TERRA PUBLICA

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Public Land… the *Fun* Side

Yes, it can get pretty boring. Reading legislation, analysing court judgements, interpreting the cadastre. That's how it is here at The Public Land Consultancy.

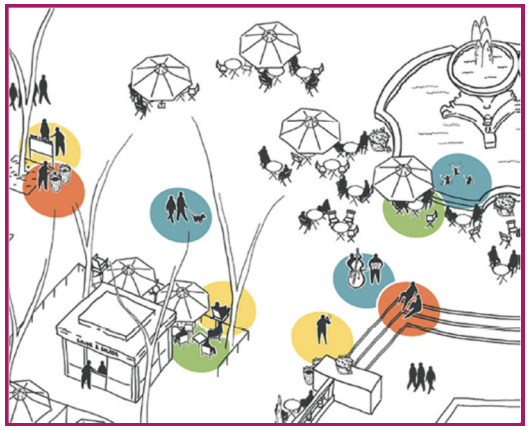
On the other side of the picture we find something called co-design – represented in Victoria by the Co-Design Studio. Operating out of Fitzroy, they describe themselves as 'a place-making and design consultancy that shapes neighbourhoods that thrive.'

A co-design workshop, Brunel University, London

Co-design's vocabulary includes 'place activation' and 'tactical urbanism.' Their tool-kit includes human interaction, community empowerment, and even guerrilla installations. Their results can be seen (and enjoyed) across the inner suburbs.

Workshops at Co-Design Studio are not like our training courses. Jump up, stomp your feet. High-five your neighbour. Take votes. Form groups for some role-play. We might even stack up some milk crates. This isn't work, this is fun!

At one point our two approaches converge. TPLC and the Co-Design Studio are both linked to the US based Project for Public Spaces. In the PPS tool-kit we find 'The Power of 10' – theconcept that places thrive when users have ten or more reasons to be there. Cities thrive when they contain ten or more such destinations. Yes, we can relate to that idea!



The Power of 10… Project for Public Places, New York

From their New York perspective, PPS observes and helps shape high profile public spaces across six continents. Vice President Ethan Kent (an inheritor of the legacy of Jane Jacobs) is in Melbourne right now, espousing place-led urbanisation, and delighting in our laneways, our café culture, and our tram network.

But then we remember: in our system the street-party needs the formal street closure; the skate-park needs the planning permit; footpath trading needs the local law; and the community plaza must comply with half a dozen State and Federal Acts.

So back to the boring stuff! The legislation, the court judgements, and the cadastral plans. Boredom: the fun stuff depends on it. ■

The Public Land Consultancy is looking for new Associates.

Are you a professional with a background in public land law, planning or management?

Are you interested in joining us? Let us know what skills you would bring to our team…

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Ownership

Who owns this land? Who owns the things on this land?

These are questions we've been pondering in the course of some recent consultancies.

Crown Land

Let's start with Crown land. Before Mabo it was owned by 'the Crown' – an entity which we explored in last month's Terra Publica. This all changed with the 1992 High Court decision and the subsequent *Native Title Act 1993* (Commonwealth). Many parcels of Crown land are now subject to two owners – the Crown and the relevant Native Title holder.

Freehold Land

But who owns freehold land? One document which you'd think might hold the answer is the title. If it's registered under the 'Torrens' system, then we can rely on 'indefeasibility' – or can we? Indefeasibility is the proposition that if your name is recorded on the title, that's incontrovertible proof of ownership. So says section 42(1) of the *Transfer of Land Act 1958* (the TLA).

There's no doubt that, for various reasons, Torrens Title is superior to the pre-Torrens system, known variously as 'general law,' 'old law,' or 'NUA' – meaning 'Not Under Act' (the Act in question being the TLA). Accordingly, any general law land remaining in Victoria is being converted, piece by piece, into the Torrens system.

But does a Torrens title really guarantee ownership? Unfortunately, indefeasibility is subject to exceptions – some of which are set out in section 42(2) of the TLA. These include fraud, adverse possession, easements and rights of way, any interest of a tenant in possession, and unpaid rates and land taxes. Some of these exceptions will be documented or visible, others may require legal analysis, cadastral survey, or forensic investigation.

Then there's the 'Calabro' exception. In 1999 Mr Calabro purchased some Torrens title land from Mr and Mrs Wintle, and the transfer was duly recorded at the Titles Office. Subsequently, the Supreme Court found that the land had earlier become a 'public highway' at common law – and therefore vested in fee simple in the local council pursuant to the Local Government Act (LGA). The relevant LGA provision post-dated the indefeasibility provision of the TLA, and therefore indefeasibility was thrown out of the window. The local municipality had become beneficial owner of the land without any recording being made on title, and without the municipality's knowledge. Pithily, the Judge offered the opinion *"I do not wish to suggest that this is a satisfactory situation."*

Fixtures and Chattels

And what about things on the land? Buildings, roadways, trees? The starting point here is the common law 'doctrine of fixtures.' If you own the land, you own whatever is affixed to it – unless otherwise determined by agreement between the parties, or by statute. But what is affixed to the land (a fixture) and what's not (a chattel)?

The chandelier at St Kilda's Palais Theatre had been affixed to the ceiling for 80 years by a chain, lifting tackle and electrical wiring. The Crown as landlord argued that it was a fixture, the tenant argued that it was a chattel. VCAT considered ownership prior to annexation, the nature of the annexation, and the intention of the annexation – and concluded that it was indeed a chattel.

Tenants' Improvements

But the more common case for public sector landlords involves the tenant who faces the end of their lease: the sporting club whose members built the pavilion, the restaurateur who paid for the new kitchen, the historical society which restored the old court house. Here we could be talking about either Crown land or freehold land. The improvements in question are surely affixed; removing them from the site is out of the question.

It's a dilemma for the landlord: any new lease should be awarded by an open process, perhaps by tender, but the prospect of dispossessing the outgoing tenant of 'their' improvements will be alarming. In these circumstances, is the landlord compelled to roll over the lease? We can think of a few strategies to employ here, including one not yet widely recognised in Victoria – the recognition of 'tenant's residual interest.' More on that some other time! ■

Calabro v Bayside, VSC (1999)
Victoria v Tymbook, VCAT (2008)

Certificates in Public Land Governance

We are very pleased to see a few more students being awarded their certificates.

To join them, you need to attend three of our training courses and write a 3000 word essay on an approved public land topic.

For details contact
dorothy@publicland.com.au

Q & A

Can a Council be forced to manage Crown land?

Question asked by a Council officer, considering options for managing Crown reserves.

"We have been told we can't resign. Unless DELWP agrees to take the management of the land back, Council must remain as the Committee of Management."

Section 14 of the *Crown Land (Reserves) Act 1978* provides for the Minister to appoint various types of Committee of Management for Crown reserves, including municipal councils.

The Act is silent on whether the council in question must agree to accept such an appointment, but no other interpretation can be entertained.

There is nothing in the Act to suggest that a Minister could compel a council to become a CoM against its wishes. The *Local Government Act 1989* supports councils taking on such functions, but there's no suggestion that it might be a duty or an obligation.

This is supported by section 41 of the *Interpretation of Legislation Act 1984*, which very clearly provides that, in general, an appointment made under an Act "*ceases to have effect if the appointee resigns in writing delivered to the appointer.*"

Nevertheless, we would counsel against getting into a legalistic dispute with DELWP. Handing the reserves back could result, at worst, in them not being managed at all. If they serve some community purpose, then Council has a few options for ensuring their ongoing management, options which can surely be worked through in collaboration with the community, and with DELWP. ■

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June to August 2018

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Tues 5 June – Melbourne
(venue: Russell Kennedy)

Environmental Law
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Tues 12 June – Melbourne
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Roads Governance

Wed 27 June – Ararat

Thurs 16 August – Melbourne
(venue: Law Institute of Victoria)

The Law relating to
Works on Roads

Tues 17 July – Melbourne
(venue: Russell Kennedy)

Land Information
and its interpretation

Wed 18 July – Melbourne
(venue: Law Institute of Victoria)

The Law relating to
Subdivisions

Wed 25 July – Melbourne
(venue: Law Institute of Victoria)

Crown Land
Law, Policy and Practice

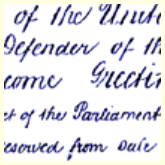
Tues 31 July – Bendigo

Thurs 23 August – Melbourne
(venue: Law Institute of Victoria)

Native Title
and Aboriginal Heritage

Thurs 31 May - Mildura

Fri 3 August – Melbourne
(venue: Law Institute of Victoria)



Restrictions
on Title

Fri 24 August – Melbourne
(venue: Russell Kennedy)

Leases and Licences
of Public Land

Fri 31 August – Melbourne
(venue: Law Institute of Victoria)

Roads Governance
for Surveyors

Tues 4 Sept – Melbourne
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Risk Management
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Date and venue
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Cost $550 per person
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Enrolments and Enquiries – Jacqui Talbot –
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For details of all these courses go to http://www.publicland.com.au/professional-development