TERRA PUBLICA
VOL 24 NO 4 WINTER 2024

The Kinder Scout Trespass

Let's explore two contradictory views of public land:

1. You can *do anything* on public land, unless some law *prevents* you.
2. You can *do nothing* on public land, unless some law *permits* you.

In Australia we generally adhere to the first view. Consider for example the objectives of the National Parks Regulations, which are "*to regulate or prohibit certain conduct...*" They are not "*to permit or facilitate certain conduct.*" Here at TPLC we call it the *Presumption of Consent*. So far, so good.

In the UK these alternative regimes were fought over, literally. In April 1932 a bunch of lefty Mancunians* defied the gamekeepers of the landed aristocracy and embarked on a mass trespass across the highlands of Darbyshire. Their arrest and jailing prompted the 'right to roam' movement, and eventually the *Countryside and Rights of Way Act* of 2000. "*Any person is entitled to enter and remain on any access land for the purposes of open-air recreation, if and so long as…*"


Daily Dispatch

MASS TRESPASS ARRESTS ON KINDER SCOUT

FREE FIGHT WITH GAMEKEEPERS ON MOUNTAIN.

RAMBLERS HELD UP BY POLICE CORDON.

AMAZING SCENES IN MOORLAND VILLAGE.

The UK's ramblers (bushwalkers to us) see the CRoW Act as enshrining the *do-anything* regime, but it in fact derives from the underlying *do-nothing* regime: you cannot walk the land unless permitted, and we, the Parliament of Westminster, hereby give you that permission – with conditions.

English law has also bequeathed to us the unadulterated *do-anything* regime, in the form of the *public highway*. You and I and everybody else is entitled to pass here, as of right, without needing consent from the Lord of the Manor. It's not a free-for-all, we must still obey the speed limits and so forth.

This public highway concept has been transposed from English to Victorian law – but there have been serious misunderstandings. In one case the court was told that when a government road is discontinued it ceases to be a public highway (that's true), and that consequently nobody can enter upon that land without DEECA's consent (totally false). A nasty embarrassment for the Prosecutor.

The origins of the do-anything regime take us back to the doctrine of *terra nullius*. In the US they called it *manifest destiny*. We are the invaders, the squatters, the pioneers, and we need no permission to be here.

In Australia, this 'as-of-right' regime has been largely modified through *Mabo*. On certain public land, underlying Traditional Owner rights exist – not courtesy of some parliament, but under basic common law. Both the Commonwealth Native Title Act and the Victorian TOS Act pick up this theme: you cannot use Crown land unless compliant.

There's still a way to go. In Victoria there's talk of retrospective State-wide LUAAs (Land Use Activity Agreements). Do it one way, we stay with regime number one. The other way takes us to number two. Time will tell. ◆

* *Mancunian: native of Manchester.*

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

27/539 St Kilda Road
Melbourne, VIC 3004
phone: (03) 9534 5128

postal: PO Box 2251
St Kilda West, VIC 3182
mobile 0412 134 243
www.publicland.com.au

Reprinted from Terra Publica, November 2009

EMINENT DOMAIN

Strewth, Americans use weird lingo. Incarceration at Guatanamo Bay is known as 'extraordinary rendition;' flat-earth ignorance is 'intelligent design,' and compulsory acquisition is 'eminent domain.'

That's a phrase they use at the contested boundary between private property and public interests. We laid-back Australians laughed at 'The Castle;' but for Americans eminent domain is an ideology-laden battleground.

On this side of the Pacific, it's a debate which is certain to intensify as we seek policy responses to urban consolidation, bushfires and coastal erosion. Acting in the public interest, governments will inevitably become more intrusive in their acquisition of private property rights.

In Victoria, our framework for compulsory acquisition is the *Land Acquisition and Compensation Act 1986*, whose statutory intent is the facilitation of land acquisition 'for public purposes.'

But what is a 'public purpose?' Here we turn to some 60 other Acts – from the *Major Transport Projects Facilitation Act 2009* to the *Westernport (Crib Point Terminal) Act 1963* and even the *Sale Station Relocation and Development Act 1981*. In each case Parliament has, in effect, decided that some project or projects serve a public purpose, and has authorised their managers to invoke the LA&C Act.

Although these projects serve a public purpose, the land does not necessarily end up in public ownership or even in public use. It's the prospect of publicly acquired land ending up in private ownership which has fuelled the U.S. outrage.

In a controversial 2005 case (Kelo v City of New London) the U.S. Supreme Court, by a 5 to 4 majority, allowed a municipality to seize private property in the course of an urban redevelopment. The majority deferred to the legislature's prerogative to determine what justifies the use of eminent domain, and allowed the municipality to implement its 'carefully considered development plan.' The minority fuelled the media shock-jocks by opining: *"today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner…"*

In this and several similar cases, the relevant legislature set itself up for criticism by failing to adopt clean, transparent, competitively neutral processes. In the Kelo case, the principal beneficiary was the pharmaceutical company Pfizer; in Mesa Arizona the beneficiary was an Ace hardware store, and in a more recent case on Manhattan, the beneficiary was the New York Times. One media-naïve city mayor justified eminent domain not on the grounds of improved civic amenity or economic gain but on the grounds of increasing the city tax base. And in the Kelo case, the defenders of eminent domain are left trying to explain why, many years later, the site of Susan Kelo's home is still a weed-infested vacant lot.

Here in Victoria, we know that public policy may justify compulsory acquisition: we have always needed to build railways, or roads, or ports; Premier Dick Hamer initiated the buy-back of penguin habitat on Phillip Island, and Premier Brumby the easement for the north-south pipeline. In each case some people were disadvantaged, but compensated.

The next round of policy development will be far more difficult. Should the state force or merely encourage urban consolidation? Abandonment of indefensible bushfire-prone homes? Retreat from advancing coastal erosion?

Add some closely related questions: is the taxpayer liable to compensate private property owners who have made unwise investments? And is the planning process as we know it capable of directing the public sector's own land-use decisions?

It's a policy quagmire. Don't know what expression they'd use Stateside – but we Aussies would just say: *strewth!* ◆

Q & A

Can there be easements over Crown land?

The law relating to easements focuses on rights over freehold land – rights held either by neighbouring private land, or by service utilities. But are there equivalent rights over Crown land?

Various examples serve to illustrate the scope of the problem…

We certainly find private access tracks traversing Crown land, but there's no coherent system for determining which, if any, should have formal recognition, nor for granting such recognition.

The legal access to a freehold property may be impeded by topography or vegetation, but practical access could be provided through Crown land. In general, landowners should not be encouraged to access across Crown land, but we believe there are circumstances where access should be permitted. In 2006 VCAT considered a case which related to bushfire prone freehold abutting the Gariwerd National Park. Here there was a very strong case for recognising a property's practical access as legal access, but it simply could not be done.

The original Government Surveyors took care to lay out Crown Allotments so that they had legal access to an abutting road reserve, but here and there we find totally landlocked blocks, to which DEECA will, perhaps reluctantly, allow access. This is reflected in section 6(1)(h) of the *Subdivision Act* 1988, which points to the existence of implied 'easements of necessity' over landlocked Crown land, and yet invokes no ongoing recognition of such easements on title.

Road reserves have always served as quasi-easements in favour of service utilities, but this is not always backed up in law. Titles to many pre-1988 freehold roads continue in the name of the original landowner, often long-dead. Although statutory law causes such roads to vest in the relevant municipality, there is no provision for implied easements, resulting in cumbersome processes for the authorisation and protection of utilities' infrastructure.

Section 386 of the *Land Act* 1958, whose origins date from the W*ater Act* 1905, grants easement-like rights over Crown waterways to certain abutting freehold properties. The nature of these rights has never been explored in a modern policy context, and they serve only to thwart sensible waterway management.

Yes, it's yet another aspect of Crown land governance waiting for review. ◆

Q & A

Can neighbours agree on 'Give and Take' fencelines?

Question asked by a CMA officer concerned about riparian vegetation and erosion control.

Answer: Yes and No. If the fenceline in question separates two freehold properties, neighbours may (by mutual agreement) put the dividing fence wherever they please. They'd be well advised to have some written agreement in place (a lease being the most formal option) to prevent an adverse possession claim being made 15 years into the future.

If their freehold-freehold boundary happens to be a watercourse, the *Fences Act* 1968 (section 5) allows neighbours to agree on a give-and-take fenceline without risking adverse possession.

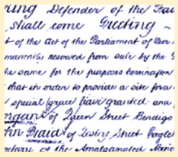
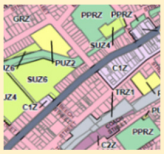
BUT – if the boundary is a freehold-Crown boundary, the situation is rather more complex – even where the freehold owner is also the licensee of the Crown land. The law here recognises cadastral boundaries, regardless of the position of the fence. The Crown land manager has no power to deem that the rights of the public, or the reach of regulations, or the authority of some Committee of Management are extended by the give, or curtailed by the take, of the mutually-agreed fenceline.

As our CMA questioner pointed out, on riparian land we often want to place the fences on practical alignments rather than on cadastral boundaries. Oh dear, yet another case for legislative reform. ■

Professional Development, July-Sept 2024

NOTE: some presentations are 3 sessions, each of 2 hours duration; others are 2 sessions, each of 3 hours duration

	Roads Governance *Presenter: David Gabriel-Jones*	**Tues 16, Wed 17, and Thurs 18 July, 10am to 12 noon**
	Crown Land Governance *Presenter: David Gabriel-Jones*	**Tues 30, Wed 31 July and Thurs 1 August, 10am-to 12noon**
	Leases and Licences of Public Land *Presenter: Richard O'Byrne*	**Tues 6, Wed 7, and Thurs 8 August, 10 am to 12 noon**
	Land Information and its Interpretation *Presenters: David Gabriel-Jones and Robert Steel*	**Tues 13 and Wed 14 August, 10am to 1pm**
	Native Title and Aboriginal Heritage *Presenter: Bridgid Cowling or Henry Dow*	**Tues 10 and Wed 11 Sept, 10am to 1 pm**

			
Working with Owners Corporations	Restrictions on Title	Land Law and Subdivisions	Referral Authorities and the Planning System

Dates to be Advised

Professional Development 'In-House'

We are getting an increasing number of requests to deliver one-day training courses 'in-house'.

Rivers and Riparian Land

Our presenter Jo Slijkerman has presented this one to North-East CMA in Wodonga and East Gippsland CMA in Bairnsdale.

Land Law and Subdivisions

We have presented this course *in-house* for Councils and the Vic Health Building Authority.

Offences and Enforcement on Roads

We recently ran three *in-house* sessions specially tailored for VicRoads

Land Information and its Interpretation.

Earlier this month we ran this course, *in-house,* for 15 professional staff of Major Road Projects Victoria.

Native Title and Aboriginal Heritage

We have run this course *in-house* for several municipalities, CMAs, and DEECA.

Cost: $550 (from 1 July 2024) including GST, course notes and certificate of attendance

Accreditation:
These courses are eligible for CPD points for lawyers, planners, valuers, and FPET for surveyors.

Registrations:
Fiona Sellars
(03) 9534 5128
fiona@publicland.com.au