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Public Land
the view from the right

Back in 1968, when economist Garrett Hardin described the tensions between private greed and the public good, he took as his metaphor the English village.

The destruction of the village common was inevitable, he argued, because individual herders, each motivated by self-interest, would overgraze it – even at the expense of its utility as a long-term shared resource. He entitled his paper '*The Tragedy of the Commons*.'

In one sense it was an apt metaphor, because many present-day policy debates are centred on public land (like Senator David Leyonhjelm's attack on National parks – see page 2).

But Hardin's essay presents only a partial picture of the traditional village.

The marketplace, the churchyard, the mechanics' institute and the bandstand in the town square all operate quite differently from Hardin's village common. Here the public interest in its manifold forms is protected by cultural, social and legal institutions – embodied in the personages of the mayor, the churchwarden, and the village constable. When tested against these public lands, Hardin's analysis would give us a different economic theory: '*The Triumph of the Village Green*.'

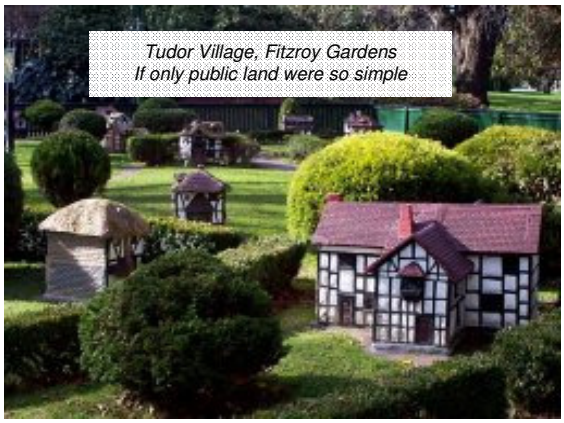
Nevertheless, his 'tragedy' analysis has been twisted by modern conservative economists to deride the very idea of public ownership. Citing Hardin, the right-wing Cato Institute has even argued that wildlife would be better protected if it were privately owned.

In the light of such distortions many commentators, including Hardin himself, later restated the original proposition as the tragedy of the *unmanaged*, or *unregulated* commons. It is only unrestrained private greed which will destroy the commons – or the economy, or the planet.

John Batman foresaw a 'village' on the banks of the Yarra, and surveyors like Robert Hoddle laid out 'parishes' and 'counties' which survive within the cadastre to this day. But Batman and Hoddle and Charles LaTrobe were not setting out to create some antipodean Devon or Yorkshire; in their various separate ways they were revolutionaries.

For them the plains and river valleys of Victoria were a blank canvas; and without a landed aristocracy (plus the convenient fiction of *Terra Nullius*) so were the statute book and the executive institutions.

Acting in the public interest, they re-invented public land: our foreshores are all in public ownership (well, nearly all); our roads and rivers disregard the *ad medium filae* rule which in Europe attributes proprietary rights to abutting landowners; and our parks and gardens are not the enclosed demesne of some Lord of the Manor. Melbourne might have been village-sized, but it was not transposing English law onto the village's public lands.



Tudor Village, Fitzroy Gardens
If only public land were so simple

As Melbourne becomes less village-like, the very nature of the public interest becomes far more complex. In place of a few score commoners with uniform values, a metropolis displays layers of value-systems, often contradictory: neighbourhood or micro-public interests vying for recognition alongside metropolitan or macro-public interests.

Turning back to Hardin's parable, we now have lobby groups purporting to defend the village common for the greater public good but in fact, like Hardin's individual herders, motivated by simple self-interest. Sure, they have a place in a democracy – but let's not imagine they are instruments of progress.

As Melbourne heads towards five million, we can expect the age-old tensions between private self-interest and the public good to persist. We constantly need to rebalance private and public interests – as so painfully demonstrated by the global financial crisis and climate change.

Public land governance will not be immune – its institutions, systems, legislation, and economy must come under continual analysis, review, and reform – otherwise, we might as well be dancing around the village maypole. ■

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Public Land
the view from the half-right

Too many National Parks! So writes libertarian Senator David Leyonhjelm (Financial Review, 14 Nov 2014).

Funny thing with these accidental balance-of-power senators – they are often half-right.

Leyonhjelm bemoans the "*dreadful environmental consequences that have arisen from the huge growth in area of protected public land"* which he sees as plagued with *"feral animals, weeds, rubbish, bushfires or vandalism*." According to him, there are "*whole mountain-sides covered by mats of impenetrable weeds"* and undergrowth *"sufficient to fuel massive bushfires…"*

This catastrophe, according to the good Senator, has three causes: (a) too many parks, (b) too little money, and (c) too much bureaucracy. He seems to be realistic enough not to call for the abolition of parks, and there's no way he's going to advocate more funding – so that leaves attacking the bureaucracy.

He wants governments to augment (or even replace) Parks Victoria with "*hunters, fishers, campers, fossickers, trail-bikers, horse-riders, kayakers, 4-wheel drivers and bushwalkers*" prepared to put in time and effort on a voluntary basis.

A predictable position for a libertarian (check them out on Wikipedia) who came out of the Shooters Party, and whose NSW power base is known as the Outdoor Recreation Party.

Yes there is bureaucracy in National Parks. The *National Parks (Park) Regulations 2013*, for instance contain 130 clauses (up from 69 in the 2003 regs) and run for 79 pages (up from 65). But remember, they were put through a rigorous RIS (Regulatory Impact Statement) process into which anybody could make a submission – including trail-bikers, hunters, fishers, and even Senators.

Is there a role for volunteers in Parks? Our authority on this subject is Richard O'Byrne, who tell us…

> *In fact Parks Victoria has, and continues to engage the Sporting Shooters to control pest animals, and 4WD clubs do great volunteer work on 4WD tracks. It's all there on the PV website.*
>
> *Unfortunately, there are not enough volunteers, and their activities tend to be in marginal activities which don't impact significantly on the $s required to run a state-wide parks organisation.*

So, somewhat grudgingly, we have to agree that the Senator is more than half-right on one point:-

> *"While salving the electorate's environmental conscience with new parks, governments have failed to provide the funds to manage them."* ■

Q & A
Who manages the boundary road?

Question asked in relation to two municipalities separated by a road.

Judge Geoffrey Chettle of the County Court knows a thing or two about parking. This year, he imposed a 3-year jail sentence on a parking meter coin-collector who had stolen $140,000 from the City of Melbourne.

But back in 2009, Chettle J found himself on the wrong side of a courtroom – charged with failing to pay a $55 parking fine imposed by the same City of Melbourne. Fortunately for him, his defence was successful: the prosecution could not demonstrate that the alleged offence had occurred within the council boundaries.

The trouble-spot was Park Street, Brunswick. To the south is the City of Melbourne; to the north the City of Moreland. When parking officer Bernard Gilmour indicated the location of the boundary by reference to Google Maps, the officiating Judicial Registrar was unimpressed. She found Google maps 'relatively useful,' but not official documents. The charge against Judge Chettle was dismissed.

The Judicial Registrar's view of Google Maps is reminiscent of the Supreme Court's view of the Melway street directory, expressed in the Calabro case: *"It is no criticism of the usefulness of that publication to say that no statutory or other provision was drawn to (the Court's) attention which would give it the force of law.*"

What surprises us is that neither parking officer Gilmour, nor Judge Chettle, nor the Registrar herself sought to throw light on the issue by reference to the *Local Government Act 1989*…

> *3(3) If the boundary of a municipal district is described by reference to a road, proposed road, railway line, former railway line or waterway (other than a waterway that forms part of the sea coast), that boundary is to be taken to be constituted by a line along the centre for the time being of the road… .*

Perhaps there's an argument for reciprocal parking permits on roads forming municipal boundaries. There's certainly a case for supporting unfortunate parking officers called on to represent their council in a court of law.

Last time we addressed this question, it was about coastal boundaries: how far does our Council's jurisdiction extended off-shore? You'll find our answer in *Terra Publica*, March-April 2009. ■

Q & A

Can we book cars parked on the beach?

Question asked by enforcement officers from a bayside council.

We're sure it seemed like a good idea at the time, the *Land Conservation (Vehicle Control) Act* 1972. Premier Dick Hamer was responding to a passing fashion for hooning up and down sand dunes in Mini-Mokes and Beach Buggies.

Together with the *Land Conservation (Vehicle Control) Regulations* 2013, this Act makes it an offence to allow a vehicle to be on Crown land other than a road or parking area. Penalty: 5 penalty units (that's about $700).

Can you issue tickets to offenders? No you can't.

Most bayside beaches are Crown land, so they come under this particular Act. The impediment: a little thing called 'the onus of proof.'

By and large we subscribe to the presumption of 'innocent until proven guilty.' There are very few exceptions to this presumption – parking offences being amongst them. Normal parking offences, that is, under the *Road Safety Act* 1986. That Act sets up a system of 'operator onus' which reverses the onus of proof: if you own the offending vehicle, you're deemed to be guilty until you dob in the real offender.

It's the same with 'aggravated littering' under the *Environment Protection Act* 1970: the vehicle's owner is deemed to be guilty of the offence, unless he or she grasses up the actual offender.

So, with normal parking offences, the end result is that we can identify our offender through their number plate. This vehicle is registered to X, so we prosecute X without needing any evidence that it was X who parked illegally. So we stick a parking ticket on their windscreen.

It's not like that with the *Land Conservation (Vehicle Control) Act* 1972. This Act contains no 'reversal of onus' provision. Our Enforcement Officer must identify the offender through means other than their number plate. And there's no provision for Penalty Infringement Notices (PINs) so any prosecution would have to be brought through summons to the Magistrates' Court.

So the answer is - Yes, but with great difficulty! ■

Q & A

Can we allow cars to park on a nature strip?

Question asked by governance staff from an inner Melbourne Council.

The answer is 'yes' – but to arrive at that answer we need to haul in a lengthy chain of inter-connected law, link by link.

Council's powers in relation to traffic stem from section 207 of the *Local Government Act* 1989, which authorises the matters listed in Schedule 11 subject to the requirements of the *Road Safety Act* 1986. Schedule 11 Clause 1 provides for powers over parking on a 'highway' which term in this context includes nature strips.

The *Road Safety Act* 1986 is the head of power for the *Road Safety Road Rules* 2009 (the Road Rules) and for the *Road Safety (Traffic Management) Regulations* 2009. Rule 197 of the Road Rules makes parking on nature strips an offence – unless authorised by signage.

So who can put up that signage?

Under clause 10 of the *Road Safety (Traffic Management) Regulations* 2009 Council may erect traffic control devices (TCDs) – which include parking signs. 'Major traffic control devices' require the consent of VicRoads; 'minor traffic control devices' do not require the consent of VicRoads.

So what's major and what's minor?

Schedule 1 of the *Road Safety (Traffic Management) Regulations* 2009 provide (Item 37) that major TCDs include signs permitting parking at a place where it would otherwise be prohibited.

For a major TCD VicRoads grants the necessary authority either by delegation or by Memorandum of Authorisation. Now we turn to the VicRoads *Traffic Engineering Manual, Volume 1*, Chapter 2. It lists (Table 2.1) the various major TCDs which have been delegated to municipal councils.

Item 37 in table 2.1 relates to parking signs where parking would be otherwise prohibited. For the circumstances where VicRoads delegates this power, we are referred on to Chapter 9 of the *Traffic Engineering Manual, Volume 1*. Chapter 9 (table 9.1) lists several types of parking which would normally be unauthorized, but the list does not include parking on nature strips. It must therefore be assumed that the power has not been delegated, and must be specifically authorized by VicRoads. ■

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