TERRA PUBLICA
VOL 14 NO 6 SEPTEMBER 2014

The East-West Divide

Our submission to whichever party wins the State election

In a democracy such as ours, we expect governments' decisions about public land to have *legitimacy*.

The bigger the decision, the more legitimacy it demands: day-to-day public land management requires adherence to properly-adopted laws and standards; prohibiting (or authorising) alpine grazing requires something we call a 'mandate;' the Gunaikurnai settlement in Gippsland has at its foundation the High Court *Mabo* ruling and Acts of both the Commonwealth and State Parliaments.

The East-West link, cutting its swathe through Royal Park, has emerged as the principal differentiating issue in the State election. The Coalition will, Labour won't. The electorate is set to invest one or other of these policies with legitimacy.

Surprisingly, it is open to Premier Napthine to proceed to dig up Royal Park without the blessing of the electorate, and without the parliamentary approvals we normally associate with permanent Crown reserves.

Why is it that Vicroads has to get new site-specific legislation for a 0.1 ha splay corner at Barwon Heads, but Premier Napthine is able to dig a nine-hectare cut-and-cover tunnel through Royal Park – without specific parliamentary approval?

Ironically, the answer lies with the Brumby Labour Government. Tim Pallas, then Minister for Roads and Ports, provided the trench-digger now being operated by Premier Napthine: it's called the *Major Transport Projects Facilitation Act 2009*. Here's an Act which provides for the use (or re-use, or abuse, or even destruction) of permanently reserved Crown land without parliament even hearing about it.

Until 2006, permanent reserves had been virtually untouchable, except with parliamentary approval. Burnley Park in Richmond was severed only after passage of the *Richmond (South-Eastern Freeway) Lands Act 1967*. Yarra Bend Park was bisected only after Parliament had vigorously debated the *Eastern Freeway Act 1971*. Think what you will of those decisions, they had *legitimacy*.

The widening of the M1 saw a departure from such precedents. Along came the *Road Legislation (Projects and Road Safety) Act 2006*. It allowed permanent reserves to be revoked without explicit parliamentary approval, provided they fell within the project area defined by the Act itself.

East-West cuts through Royal Park – Authorised by Executive decree

Finally, Minister Tim Pallas gave us the *Major Transport Projects Facilitation Act 2009*. Here is an Act which allows permanent Crown reserves to be revoked without parliamentary approval, provided they fall within some project area which may be declared – you guessed it – without parliamentary approval. Labour had presented the Coalition with the Royal Park trench-digger.

Splay corner at Barwon Heads – Authorised by its own site-specific Act of Parliament

Meanwhile, the 0.1 ha road-splay at Barwon Heads still needed explicit authorisation by parliament. So did some proposal relating to 0.2 ha at Middle Creek Leneva, and to (we're not making this up) 106 m2 at somewhere called Boorhaman.

Continued, Page 2

Page 2… Follow-Up
Grant Arnold reports on…
- *Our series of 'Local Reserves' workshops,*
- *Some recent work on Bathing Boxes*

Page 3… Q & A
Ask the wrong question, get the wrong answer.
- *How the Titles Office allowed privatisation of a beachside road reserve.*

Page 4
- *Our Public Land Advisory Service for Local Government in Victoria*
- *Our schedule of forthcoming courses and workshops*

The Public Land Consultancy
ABN 69 067 045 520
Principal: David Gabriel-Jones
Email: terrapublica@publicland.com.au

57/151 Fitzroy Street
St Kilda, VIC 3182
phone: (03) 9534 5128

postal: PO Box 225
St Kilda West, VIC 318
mobile: 0412 134 24
www.publicland.com.a

East-West, continued

The 150-year-old system for designating Crown reserves as either permanent or temporary has failed. It fuels an annual abuse of the parliament.

The legislature is called on to authorise utter trivia, while the executive can get away with making massive changes to parkland of state significance. We need a better method of prioritising Crown land.

So here's our submission to the incoming government, whoever it may be. Let's design a new classification system for Crown reserves. Let's distinguish between the more important and the less important reserves. Let's match decision-making processes to that level of importance. In short, let's attempt to restore some level of legitimacy. ■

Grant Arnold reports on a couple of recurrent public land themes

Follow-Up 1
Local Reserves

Over the last couple of months, we've run half-a-dozen workshops exploring an apparent contradiction in recent reports by the Victorian Auditor General's Office (VAGO).

The report into the *Oversight and Accountability of Committees of Management* identified systemic failings with the existing system. It recommended that "*DEPI develop and implement strategies to better identify the most appropriate managers for Crown land reserves, and align reserves accordingly.'*

The No-Thank-You Gift

Terra Publica (Easter 2014) reported on the Auditor-General's reports into management of local-significance Crown reserves

In response, DEPI assured VAGO that it would be *"engaging with and seeking to reassign to local councils reserves with local-level values..."*

But such an approach is at odds with another VAGO report into *Asset Management and Maintenance by Councils*:-

"*Some councils … would prefer not to have the responsibility for managing (gifted) assets, which commonly include buildings and parks and recreational facilities, because they are unable to dispose of them but are obliged to maintain them at a substantial cost."*

As the Municipal Association of Victoria (MAV) noted "*the administration of Crown land assets on behalf of the State Government imposes a heavy burden on rural councils"* and *"Crown owned assets form the major part of rural councils' asset renewal gap*".

Our workshops generated significant interest with more than 60 participants, representing more than half the municipalities in the state.

What we found was:-

- Very few participants were aware of any contact from DEPI with their council on this subject
- there was little appetite, particularly among rural councils, for taking on formal management responsibility for any more Crown land reserves
- many participants indicated that they were more interested in handing back Crown reserves for which council was already Committee of Management..

Other consistent themes to emerge were:

- Allocating local reserves to local government makes good sense – but on-ground outcomes will not improve if councils get mere custody rather than meaningful decision-making powers.
- **The nub of the problem is the dual system of governance for parallel sets of assets: some come under the Crown Land (Reserves) Act, some under the Local Government Act.**
- Councils too are rethinking their community committees, with many moving away from the use of sec 86 Local Government Act to a blend of advisory and incorporated Committees.
- Few participants were aware that there may be Regulations in place for Crown reserves, and the risk exposure if those regulations are at odds with local laws.

Our opinion here at The Public Land Consultancy? We need a system which delivers, rather than delegates, responsibility and accountability at the local government level; a system that promotes efficiencies; a system that eliminates duplication and unnecessary processes.

How could this be achieved? Through a legislative amendment providing for the vesting of 'local-level' Crown land reserves in councils and enabling them to manage that land under the Local Government Act (just as they manage freehold reserves) rather than under the Crown Land (Reserves) Act.

A revised governance system could also deliver financial benefits. Proceeds of the sale of any 'surplus' local-level Crown land reserves would remain with councils rather than disappearing into the Consolidated Fund. After all, the land didn't cost the state government anything and the vast majority of investment in it has come from the local community and the local government. ■

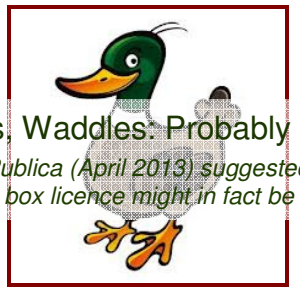
Follow-Up 2
Bathing Boxes

Another recurrent issue that crosses our desk here at The Public Land Consultancy is bathing boxes. Our clients are councils faced with impossible demands:-

- *What is council going to do about the storm damage to my boat-shed?*
- *What are you going to do to protect my bathing box in to the future?*

We know that any works associated with the management of natural coastal processes can be very costly and are often not a long term solution.

Worse still can be self-help remediation taken by individuals acting without authority, and little idea of the effectiveness and consequences of their actions.



Quacks, Waddles: Probably a Duck

Terra Publica (April 2013) suggested that a bathing box licence might in fact be a lease

The Victorian Coastal Strategy 2014 (VCS), released recently with a surprising lack of fanfare, highlights the longer-term threat to coastal infrastructure from erosion. It proposes that: "*Natural coastal processes are adopted as the preferred form of defence against possible impacts of a changing climate".*

A sound position, but of little assistance to Councils when it comes to the questions that bathing box and boatshed users are now asking.

The Strategy does note that the financing of coastal infrastructure may involve both public and private entities. It suggests exploring a range of options to fund protective works and determine in what circumstances they apply.

Maybe it's time to up the ante on fees and rentals. Maybe it's time to adopt special rates (as was suggested in the draft VCS). Maybe the major beneficiaries of protection works, the bathing box and boatshed users, should foot more of the bill.

Historically, the financial return to the community from the private use of these structures has been tokenistic, at best. We hope the Regional Coastal Strategy (RCS) for the Central coast, currently under development, will offer some more specific direction.

The VCS also identifies the need for Regional Coastal Risk Assessments to identify and prioritise coastal hazards management and adaptation responses, including erosion and inundation risks, for key public assets. But are bathing boxes and boatsheds public or private assets?

We understand that DEPI is in the process of reviewing its Draft Bathing Box Policy and associated Guidelines, which interestingly enough, were prepared following a recommendation to do so in the 2008 VCS.

Clarity around the ownership of improvements, the rights and obligations of Councils as landlords and users as tenants, particularly in the context of adaptation responses to erosion threats, are just some of the issues we believe need to be considered and factored into the review.

We would like to think that DEPI will be undertaking some rigorous consultation with the Association of Bayside Municipalities and/or relevant councils in fleshing out the key issues and identifying the best way forward. . ■

Ask the Wrong Question, Get the Wrong Answer.

Has the road been *proclaimed* as a Public Highway? That's the question the Titles Office put to a coastal Council. The answer they got was – No, it hasn't. On that basis they acceded to an encroaching land-owner's adverse possession claim, allowing him to acquire a beach-side road reserve.

The question that should have been asked was: has the road become a public highway *by any means*? The corresponding answer would have been – Yes it has, under the common law. The claim would then have been rejected, and what's effectively foreshore land saved from private appropriation.

There are at least three means by which a road can become a public highway, and thus become immune from adverse possession claims:-

- If the road was created in a post-1988 subdivision, it is automatically a public highway under the Subdivision Act
- A road may be proclaimed as a public highway under section 204 of the Local Government Act
- A road may also become a public highway under the common law doctrine of dedication and acceptance.

Government roads are, of course, both Crown land and public highways, thus doubly protected.

We're assured that these days Land Victoria is asking the right questions (and, we hope, getting the right answers). . ■

Our Program of One-Day Training Courses

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

Environmental Law for Councils as Land Managers *Grant Arnold, Associate*	Wednesday 8 October	Melbourne
Crown Land Law, Policy and Practice *David Gabriel-Jones, Principal*	Wednesday 15 October Tuesday 25 November Friday 5 December	Shepparton Warrnambool Melbourne
Land Law for Managers of Roads, Streets and Lanes *David Gabriel-Jones, Principal*	Monday 20 October Friday 28 November	Bacchus Marsh Melbourne
Managing Volunteers and Grants Programs *Richard O'Byrne, Associate*	Friday 10 October Wednesday 15 October	Horsham Melbourne
Land Law and Coastal Adaptation *Richard O'Byrne, Associate*	Wednesday 22 October	Melbourne
Referral Authorities – Doing it better *Grant Arnold, Associate*	Thursday 23 October	Melbourne
Re-Imagining Urban Public Land *David Gabriel-Jones, Principal*	Tuesday 28 October	Melbourne
Land Law for Managers of Rivers and Lakes *David Gabriel-Jones, Principal*	Thursday 30 October Wednesday 19 November	Melbourne Sale
The Law and Subdivisions *Grant Arnold, Associate*	Tuesday 11 November	Melbourne
Land Law for Service Utilities	Wednesday 12 November	Melbourne
Native Title and Aboriginal Heritage *David Yarrow, Victorian Bar*	Thursday 13 November	Melbourne
Leases and Licences of Public Land *Karen Hayes, Property Coordinator, City of Yarra*	Tuesday 18 November	Melbourne
Easements and Restrictive Covenants	Wednesday 26 November	Melbourne
Risk Management Law *Michael Beasley* Land Information and its Interpretation *Scott Jukes,* Building Law – Strategic Overview *Tom Vasilopoulos*	Dates to be fixed	Melbourne

Our Program of Half-Day Workshops

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

Unused, Little-Used and Discontinued Roads *David Gabriel-Jones, Principal*	Friday 14 Nov	Melbourne
Encroachments onto Council-Controlled Land *David Gabriel-Jones, Principal*	Friday 21 Nov	Melbourne

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

Public Land Advisory Support

A retainer-based advisory Service for Local Government

We can provide…

- A ten minute phone discussion
- A brief exchange of emails
- A more formal written opinion
- A 'Q&A' article in Terra Publica

Our resources…

- Our in-house team of consultants
- A wide circle of lawyers, surveyors, planners, and engineers
- 14 years' experience of providing practical advice to councils, statutory authorities and government agencies across Victoria.

Call David Gabriel-Jones on (03) 9534 5128 to discuss
a retainer arrangement to suit your particular needs.