for some purpose which would not otherwise be authorised. A government road is a 'public highway' over which any member of the public is permitted by law to come and go – so no licence is required for the purpose of coming and going. This is reinforced by section 9 of the RM Act, which restates an abutting owner's common law right to cross their boundary onto a road.

However, the body of common law in question is silent on the manner by which a member of the public may come and go. There is no presumption that it may involve a motor vehicle. The right to come and go does not imply a right to lay concrete, to chop down trees, or to put in culverts.

So, although our questioner doesn't need a Land Act licence, he may still need a Works on Roads permit (section 63, Road Management Act) and a planning permit, for instance to remove native vegetation.

What if the road had been declared to be an 'unused road' (which would not come under the RM Act) and a grazing licence has been issued to some other landowner? Even then, the road reserve is a public highway, and anybody is entitled to come and go along it. All abutting properties have rights of access – exactly as if it were a road under the RM Act and section 9 of that Act applied. ■

More questions? The answer could be our retainer-based advisory service… Call David on (03) 9534 5128

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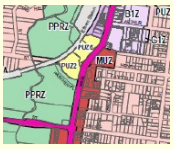

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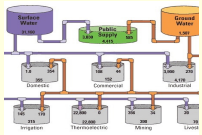

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