

*Melbourne's population has hit 5 million. We first published this piece in 2009, when it was fewer than 4 Million. We say that today, it's more relevant than ever.*

## The Village of Five Million

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. 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 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, Hoddle, Charles LaTrobe and Alfred Deakin 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 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 governance systems 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. Even the peak bodies are mere agglomerations of local self-interest: the very names ‘Save Our Suburbs’ and ‘Protectors of Public Lands’ identify them as negative and reactionary.

*As Melbourne now heads towards six, seven, or eight 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. Public land governance will not be immune – its institutions, systems, and legislation, must come under continual analysis, review, and reform – otherwise, we might as well be dancing around the village maypole. ■*

### Page 2 Q and A

- The Governor in Council
- Committees of Management

### Page 3 Changes at TPLC

- We welcome some eminent lawyers to our team of course presenters
- New Feature: The Public Land Lunchtime Conversations

### Page 4 Training

Our schedule of Intensive Short Training Courses September to December 2021

*The Public Land Consultancy acknowledges that our core work relates to the lands of Victoria's Traditional Owners. We promote recognition of Indigenous rights through study, policy and the law.*

## We need the Governor's approval to vary our lease. Where do we write to her?

*Question asked on behalf of a tenant holding a statutory lease.*

As we all know, the Governor is her Excellency Linda Dessau AC, whose address is Government House Drive, King's Domain. It's the place flying the gold-coloured version of the Victorian flag.



But what is the Governor in Council? Well, it's the Governor acting on the advice of the Executive Council – which is, in practical terms, the thing better known as State Cabinet. A quorum of two ministers and the Governor is sufficient for the Governor in Council (or GinC) to meet, which it does about once a week at the Old Treasury Building, Spring Street, Melbourne.

The GinC is empowered to do many things under no fewer than 250 Acts of the Victorian Parliament. These include many land-related Acts ranging from the *Jeparit Land Act 1922*, under which the GinC may charge £1 per annum rental for the site of the Jeparit Fire Station, to the *Great Ocean Road and Environs Protection Act 2020* under which it may create 'scenic landscape areas'.

So how do we get our proposed lease variation into the Old Treasury Building? There is a Clerk of the Executive Council, who works out of the Department of Premier and Cabinet, 1 Treasury Place, East Melbourne – but he or she compiles the Executive Council agenda only from items submitted by Ministers. Items relating to administration of the *Crown Land (Reserves) Act 1978* must come to the Executive Council via the Minister for Environment and Climate Change; matters relating to the *Cemeteries and Crematoria Act 2003* must come via the Minister for Health, and so forth.

So to vary your lease, you will need to go through the Department or Statutory Authority which issued it. That body can make recommendations to its Minister, who can put items up to the Clerk of the Executive Council, who can get them into the Old Treasury Building where, in accordance with constitutional convention, they will be duly signed off by her Excellency, Linda Dessau. ■

## Can a Committee for a Crown reserve also manage a Government road ?

*Question which should have been asked (but wasn't) by a near-Melbourne municipality acting with the best of intentions.*

Here's an unused government road with high-quality remnant vegetation. Here's a council keen to facilitate community-based conservation. Here's an incorporated community group with all the skills, resources and enthusiasm to take on the job. Let's sign up a Management Agreement!

BUT – when the community group happens to be a Committee of Management (CoM) under the *Crown Land (Reserves) Act 1978* – sorry guys, you've just gone *ultra vires*. The CL(R) Act provides for the incorporation of community-based CoMs, and defines their powers and duties. These powers do not extend to managing land outside their specific Crown reserve.

Next question - What to do about it?

**Answer 1** – Ignore it. What's the risk? We're not looking at big-money contracts; both the council and the committee have insurance cover (probably); and there seems little scope for third-party challenges (we hope). The auditors may not even notice (fingers crossed).

**Answer 2** – Fix the land status. Discontinue the road under either the *Land Act 1958* or the *Local Government Act 1989*, reserve it under the *Crown Land (Reserves) Act 1978*, and appoint the Committee to manage it. Twelve months' work at the least, all sorts of side issues (like extinguishing public rights over the road), and no certainty of arriving at the desired result.

**Answer 3** – Abandon the CoM and reconstitute it under the *Associations Incorporation Reform Act 2012*. Same people, same roles, different accountability, impediments lifted.

**Answer 4** – Fix the Act (we like this answer). We see gross deficiencies of that slab of the CL(R) Act which allows Committees to become incorporated. It should be rewritten along the lines of the *Cemeteries and Crematoria Act 2003*. And here's another reform to make at the same time: with the consent of the Minister, a Committee of Management should be allowed to enter into agreements for management of other land. ■

*Readers of Terra Publica should not act on the basis of its contents which are not legal advice, are of a general nature, capable of misinterpretation and not applicable in inappropriate cases.*

## Changes at The Public Land Consultancy

*Some well-known people around the legal profession will be joining us as sessional presenters.*

**Mark Bartley** LLB(Hons) BA,  
Partner at HWL Ebsworth.

Mark will be presenting:

- Referral Authorities and the Planning System
- The Law governing Subdivisions
- Restrictions on Title

**Nick Sissons** LLB, B.Planning,  
Senior Associate at HWL Ebsworth.

Nick will be presenting:

- Property Law for Planners
- The Law governing Subdivisions
- Restrictions on Title

**Tim Graham** LLB., BA.,  
Partner at Bugden Allen Graham Lawyers.

Tim will be presenting:

- Working with Owners Corporations

**Michael Beasley** LLB, B Econ.  
Michael will be presenting:

- Risk Management and Insurance on Public Land

**Sonia Turnbull** MA, MBA, JD,  
Senior Associate at HWL Ebsworth.

Sonia will be working with us on a new course, probably for 2022:

- The Law and Contaminated Land

*At the same time as welcoming new people to our team, we salute others who are moving on:*

**Simon Libbis**

is taking up a full-time position with the Law Institute of Victoria

**Astrid Di Carlo**

has been appointed as in-house legal counsel at City of Kingston

**Grant Arnold** is retiring, to take up some serious golf and fishing

*Good Luck and Best Wishes all!*

**Sylvanie Morgan** is stepping down after many years as our bookkeeper, and passing the accounts over to:

**Peter Shepherd.** Peter will continue to use the email address [accounts@publicland.com.au](mailto:accounts@publicland.com.au)

### Coming Soon

- Statutory Approvals on Public Land
- Offences and Enforcement on Public Land
- Property Portfolio Optimisation for Councils
- The Law and Contaminated Land

*To express interest in any of these courses, contact our Training Manager Fiona Sellars at [fiona@publicland.com.au](mailto:fiona@publicland.com.au) or phone (03) 9534 5128*



## Public Land Conversations

*Join us for a Lunchtime Conversation about some current Public Land Issue*

August: Road Deviations

September: Riparian Regulations

October: Delegated Management

*The Second Tuesday of each Month  
12 noon to 12:45 pm*

---

## Intensive Training Courses September and October 2021

*Each presentation runs  
across three sessions,  
each of 2 hours duration*

---



### Crown Land Governance

*Presenter:  
David Gabriel-Jones*

Tues 14 Sept, 10am to 12pm  
Wed 15 Sept, 10am to 12pm  
Thurs 16 Sept, 10am to 12pm

---



### Roads Governance

*Presenter:  
David Gabriel-Jones*

Tues 28 Sept, 10am to 12pm  
Wed 20 Sept, 10am to 12pm  
Thurs 21 Sept, 10am to 12pm

---



### Working with Owners Corporations

*Presenter: Tim Graham*

Tues 5 Oct, 10am to 12pm  
Wed 6 Oct, 10am to 12pm  
Thurs 7 Oct, 10am to 12pm

---



### Leases and Licences of Public Land

*Presenter: Richard O'Byrne*

Tues 12 Oct, 10am to 12pm  
Wed 13 Oct, 10am to 12pm  
Thurs 14 Oct, 10am to 12pm

---



### Land Law and Subdivisions

*Presenters  
Mark Bartley / Nick Sissons*

*(This presentation is two sessions  
each of 3 hours duration)*

Tues 12 Oct, 10am to 1pm  
Wed 13 Oct, 10am to 1pm

---



### Roadsides and the Law

*Presenter:  
David Gabriel-Jones*

Tues 19 Oct, 10am to 12pm  
Wed 20 Oct, 10am to 12pm  
Thurs 21 Oct, 10am to 12pm

---



### Referral Authorities and the Planning System

*Presenter: Mark Bartley*

*(This presentation is two sessions each  
of 3 hours duration)*

Tues 19 Oct, 10am to 1pm  
Thurs 21 Oct, 10am to 1pm

---



### Land Law for Rivers and Riparian Land

*Presenter:  
Johanna Slijkerman*

Mon 25 Oct, 10.30am to  
12.30pm  
Tues 26 Oct, 10.30am to  
12.30pm  
Fri 29 Oct 10.30am to 12.30pm

---

*And don't forget – We can present these courses for you, in-house!*

---

**Cost:** \$440 per three-session course, including GST, course notes and certificate of attendance

**Accreditation:**  
These courses are eligible for CPD points for lawyers and FPET points for surveyors

**Enquiries and Registrations:**  
Fiona Sellars  
(03) 9534 5128  
fiona@publicland.com.au