

Quacks, Waddles: Probably a Duck

“A Portsea bathing box set a record \$585,000 when five bidders fought for the property at auction.”¹

Fought for the property? What property?

The Real Estate Company which conducted the auction was not able to produce a title, because bathing boxes have no title. Nor was there any section 32 statement giving details of the land being sold, because there wasn't any land being sold.

Presumably there was some form of contract, but goodness knows what it looked like – certainly not like anything prescribed in the *Estate Agents (Contracts) Regulations 2008*.

So why such vigorous bidding? What was actually being bought and sold? Answer: the expectation of long-term, exclusive possession; the expectation of holding on-saleable rights.



Lockable, Assignable: Probably a Lease

That brings us to the difference between leases and licences. According to the High Court² a tenure is 'beyond doubt' a lease if 'the right which is conferred is a right of exclusive possession of the property...' Otherwise, it's a licence. (But then, according to the

very same judgment, there are 'exceptional cases.' There you go: if you want to distinguish a duck from a pigeon, don't ask a lawyer.)

The distinction between leases and licences is not a matter of semantics (nor indeed of ornithology) but a question upon which significant sums of money may turn. Some of the cases on the law-books stem from disputes over stamp duty, some from disputes over rent determinations.

Seems to us there's another dispute looming – fuelled by the mega-dollars tied up in 1800 bathing boxes on Victoria's foreshores.

The documents authorising use of the foreshore for these 1800 bathing boxes and boatsheds will invariably be headed up 'licence' – but are they really leases? Numerous court judgments suggest that they may be.

Any bathing box involves exclusive occupation – indisputable evidence of which is the tenant's lock on the door. But the most compelling argument for them being regarded as leases is the fact that they're 'bought' and 'sold' on the market. Buyers and sellers have been allowed to act as if there is a legal interest in the 'property' (as indeed there would be if it were a lease) and foreshore managers over the decades have condoned their inference.

A parallel situation arises where roads are created by 'implied dedication.' If a landowner acts as if land has been dedicated to the public as a road, then the law may find such land to be a 'public highway' vesting in the local municipality, despite the absence of any express grant to that effect.

A contrary argument might be built around the indemnity of the Crown – a centuries-old privilege, but one which contemporary governments find increasingly difficult to justify.

So if some court found our licenses to be leases, what then? Now that coastal adaptation is being accelerated by climate change, the consequences could be immense. A lease (unlike a licence) cannot be arbitrarily terminated by the landlord. In Victoria, resumption of a lease without tenant's consent would require compulsory acquisition under the *Land Acquisition and Compensation Act 1986*, at valuation.

However, as we so often observe here at Terra Publica, the law should be driven by policy, not vice versa. What direction should policy take?

The hard-line policy: dispossession. Why should these lucky few continue their privatisation of a public asset? If they foolishly valued an ephemeral licence as a secure lease, why should the taxpayer bail them out? *Caveat emptor!*

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Crown Land 'Titles'**

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**The Departmental
Restructures**

Quacks, Waddles ...

The more sympathetic policy: acknowledgment of equity (we might call this the Tasmanian policy³). Some responsibility falls on those land managers who have failed to scotch the fiction of secure tenure, and allowed the market to commit mega-bucks on the basis of that fiction. There's something here for everybody: the 'owner' gets an appropriate form of title, and the land manager picks up a rental reflecting the true value of the land.

We're open to persuasion, but inclined to the latter view. The starting point for any policy has to be the real world, the here-and-now. Let's admit that the bird is, in fact, a duck. ■

1 <http://www.propertyobserver.com.au> – 18 Jan 2013

2 *Radaich v Smith*, High Court of Australia, 1959

3 *Crown Lands (Shack Sites) Act* (Tasmania) 1997

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'Practical Local Action'

By Richard O'Byrne

Steiglitz is a quiet hamlet 40km out of Geelong, on the way to Ballarat. It was once a bustling gold mining township, but those days are long gone.

The township has some delightful buildings from the era, some on freehold land, and some contained in the Steiglitz Historic Park, listed on Schedule 3 of the National Parks Act 1975.

Back to Steiglitz Incorporated is a small but resilient community group which has been supporting and promoting the heritage of Steiglitz for over twenty years. The group's current focus is the former Steiglitz Schoolhouse No 1487.

This sound but dilapidated timber building now sits forlornly in bushland, almost a kilometer outside the township, where it is of no use to anyone. It has been vandalized and is at risk of destruction by wildfire.

Back to Steiglitz would like to pick up the schoolhouse from its current Crown land site and relocate it on vacant Crown land in the township, for use as an interpretation and community centre. They face a few obstacles, starting with the Burra Charter.

The bible of heritage conservation, *the Australia ICOMOS Charter for Places of Cultural Significance* (1999), more commonly known as the Burra Charter, advocates preservation of heritage buildings *in-situ*. Fortunately, there's a let-out clause – the Charter endorses moving a building if it is the sole practical means of ensuring its survival.



Chris Kempers, Back to Steiglitz

Further good news for Back to Steiglitz Inc is Minister Ryan Smith's 'Environmental Partnerships,' which sets out a 'pathway for action' for managing the state's parks, forests and other public land for the benefit of the community. Here we find a commendable commitment to 'support practical local action.' The DEPI website expands on this theme:-

"Local communities can be involved in aspects of historic place management... places benefit from the sense of custodianship developed locally. Solutions for the re-use and viability of redundant public buildings may be found in community ownership or direct involvement in their maintenance and use."

Yes, there is a preference for in-situ restoration, but we believe that after seventeen years of deterioration on its current site, it's now time to let Back to Steiglitz Inc get on with the 'practical local action' of relocating their schoolhouse, and settling down to the hard work of restoration and preservation. ■

Land Law and Coastal Adaptation

Presenter
Richard O'Byrne

Climate change adds a further reason for coastal managers to understand the complex body of law applying to foreshores and off-shore waters.

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Presenter
Karen Hayes

On Crown land and other public land, landlord-tenant relationships can involve complexities unknown on private freehold land...

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Presenter
Richard O'Byrne

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Q&A

How do I find title documents for Crown land?

Question asked by a municipal building surveyor at one of our recent courses

Not sure that we'd use the word 'title' in relation to Crown land, but nevertheless we know what the questioner means...

First, you have to ascertain the Crown description. This will take the form of Crown Allotment, Section, Parish or Township. The current Steiglitz school site (see page 2) is Crown Allotment 70D, no section, Parish of Durridwarrah. So how do you find this information? Here's how we do it:-

Start by going to [Explore Victoria Online](#).

On the interactive map of Victoria, zoom into the location that interests you. It may help navigation if you go into the 'Layers' menu, then into the 'Topographic' folder and turn on the 'roads' and 'watercourses' layers.

Once you're in the right general area, turn on a couple more layers:-

In the 'Land Status and Boundaries' folder turn on 'Property Parcel Description' and 'Crown Land.' In the sub-folder 'Admin Boundaries' turn on 'Parishes.'

Note – some layers only work at a relatively small scale. If they don't turn on, just zoom in a bit closer.

Now you'll see various data including CA numbers, Section and Parish or Township. If you can't figure out which data is which, turn individual layers off and on again and see which items disappear and reappear.

Now that you know the Crown description, go to [Landata](#) and choose 'Crown Land Search.' At this point you need to create an account, or sign in if you have one already.

On the first drop-down list, choose 'Crown Allotment,' then on the second drop-down list choose the relevant Parish or Township, and enter the CA number and Section that you found earlier. (Have fun reading the list of parish names: some of them are incredible.)

The system will list all the documents held relating to that CA. Select 'Crown Land Status Report.'

This is where it starts to cost you money. To get the status report for the Steiglitz school site cost us \$15.80. It was emailed to our nominated email address within a few seconds – although we have known it to take several hours. Here is an extract from of the report...

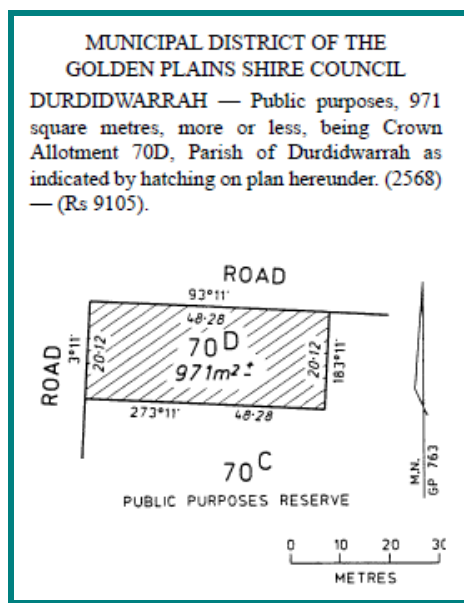
Status: 1 of 1

Currency: CURRENT
Parcel Status: Crown land (reserved)
Reserve Purpose: PUBLIC PURPOSES
Reserve Type: Temporary
Park:

Related instruments

Gazette	Year: 2001	Page: 461	Number: G11
Act	Year:		Number:
Special	Date:	Page:	Number:
Gazette			
Order in Council	Date: 14-MAR-2001		

In this case, we see a reference to the relevant Government Gazette (Gazette Year: 2001 Page: 461, Number G11), but no scanned image. So, to complete the picture of our Crown land parcel we need to go to [Government Gazette](#), choose 'gazettes' then 'gazette archives' then in 'Look at gazettes for ...' choose 2001. For pre-1998 gazettes, you're redirected to the State Library of Victoria archive, which is reasonably user-friendly.



Finally we have Gazette G11 of 15 March 2001, we turn to page 461 (which must be read in conjunction with page 460) and we find the Order in Council reserving the CA for 'public purposes.'

Land Information and its Interpretation

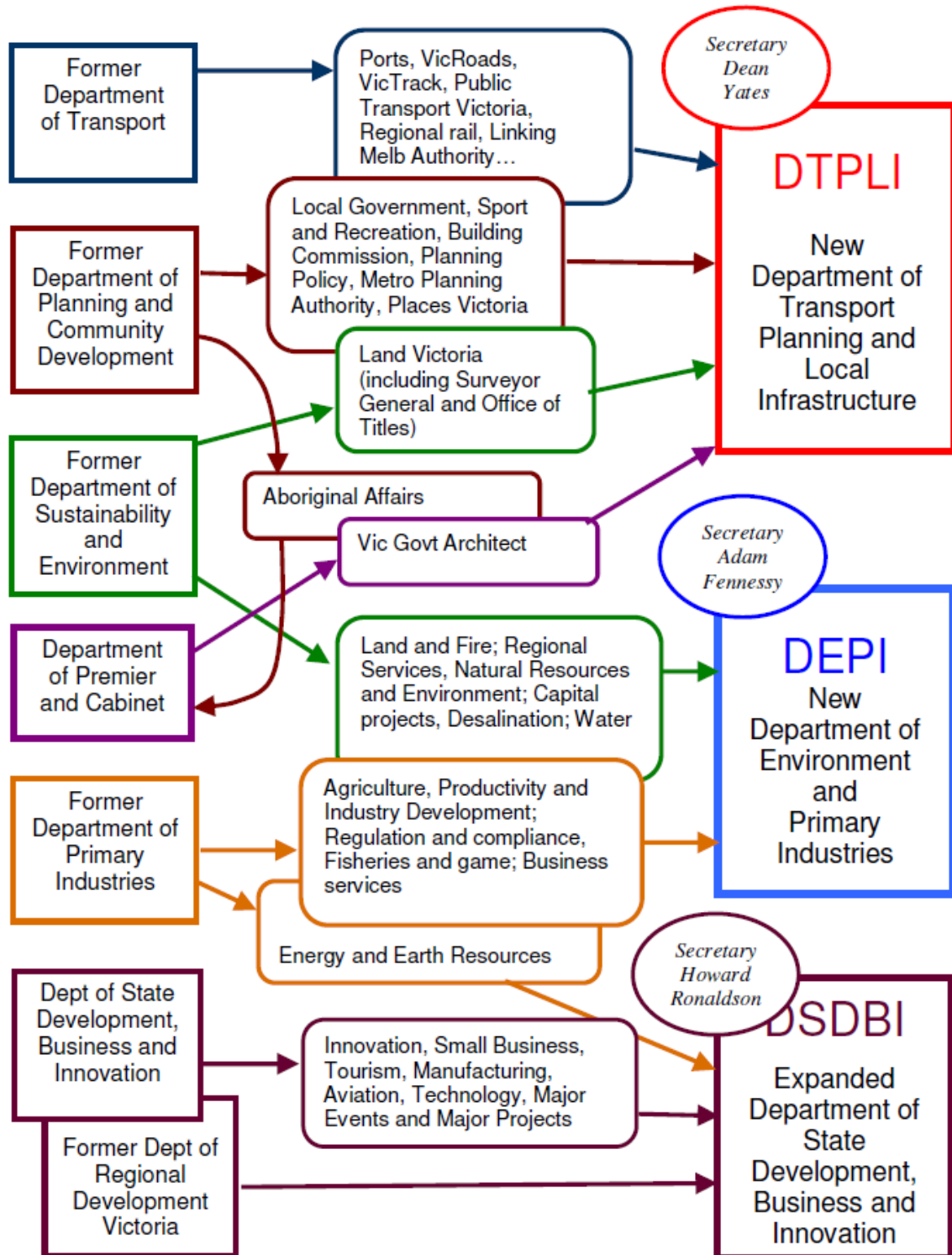
Presenter Jeremy Pearce L.S.

A one-day course for professional staff of public and private sector organisations who need to access, assemble, interpret and use land information

To arrange an in-house presentation of any of our courses, email lesley@publicland.com.au

Q & A

Hey, what's happened to our favourite Government Departments?



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The Public Land Consultancy

Independent professional advice and support for managers and users of public land

Winter Calendar

Professional Development Courses

July – September 2013

Crown Land



Melbourne	Thur 11 July
Colac	Thur 8 August
Shepparton	Tues 3 September
Traralgon	Tues 17 September

Roads Streets and Lanes



Ararat	Wed 26 June
Melbourne	Tues 9 July
Melbourne	Tues 13 August
Shepparton	Thur 22 August

Rivers and Lakes



Melbourne	Thurs 1 August
Traralgon	Tues 27 August
Geelong	Thurs 12 September

Volunteers and Grants



Melbourne	Wed 24 July
Geelong	Wed 14 August
Bendigo	Wed 28 August
Wangaratta	Wed 11 September

Environmental Risk for Land Managers



Melbourne	Wed 3 July
Ballarat	Thur 18 July
Bendigo	Thur 1 August
Traralgon	Thur 15 August
Melbourne	Thur 29 August

Coastal Adaptation



Melbourne	Wed 17 July
Traralgon	Wed 7 August
Melbourne	Wed 4 September
Geelong	Wed 18 September

Subdivisions Law

Melbourne Friday 19 July

Building Law and Regulation

Melbourne Tues 23 July

Public Land Leases and Licences

Melbourne Tuesday 6 August

Risk Management

Melbourne Tuesday 20 August

Land Law for Service Utilities

Melbourne Thursday 5 September

Native Title and Aboriginal Heritage

Melbourne Tuesday 10 September

All courses are of one-day duration

Starting time 9:00 am. Finish 4:30 pm

For details of all these courses go to

www.publicland.com.au/professional_development.html

Enrollments and Inquiries email Lesley Simons

lesley@publicland.com.au

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