

## Hermaphrodites...

Crown land or freehold land? It seems the authors of the *Transport Integration Act 2010* can't tell the difference.

Section 35 of that Act relates to land purchased 'in fee simple' by the Director of Public Transport. Fee simple: that's freehold land. It's 'clarified' at section 35(4): *to avoid doubt, land acquired in fee simple by the Director on behalf of the Crown is Crown land.* So it's not freehold land, it's Crown land. Then, by way of further clarification, we are told that such land (Crown land, you understand) is under the operation of the *Transfer of Land Act 1958* – in other words, it's freehold land. Get it?

*Look at it this way. A female person has all the characteristics of a woman. But to avoid doubt, the person is a man. But despite being a man, she's still a woman. Ah; got it!*

So if you come across a bit of land purchased by the Director of Public Transport, you might have to do a chromosome test.

## ...and Orphans

VicRoads has discovered that there are roads that nobody wants. Someone has coined the phrase 'orphaned roads.'

Not those roads at the arterial end of the spectrum, on which various authorities lavish their attention, but down at the bottom end – those unkempt disheveled tracks you find heading off into the State Forest or National Park. Nobody wants to confess to their parentage.

If we need chromosome tests to interpret the *Transport Integration Act 2010*, then maybe we need DNA tests to interpret the *Road Management Act 2004*. If it's a road for the purposes of that Act, then it does indeed have a coordinating road authority – even if that authority denies involvement in the road's conception. In the cases described by the VicRoads paper, the parents of these orphans must be either the local council or DSE.

The correct identification of coordinating road authorities does not require a legislative amendment – but in addressing this issue VicRoads has come to recognise the need for a few patches on the *Road Management Act 2004*. Not surprising – the whole

Act was put together in a mere 12 months following the High Court's 'Brady' decision, and not too much attention was given to the bottom-end-of-the-spectrum roads.

The amendments as proposed by VicRoads have some good bits, some bad bits and some missing bits.

**The good bits...** The proposed amendments will consolidate (not change) the definition of 'municipal road.' They will help to kill off some widespread misinterpretations, such as those raised by the Fenelon-Dove debacle. DSE will be obliged to manage unused roads recognizing that their primary long-term purpose is to function as roads, and that any use for other purposes such as grazing is secondary.



Orphans. *Skipping the metaphors for a minute, we recommend supporting Plan International...*

[www.plan.org.au](http://www.plan.org.au)

**The bad bits...** They would allow government road reserves to be discontinued and sold off without any exhibition or consultation. This is surely an unintended consequence of the proposed amendment, one which would not survive the subsequent Regulatory Impact Statement. We would be arguing that road closures not only need exhibition and consultation, but in some cases formal referral to authorities such as the CFA, and judicial review.

**The missing bits...** The VicRoads paper fails to recognize a whole class of orphans – those overgrown rights-of-way being surreptitiously incorporated into abutting backyards, and grubby back alleys hiding away behind the local shops. They also have parents, who may need to be identified if the offspring are going to get any care and attention.

You'll find the VicRoads paper and our detailed response on our website. ♦

*Page 4: Our Training Program, September to December 2011*

## Public Open Space in Subdivisions: a Primer

With the assistance of Andrew Walker of the Victorian Bar, we've just slotted a new section into our one-day training course "Land Law and Subdivisions." For the benefit of students who've already done the course – here's a summary...

- The Victorian Planning Provisions (VPPs) at Clause 52.01 provide that planning schemes may specify the percentage of area to be set aside as POS (or the percentage of dollar value; or a combination).
- There are exemptions for existing residential buildings, utility installations, and two-lot subdivisions unlikely to be further subdivided.
- Sec 18, *Subdivision Act* 1988: If the planning scheme is silent, the percentage is 5%; but Council and the applicant may agree otherwise.
- Sec 20, *Subdivision Act* 1988: Council must use land and monies from this source only for public open space.
- *Maroondah City Council v Fletcher* [VCAT, 2009] - Open space requirement should be consistent with open space policy and clearly based on assessment of need.
- *Stokoe Pty Ltd v Melbourne City Council* [VCAT, 2000] - Contributions should be used to facilitate active and passive recreation needs.
- *Stupak v Hobsons Bay City Council* [VCAT, 2011] - In considering a three lot building subdivision, VCAT found no reason to reduce from 5% to 2%.
- *Peter Herbert and Associates Pty Ltd v City of Stonnington* [AAT, 1996] - Contributions do not need to be for the acquisition of new open space. They may be for capital works or improvements, but not maintenance.
- *Goodison & Associates v Port Phillip City Council* [VCAT, 2008] - Cash contributions may not be collectable after the Certificate of Compliance has been issued.
- If no amount is specified in clause 52.01 the public open space contribution will depend on the factors listed in section 18(1A) of the *Subdivision Act* 1988.
- It appears that if the subdivision is for a community purpose, or achieves a community benefit, then that is a relevant consideration in ascertaining the public open space contribution: see *Paul v City of Melbourne* [AAT, 1984]

Andrew Walker warns... different divisions of the Tribunal have reached different conclusions on similar facts.



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### LAND LAW AND SUBDIVISIONS

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[www.publicland.com.au/professional\\_development](http://www.publicland.com.au/professional_development)

## Why does Argyle Square, Carlton, have such a strange appearance in our GIS?

*Question asked by a planner  
in the City of Melbourne*

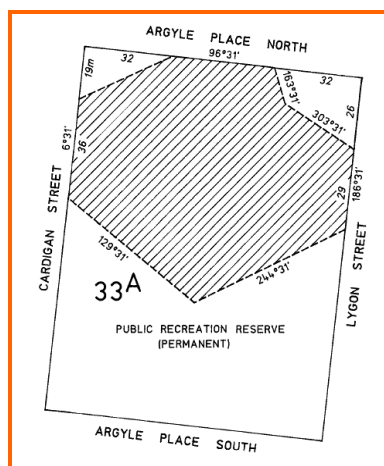
Well, it seemed like a good idea at the time.

That was 1997. More parking was needed in Lygon Street, Carlton. Melbourne University and Equiset had just built an underground car park below University Square, so why not put one below Argyle Square?



Above: Argyle Square, Carlton: lawns, heritage English oaks, fancy paving, but no car park.

Below: Schedule 13 from the Land (Reservation and Other Matters) Act, 1997.



Council did some thinking, some planning, and some lobbying, and Parliament enacted the *Land (Reservation and Other Matters) Act, 1997*. A diamond-shaped swathe of the permanent reserve was un-reserved at stratum, and made available to be leased out for an underground car park.

So why is there no underground car park below Argyle Square? When the City of Melbourne put the development proposal out to tender, there were no bids. The weird shape, the leasehold tenure, the uncertainties of council politics: the market looked at the scheme and said 'no thank you.' The Act remains on the statute books – but it's hard to see anything ever being built. Anyway, the Lygon Street hoonos just want to cruise, not park. ♦

## Do we really need CMA consent to repair a fence on the foreshore?

*Question asked by a Works Manager from  
a bayside municipality*

The bad news – yes you do. The good news, the consent you require has already been given. No need to apply to DSE.

At section 37, the *Coastal Management Act 1995* provides that the use and development of coastal Crown land requires the Minister's consent – meaning the Minister for Environment and Climate Change.

We need firstly to satisfy ourselves that the fence we want to rebuild is in fact on coastal Crown land. To do this requires us to look at the definition in section 3 of the Act, then at the gazetted exemptions from that definition – for instance, the bunch of exemptions gazetted on 30 October 2003.

If, at the end of that exercise, we are confident that the land is indeed coastal Crown land, we can then test our fencing proposal against the blanket consent already granted by Sherryl Garbutt, who was Minister for Environment and Conservation, back on 14 March 2000.

That consent covers (amongst other things) repairs and maintenance of fences, provided there is no increase in length or height, and no realignment of the fence. It also allows emergency or temporary fencing required for public safety.

But if you want to remove or replace an existing fence for reasons other than public safety, then you're going to have to head off to DSE for Coastal Management Act consent. ♦

## LAWYERS: Continuing Professional Development (CPD)

The Public Land Consultancy is very pleased to announce an agreement with the Law Institute of Victoria (LIV) relating to CPD. You can now book into presentations of our courses through the LIV website...

[www.liv.asn.au/Education---Events/whatsOn-Calendar](http://www.liv.asn.au/Education---Events/whatsOn-Calendar)

## Our Training Course Program September to December 2011

<p style="text-align: center;"><b>Native Title and Aboriginal Heritage</b></p> <p style="text-align: center;"><i>Presenter – David Yarrow, Victorian Bar</i></p> <ul style="list-style-type: none"> <li>• Wed 21 Sept      Law Institute of Victoria</li> <li>• Mon 24 Oct      Ararat</li> </ul>	<p style="text-align: center;"><b>Land Law, Rivers and Lakes</b></p> <p style="text-align: center;"><i>Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</i></p> <ul style="list-style-type: none"> <li>• Thurs 20 Oct      Traralgon</li> <li>• Wed 16 Nov      Kerang</li> </ul>
<p style="text-align: center;"><b>Leases and Licences of Public Land</b></p> <p style="text-align: center;"><i>Presenter – Karen Hayes, Property Manager</i></p> <ul style="list-style-type: none"> <li>• Tues 25 Oct      Shire of Surf Coast</li> <li>• Fri 11 Nov      Ararat Rural City Council</li> <li>• Mon 21 Nov      Law Institute of Victoria</li> <li>• Fri 25 Nov      Wangaratta</li> </ul>	<p style="text-align: center;"><b>The Law and Risk Management</b></p> <p style="text-align: center;"><i>Presenter – Michael Beasley, Russell Kennedy</i></p> <ul style="list-style-type: none"> <li>• Wed 12 Oct      Geelong</li> <li>• Wed 17 Oct      Bendigo</li> <li>• Mon 24 Oct      Russell Kennedy</li> <li>• Mon 14 Nov      Wangaratta</li> <li>• Wed 30 Nov      Traralgon</li> </ul>
<p style="text-align: center;"><b>Land Law, Roads and Streets</b></p> <p style="text-align: center;"><i>Presenter – Andrew Walker, Victorian Bar</i></p> <ul style="list-style-type: none"> <li>• Fri 9 Sept      City of Monash</li> <li>• Fri 14 Oct      Law Institute of Victoria</li> <li>• Wed 2 Nov      Law Institute of Victoria</li> <li>• Mon 28 Nov      Traralgon</li> <li>• Thurs 1 Dec      Law Institute of Victoria</li> </ul>	<p style="text-align: center;"><b>Crown Land Law</b></p> <p style="text-align: center;"><i>Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</i></p> <ul style="list-style-type: none"> <li>• Thurs 22 Sept      Law Institute of Victoria</li> <li>• Thurs 24 Nov      Law Institute of Victoria</li> <li>• Thurs 13 Oct      Bendigo</li> <li>• Mon 7 Nov      Wangaratta</li> </ul>
<p style="text-align: center;"><b>Re-Imagining Urban Public Land</b></p> <p style="text-align: center;"><i>Presenter – David Gabriel-Jones</i></p> <ul style="list-style-type: none"> <li>• Tues 25 Oct      Law Institute of Victoria</li> <li>• Thurs 17 Nov      Law Institute of Victoria</li> </ul>	<p style="text-align: center;"><b>Planning Law - a Strategic Overview</b></p> <p style="text-align: center;"><i>Presenter – Andrew Walker, Victorian Bar</i></p> <ul style="list-style-type: none"> <li>• Mon 5 Sept      Gippsland Water</li> <li>• Wed 23 Nov      Geelong</li> <li>• Mon 5 Dec      Law Institute of Victoria</li> </ul>
<p style="text-align: center;"><b>Land Law for Service Utilities</b></p> <p style="text-align: center;"><i>Presenter – Astrid Di Carlo, Russell Kennedy</i></p> <ul style="list-style-type: none"> <li>• Wed 21 Sept      Gippsland Water</li> <li>• Tues 11 Oct      Russell Kennedy</li> <li>• Thurs 24 Nov      Russell Kennedy</li> </ul>	<p style="text-align: center;"><b>Coastal Land Law</b></p> <p style="text-align: center;">Fri 8 April <i>Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</i></p> <ul style="list-style-type: none"> <li>• Mon 5 Sept      City of Bayside</li> <li>• Mon 19 Sept      Law Institute of Victoria</li> <li>• Mon 10 Oct      Warrnambool</li> </ul>
<p style="text-align: center;"><b>Environmental Law: Vegetation and the Law</b></p> <p style="text-align: center;"><i>Presenter – Brendan Sydes, Principal Solicitor, EDO</i></p> <ul style="list-style-type: none"> <li>• Wed 19 Oct      LIV (Environment)</li> <li>• Fri 25 Nov      LIV (Vegetation)</li> </ul>	<p style="text-align: center;"><b>The Law and Subdivisions</b></p> <p style="text-align: center;"><i>Presenter, Dr David Mitchell, RMIT</i></p> <ul style="list-style-type: none"> <li>• 7 Oct      City of Wyndham</li> <li>• Wed 23 Nov      Gippsland Water</li> <li>• Fri 2 Dec      Law Institute of Victoria</li> </ul>
<p><b>Enquiries and Registrations:</b> Lesley Simons – <a href="mailto:lesley@publicland.com.au">lesley@publicland.com.au</a> – phone 9534 5128</p> <p><b>Cost:</b> \$495 including GST, course notes, working lunch. Discounts for course hosts.</p> <p><b>All Courses are one-day duration; 9:00 a.m. to 4:30 p.m.</b></p>	

For details of all these courses:  
[www.publicland.com.au/professional\\_development](http://www.publicland.com.au/professional_development)