

The A-List, the B-List, and Yarra Bend Park

\$100 million is not to be sneezed at. That's the sum that Melbourne Ratepayers pay each year through their Parks Charge into something called the Parks and Reserves Trust Account.

The beneficiaries of this fund might be described as the A-List of Melbourne's Parks and Gardens – they include the Royal Botanic Gardens, the Zoo, and the Shrine of Remembrance. But the lion's share of the fund goes to Parks Victoria, and thence to all the metropolitan parks under Parks Victoria's management – with one notable exception.

The B-List of Melbourne parks and gardens are those which must rely on their councils to fund them. As you'd expect, this list includes land of municipal or local significance – but it also includes many parks of metropolitan or even state significance, like the heritage gardens of the City of Melbourne and most of the Port Phillip foreshore.

Then there's the C-List

Then we come to the C-list: parks which have been left to fend for themselves. The single most important entry on this list is Yarra Bend Park – inner Melbourne's largest and most important tract of near-natural public open space.

Yarra Bend's strength is its relatively undeveloped natural character – which remains surprisingly intact despite the golf courses and sports ovals which have been carved out of it. At 260 hectares, with 12km of river frontage, 117 significant flora species and 193 fauna species it out-performs many parks on Melbourne's A-List.

Now here's an irony for you: back in 1933 the Park's unique character prompted legislation establishing its site-specific governance arrangements – and it's those arrangements which now render it ineligible for the funding required to manage its unique character.

The *Kew and Heidelberg Land Act* 1933 set up the Yarra Bend Park Trust, and gave it a very modest revenue stream from abutting municipalities. Over

the years the Trustees augmented this revenue from sources of their own creation, principally the two golf courses. To their eternal credit, they rejected some potentially lucrative income sources, including a caravan park, a four-star hotel and a drive-in theatre, for the simple reason that they would have destroyed the Park.

This is an arrangement untouched by the passage of time: Kew, Heidelberg and Collingwood morphed into Boroondarra, Darebin and Yarra; The MMBW hived off Melbourne Parks and Waterways which morphed into Parks Victoria, and the Metropolitan Improvement Fund morphed into the Parks Charge – but Yarra Bend remained set in 1933. When reform eventually came, it was the wrong reform.



Melbourne's colony of grey-headed flying foxes declined the offer of A-List accommodation – and voted with their wings in favour of Yarra Bend Park

In 1996, at the zenith of enthusiasm for the 'purchaser-provider' model of public sector management, the government of the day required the Trust to dismiss its workforce and engage Parks Victoria instead. This did not provide access to the A-List millions: the Trust continues to derive income essentially from in-park revenue sources, but now pays Parks Victoria to do the on-the-ground work. With golf revenue in decline, and Parks Vic's management fees on the rise, it's an unsustainable formula.

Park or Theme Park?

Many parks and reserves have on-site commercial revenue sources. Of Melbourne's A-list parks, the Zoo is highly commercialised, the Royal Botanic Gardens are not. Achieving the balance is a question of judgement and often controversy. But we're certain of one thing: there's a vast difference between commercial enhancements which complement a park's natural values, and commercial intrusions which merely exploit or even compromise those natural values. Take a wander around Albert Park sometime, and you'll clearly see which are which.

The threat at Yarra Bend is more commercialisation, for the wrong reasons. Build a better golf club-house, by all means, but do it because it will provide services for park users, not because it will balance the books.

Continued...

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21 April
2009

Conference
Public land @ 5 million
MELBOURNE, THE FUTURE, AND PUBLIC LAND

Call for Papers
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The A-List, the B-List continued...

Fortuitously, the Victorian Environment Assessment Council (VEAC) has just been commissioned to conduct the most comprehensive review of public land in the Melbourne metropolitan area for the past 50 years. In accordance with the *Victorian Environment Assessment Council Act 2001*, this investigation will focus on the very values which give Yarra Bend its significance. VEAC is required to consult with the community, to release a discussion paper, and to submit a final report to government by May 2010.

Getting Your Name on the Door

As with VEAC's recent non-metropolitan investigations, this reference will provide a context in which to undertake all sorts of parallel studies and develop new policy. How should the Parks and Reserves Trust Account be allocated? What are the hitherto unwritten criteria for the A-List? Who do you need to know to get your name on the door?

For Yarra Bend Park, VEAC provides the context in which to analyse its place in the hierarchy of Melbourne's parklands, to provide a framework for review of the 20th century's legacy of uses, features and attractions and to establish management objectives relevant to the 21st century.

And who knows where Yarra Bend might head, if liberated from the shackles of self-sufficiency? Remember – it was once known as Yarra Bend National Park. ■

Unused, but not Unusable

We have it on the authority of the County Court: an unused government road licensed to an abutting owner is still a public highway.

That's good news for pony clubs, and recreational fishers, and bushwalkers. It's bad news for graziers with calving cattle, and orchardists with trees in fruit, and purchasers of rural retreats who blithely accepted some Estate Agent's assurance that the back paddock was the subject of an unused road 'lease' rather than a licence.

On 19 December 2008 Mr Justice Anderson handed down his judgement on a long running dispute between neighbours at Yarra Glen. He found that an unused road licence issued by DSE under the *Land Act 1958* can not take away the rights of the public to "pass and repass" over the licensed land.

The plaintiffs (the Fenelons) had argued that the grant of a licence for grazing was incompatible with public usage, and by using the road the defendants (the Doves) were committing a trespass. In response the Doves argued that the statutory provisions causing a road to become an 'unused road' were materially different from those causing a road to be permanently closed or discontinued. Consequently, the road was still a 'public highway,' they had rights to use it, and what's more they had a right to cut the wire fence which the Fenelons had erected across it. The Court agreed.

In expressing this position, the County Court was confirming an earlier VCAT decision in which it was noted that although the Land Act may oblige some landowners to obtain a licence, it does not thereby remove the right of a member of the general public to use the road. As VCAT noted, a licence for grazing does not stop the public using the land for other purposes.

Pony clubs will be happy: they can ride up and down the thousands of unused roads criss-crossing rural Victoria. Farmers will be unhappy: how can they properly manage stock and crops if members of the public are entitled to tramp around within their fencelines?

The County Court decision is far from the end of the matter. Apart from the possibility of appeals, we are left with the crying need for a review of the approach to unused government roads. As *Terra Publica* argued two years ago, this is an issue of policy rather than law:-

It should be recognised that access may be reasonably required along some licensed roads, but not others. At present there is legal uncertainty about whether an unused road is or is not a public highway – but the more pertinent question is who should be permitted access to an unused road, and in what circumstances. The answer to this question will clearly vary from one case to another.

Twenty years earlier, Peter Cabena saw unused roads as a strategic and environmental resource of immense significance. He argued that road reserves should be available for uses other than traffic and grazing – uses such as wildlife corridors, shelter belts, salinity soaks and walking tracks – and to achieve this objective he proposed a completely new statute governing their management and administration. Now, in 2008, the concept of using road reserves for conservation purposes is not novel, but are we any closer to reforming the legislation?

As we see it, there is no longer any excuse: government must now initiate the modernisation of provisions which had their origins in the *Unused Roads and Water Frontages Act of 1903*. ■

References...

- County Court – case CI-0801007 – not yet reported
- VCAT – Nugent v TAC – 31 August 1999
- *Terra Publica* – Vol 6, no 8 – Oct-Nov 2006
- Peter Cabena – *Unused Roads in Victoria* – Department of Conservation Forests & Lands, Dec 1985

Letter to the Editor



Dear Terra Publica

Your article on community involvement (October 2008) seeks to kill off section.86 committees for the management of public land in favour of a "new paradigm".

The biggest criticisms you can make of s.86 committees are that their decisions are merely vicarious, taken on behalf of Council and they do not hold their own insurance, Council does.

Your "new paradigm" would see authorities created from community groups. The process is not described, but would presumably be by election. Yes, it would be a fourth level of government. I cannot imagine the voters of Australia endorsing that proposal.

The comments about community spirit and volunteerism are well made. What the article fails to recognise is the population stability in small country towns is measured in generations, sometimes as many as eight, and "tree changers" are in a tiny minority. That creates country community "ownership" of public land assets that the communities of metro suburbs can match only by individual exceptions, where the rule is frequent transitions of residents.

Our section 86 committees serve us very well in rural councils. But we would not propose to migrate the philosophy to metro Councils which have developed their own land management solutions for their different social environments.

Regards,

Glen Davis
CHIEF EXECUTIVE OFFICER

"Confusing and Inconsistent"

It's not just you and I who have difficulties with the *Road Management Act* 2004. In his judgement on the Fenelon-Dove case (see page 2), Mr Justice Anderson "found the relevant provisions extremely confusing and, in places, inconsistent."

Section 160 of the *Road Management Act* 2004 inserted a new section 3A into the *Land Act* 1958, which says that 'unused roads' do not fall under the *Road Management Act*. But then, in 2005, VicRoads framed the *Road Management (General) Regulations* 2005, which purport to allow the discontinuation of such unused roads, without public consultation.

As Mr Justice Anderson said: "This provision makes little sense if the *Road Management Act* 2004 has no application to unused roads and this, as I have already concluded, is the correct interpretation of the *Land Act*." Resolution of the Fenelon-Dove case did not rely on this point, which is perhaps why His Honour did not go the further logical step of declaring the regulation to be null and void.

It's well accepted that subordinate legislation (such as regulations) cannot contradict its own authorising legislation (*i.e.* the Act under which the regulations are made). As the law-texts put it, a river cannot rise higher than its source. Indeed the *Subordinate Legislation Act* 1994 requires the Office of the Chief Parliamentary Counsel to certify that, for any new regulation, this doesn't happen. In this case, something seems to have gone wrong.

Our gripe, however, is not with the legal anomaly, but with the poor public policy. We believe that except in extraordinary circumstances, public rights to public land should not be curtailed without due process. Yet this is what the *Road Management (General) Regulations* 2005 purport to do. In the Fenelon-Dove case, if the regulations were to stand, then the Doves' court-confirmed rights to use the road could be taken away, without their knowledge or consent, through its arbitrary discontinuation.

Confusing and inconsistent? We reckon it's little short of tyrannical. ■

Readers of Terra Publica should not act on the basis of its contents which are of a general nature, capable of misinterpretation and not applicable in inappropriate cases. They do not, nor are they intended to, constitute legal or specific advice. The Public Land Consultancy is available to provide advice on public land matters and will, on request, arrange legal advice for clients from its associate Maddocks, of 140 William Street, Melbourne.

For Your Diary...

Tuesday 21 April 2009

Public land @ 5 million

MELBOURNE, THE FUTURE, AND PUBLIC LAND

Between now and 2030...

- What values will Melbournians attribute to their public land?
- How can existing road reserves and car parks be harvested?
- Railway land – urban blight or a catalyst for change?
- How should councils use their public land-holdings?
- How will our creeks and foreshores be restored?
- Can we afford 'part-time' public land, like racecourses?
- What will still be free, and what will be commercialised?

To submit a paper or suggest a topic or speaker please email
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Land Law for Managers of Rivers and Riparian Land	26 Feb 09 Warrnambool 21 May 09 Ballarat	21 Oct 08 Bendigo	21 Apr 09 Wangaratta	4 May 09 Traralgon
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