TERRA PUBLICA
VOL 20 NO 6 AUGUST-SEPTEMBER 2020

The Complaints Department

Complaints: rich territory for cartoonists – and for policy analysts.

The Victorian Ombudsman (Deborah Glass) has scrutinised the ways in which all Victorian municipalities handle complaints. Her study was seriously hampered by the definitional disparities which pervade systems for recording complaints across the sector.

The City of Melbourne reported almost 300,000 'requests for service', of which a mere 88 were classified as complaints. At the other end of the scale, Ararat Rural City Council had fewer than 10,000 requests for service, of which 1180 were recorded as complaints. The Ombudsman did not see these figures as demonstrating a poor standard of service at Ararat, but rather a remarkably narrow definition of 'complaint' at Melbourne.

We empathise with one response, from the City of Melton: *(We are) unable to extract data because of the varying complexity of different categories and subject matters*.

Under the incoming *Local Government Act 2020*, we find (at section 107) the start of a new approach to complaints. But it's only a start.

The new Act offers a very broad definition of 'complaint.' It recognises things defined as 'public interest complaints,' being matters to be dealt with by IBAC. It recognises that some complaints might be subject to statutory review, for instance at VCAT. But we are not sure this will help resolve the Melbourne / Ararat divide, as bemoaned by the Ombudsman, and avoided by Melton.

What's needed is a new taxonomy of complaints. The examples in the box below point in the direction of a categorisation.

At one end of the scale our 'complaint' is a mere expression of opinion. The response here may well be: thankyou for your feedback, but you are in the minority / sorry, the decision has already been made / as a non-resident we don't care what you think (but politely).

At the other end of the spectrum, an appropriate response may be: Hey, take it up with your neighbour Sport, it's nothing to do with Council; or even 'See you in court Sir/Madam' (but, as we said, politely).

Complaints – all directed at some poor unfortunate public land manager…

- *I don't like your choice of street trees*
- *This street tree is dangerous and should be removed*
- *My next-door neighbour's tree is dangerous and should be removed*
- *Council issued a planning permit for the removal of this tree – I object!*
- *Your tree fell on my car. You failed in your duty of care, and I hereby sue you for damages.*

Sure, they are all complaints – but quite different types of complaint, and warranting quite different responses.

We hope that they will be treated appropriately in the Local Government regulations now being drafted by Local Government Victoria.

In between these extremes are complaints that should be welcomed: some operational error to be corrected, some policy deficiency to be rectified, some discretionary decision to be reconsidered in the light of new information.

In addressing the matter of complaints, the real issue is not their identification and classification, important though that may be.

The real issue is not even their minimisation, desirable though that may be. The real issue is surely their *resolution*.

Continued page 2

The Public Land Consultancy
ABN 69 067 045 520
Principal: David Gabriel-Jones
Email: terrapublica@publicland.com.au

27/539 St Kilda Road
Melbourne, VIC 3004
phone: (03) 9534 5128

postal: PO Box 2251
St Kilda West, VIC 3182
mobile 0412 134 243
www.publicland.com.au

The Complaints Department – continued

Yes, people complain. A council's response should have certain characteristics: it should be prompt; it should be courteous. It should be legally sound, and capable of withstanding critical scrutiny. It should be valued as community feedback, and seen as a positive contribution to Council's understanding of the relevant area of service.

As we said, rich territory for cartoonists

Central to any complaints response strategy must be professional competency.

The officers handing the complaint, and the officers at risk of being complained about, need to be properly trained in their jobs.

We have our doubts about training programs being well targeted. Does the young arborist fresh out of horticultural college really need training in emotional intelligence? Well maybe – but not at the expense of training in the administration of park regulations and the law relating to risk management.

As the covid19 security guards found, it's fine to have training in cultural diversity, but not if you're untrained in actual infection control.

The officer issuing the occupancy agreement must know the difference between a lease, a licence and a footpath trading permit. The officer compiling the road register must understand the various meanings of the word 'road.' The officer issuing the planning permit really should understand about easements, covenants and restrictions on title.

The incoming Act refers to 'prescribed processes' for dealing with complaints, internal reviews, and exercising discretion – and '*any other matter prescribed by the regulations*.'

So we can expect regulations. Let's hope they help solve the City of Melton's problem. If they don't, you can expect, err, complaints. ■

What's What and Who's Who at The Public Land Consultancy

Simon Libbis

B.Juris., LLB;

LIV accredited specialist in Property Law

We are pleased to welcome Simon Libbis on board as an Associate. He joins Grant Arnold, Astrid DiCarlo, and Richard O'Byrne.

Simon is well known in the Victorian property industry, although he hails from South Australia, where he was at one time the Registrar of Titles.

Here at The Public Land Consultancy, Simon will be working on issues relating to freehold land, and running a couple of our courses –

- Working with Owners Corporations
- Land Law and Subdivisions.

* * * * *

We're sorry to see the retirement of Dr Dorothy Jenkins, who has been working with us for many years, most recently as mentor of certificate students.

In that position she helped numerous candidates gain their Certificate in Public Land Governance.

All the best Dorothy and Lloyd!

* * * * *

Did you know?
If you attend three of our one-day courses, and write a 3000-word essay on a related subject, you may be eligible for a…

CERTIFICATE IN PUBLIC LAND GOVERNANCE

For more information contact
David Gabriel-Jones
dgj@publicland.com.au

How Native Title can be nullified by an ambulatory boundary (or can it?)

As we all know, Crown land cannot be sold off as freehold unless the vendor (let's say the Department of Treasury and Finance) goes through the 'valid future act' provisions of the Commonwealth *Native Title Act 1993*. This may involve an Indigenous Land Use Agreement and compensation to the Native Title holder.

BUT… there are other circumstances, apart from sale, under which Crown land can become freehold.

Here we're thinking about *ambulatory boundaries* – such as we find at Lake Bullen Merri, and the beach in front of Mr Lindsay Fox's residence at Portsea.

The water level drops (or the beach accumulates), wet land becomes dry land, and the freehold boundary moves in response. Land which had been Crown land becomes freehold land. Here's the key question: has Native title been validly extinguished?

The 'yes' argument takes us to section 24IB of the Commonwealth NT Act. Here we find that *pre-existing* entitlements, set up before 1996, continue to be honoured.

The doctrine of accretion dates back to medieval England and so, it could be argued, properties with ambulatory boundaries enjoy a pre-existing entitlement to extinguish Native title.

The 'no' argument takes us to section 15 of the *Land Titles Validation Act 1994*, which was Victoria's endorsement of the Commonwealth NT Act. Here we find confirmation of continued public access to and enjoyment of various places – including beaches, foreshores and the beds and banks of waterways.

Turning to the *Traditional Owner Settlement Act 2010* we find various provisions allowing Crown land to be granted to Traditional Owner groups. Nothing to prevent this being used for the foreshores of Lake Bullen Merri, or the beach at Portsea. It's a provision totally incompatible with freehold through accretion.

We eagerly await the court case! ■

How Native Title was resurrected along Victoria's waterways (or was it?)

As we all know, Native title has been extinguished on freehold land. What's more, it is deemed to be extinguished on any land freeholded before 1993 – even if that land was subsequently surrendered back to the Crown.

Along many of Victoria's waterways we find land which was once freehold, but is now Crown land again. Does Native title exist in such places?

The land we're thinking about was granted as freehold prior to 1881, with a waterway forming one of its boundaries. Here the government surveyor was following the English common law dictum *ad medium filum aquae*, under which properties bounded by a river were deemed to go to the centreline of that river.

In 1881 Crown land along most Victorian waterways was permanently reserved, and so became unavailable to be granted as freehold. But the 1881 reservation did not undo alienations which had already occurred.

Next we come to the year 1905. The Water Act of that year was revolutionary in various ways. Of particular interest to us is the way the 1905 Act dealt with those centre-of-the-river boundaries.

At section 5 we find: *Where any river creek stream or water-course or any lake forms the boundary or part of the boundary of an allotment of land heretofore alienated by the Crown the bed and banks thereof shall be deemed to have remained the property of the Crown and not to have passed with the land so alienated.*

In other words, the 1905 Act nullified the earlier alienation. But look more closely: this was not simply the re-acquisition of freehold land, nor was it the revocation of a Crown grant. **This was the assertion that the land had never been granted in the first place!** It's something known as a *legal fiction*.

So, we would argue, here's a case for claiming that Native title was never extinguished, and continues to exist...

Again, we await the court case! ■

Artwork: Josephine Naparulla *Waterhole at Docker River (2001) (detail)*

Our Forthcoming On-Line Training Courses

September - November 2020

Each course consists of 3 modules, each of 2 hours

Coastal Land Governance

Tues 8 September;
Wed 9 September; and
Thurs 10 September
(10am to 12pm each day)

Leases & Licences of Public Land

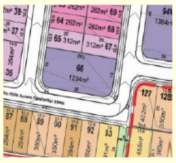
Tues 15 September;
Wed 16 September; and
Thurs 17 September
(10am to 12pm each day)

The Law relating to Works on Roads

Mon 5 October;
Mon 12 October; and
Mon 19 October
(10am to 12pm each day)

Roadsides and the Law

Tues 6 October;
Wed 7 October; and
Thurs 8 October
(10am to 12pm each day)



Land Law and Subdivisions

Tues 13 October;
Wed 14 October; and
Thurs 15 October
(10am to 12pm each day)

Crown Land Governance

Tues 20 October;
Wed 21 October; and
Thurs 22 October
(1pm to 3pm each day)

Working with Owners Corporations

Tues 27 October;
Wed 28 October; and
Thurs 29 October
(1pm to 3pm each day)

Property Law for Planners

Mon 9 November;
Mon 16 November; and
Mon 23 November
(10am to 12pm each day)

Roads Governance

Tues 10 November;
Wed 11 November; and
Thurs 12 November
(10am to 12pm each day)

Accreditation for Public Land Authorised Officers

Wed 4 November, and
Wed 11 November, and
Wed 18 November
(1pm to 3 pm each day)

Cost $440 per person
including GST and course notes.

Enrolments and Enquiries
Jacqui Talbot – (03) 9534 5128
jacqui@publicland.com.au

Each course consists of three 2-hour modules, spread over three days

For details of all these courses go to
www.publicland.com.au/professional-development

Councils across Victoria use our Retainer-based advisory service.

We can provide:

- a ten minute phone discussion
- a brief exchange of emails,
- a more formal written opinion,
- or even an article in *Terra Publica*…

Your pre-authorised staff call our experts whenever they need our advice; we keep a log of time committed; we send you a quarterly invoice against your purchase order.

It's a service being taken up by metropolitan and provincial councils. If it interests you, please call David on (03)9534 5128