



Taking it to Appeal

Planners are all too familiar with the idea of review and appeal – but not so the custodians of Crown land legislation. As the State Government heads into a re-write of a suite of Crown land Acts, there's a principle which we hope is kept in mind: public sector administrators must be accountable. Their decisions should be open to review and appeal – but by whom?

Public servants are answerable to Ministers, who are answerable to the electorate – but that's a small consolation if you're a disgruntled member of the public. You want to have your day in the Victorian Civil and Administrative Tribunal.

VCAT can deal only with matters specified in some enabling Act. Under the *Domestic Animals Act 1994* I can appeal against Council's decision that my dog is dangerous. Under the *Racing Act 1958* I can appeal against Racing Victoria's refusal to licence me as a jockey. Under the *Cemeteries and Crematoria Act 2003* I can appeal against a Cemetery Trust which declines to bury me.

But, as Crown land law stands, there's virtually no role for VCAT. If DELWP issues a water frontage licence to my neighbour rather than to me, I can't go to VCAT. If they decide to discontinue the government road that gives access to my property, I can't go to VCAT. If the Yacht Club sublets the foreshore restaurant without going to tender; if I'm charged more rent for use of the Crown reserve than some other user is charged, I can write to the Minister or phone Neil Mitchell, but I can't go to VCAT.

In some cases there may be avenues of appeal under administrative law – but that takes us in the direction of the Supreme Court, and all the costs that go with it.

There is no doubt that proposals to issue leases and licences of Crown land can be contentious. To whom should the tenure be issued, for what purpose, and on what terms? Indeed, should there be any tenure at all? Plenty of scope for dissent here: ideal territory for VCAT, surely. But as the law stands, many proposed Crown tenures come under no scrutiny whatsoever.

In a bizarre twist, a few leases and licences come under scrutiny by the Parliament itself – and they are often utterly insignificant. Here is a proposal for an ice-cream van in the car park of a flora reserve: it must lie before both houses of Parliament. That is the consequence of section 17DA of the *Crown Land (Reserves) Act 1978*.

And it gets worse. Here is a proposal for a doctors' consulting suite in a hospital: it must also lie before both houses of Parliament, but

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only if the relevant part of the hospital complex happens to be on Crown land. That means months of delay, not only for the initialisation of the lease or licence, but again for every renewal. That's the consequence of section 69AAE of the *Health Services Act 1988*.

We can't imagine why such decisions can't be entrusted to the relevant Health Services Board.

And here's another bizarre twist. In the 30 years since managers of Crown land have been burdened by section 17DA, never once has Parliament used its power to disallow a proposal. Never once. It seems the entire apparatus is nothing but a waste of time.



The Andrews Government has accepted recommendations from the Victorian Environmental Assessment Council (that's VEAC – not to be confused with VCAT): Crown land law should be brought into the twenty-first century. Brought from where? Most was laid down in the nineteenth century, overlaid by the bureaucratic failures of the twentieth century.

The Parliamentary scrutiny clauses come from 1992 in the case of the *Crown Land (Reserves) Act*, and 2014 in the case of the *Health Services Act*. Weird: you wonder why the latter provision was made, 22 years after the former provision had proved to be not only burdensome but utterly useless.

We see a dozen matters – over and above those highlighted by VEAC – that are overdue for review. One of them is appeals to VCAT. The current rewrite of Crown land legislation is surely the opportunity. ♦



Public Land Conversations

For us, one of the highlights of 2022 was our series of lunchtime conversations.

On the second Tuesday of each month, about 100 people joined us on-line for a discussion of diverse topics such as...

- Adverse possession
- Land is 3-Dimensional
- Problems with Vocabulary
- Pocket Parks
- Commemorations on Public Land
- Victoria's State borders
- Delegated Management
- Easements on public land
- A walk down Bourke Street

And we have some of topics lined up for 2023:

- A paddle down the Yarra – from Dight's falls to the Bay
- Unhappy campers: a look at four or five very disgruntled users of public land – do we commiserate with them?
- *Diagrams* as an alternative to *words*...

To sign up for these conversations, contact Fiona...
fiona@publicland.com.au

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.

Q Can my proposed subdivision include a nearby government road reserve?

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Question asked by a developer whose overall project area spills over beyond their freehold land.

The short answer is No. The *Subdivision Act 1988* is all about the reconfiguration of freehold land – land which has already been alienated from the Crown. This is explicitly stated in section 4(7)... *This Act does not apply to subdivision by the Crown in order to issue a Crown grant under any Act.* Government roads are Crown land, normally disposed of through a Crown grant under the *Land Act 1958*, administered by Department of Treasury and Finance.

Most government roads were laid out in the 1800s, by surveyors who were guessing at the way in which nearby land would be developed in later decades. Many are now unused, and unlikely to ever be used in their present configuration.

One way of reconfiguring such land is to *discontinue* the government road. It ceases to be a road reserve, but is still Crown land – to be disposed of by DTF. Such a disposal requires a Crown grant. So, looking at section 4(7), the subdivision cannot include the road reserve – at least not until the Crown grant has been issued.

But here comes a curious little variation. If the government road is not *discontinued*, but *deviated*, then no Crown grant is required. The road reserve which had been Crown land becomes freehold land owned by the relevant municipality, without any Crown grant. And the dollar value of the land is credited to Council, not to DTF. But does 4(7) still apply? Our assumption is that it does.

We would not recommend drawing up a subdivision proposal in the hope that the government road will somehow become available. Council as responsible authority cannot unilaterally decide on a *deviation* as against a *discontinuation*. But we do say: talk it through with council and your legal advisers: there may well be benefits all round. ♦

Thanks to our many clients in 2022



GREAT OCEAN ROAD
COAST & PARKS AUTHORITY



Victorian
Health Building
Authority



Training Courses, Jan-March 2023

NOTE: some courses are three sessions, each of 2 hours duration; others are 2 sessions, each of 3 hours duration.

	<p>Crown Land Governance <i>Presenter: David Gabriel-Jones</i></p>	<p>Tues 31 Jan, 10am – 12pm Wed 1 Feb, 10am – 12pm Thurs 2 Feb, 10am – 12pm</p>
	<p>Leases and Licences of Public Land <i>Presenter: Richard O'Byrne</i></p>	<p>Tues 14 Feb, 10am – 12pm Wed 15 Feb, 10am – 12pm Thurs 16 Feb, 10am – 12pm</p>
	<p>Roads Governance <i>Presenter: David Gabriel-Jones</i></p>	<p>Tues 14 Feb, 10am – 12pm Wed 15 Feb, 10am – 12pm Thurs 16 Feb, 10am – 12pm</p>
	<p>Coastal Land Management <i>Presenter: Richard O'Byrne</i></p>	<p>Tues 28 Feb, 10am – 12pm Wed 1 Mar, 10am – 12pm Thurs 2 Mar, 10am – 12pm</p>
	<p>Land Law and Subdivisions <i>Presenter: Mark Bartley</i></p>	<p>Tues 28 Feb, 10am – 1pm Wed 1 Mar, 10am – 1pm</p>
	<p>Native Title and Aboriginal Heritage <i>Presenter: Anoushka Lenffer</i></p>	<p>Wed 1 Mar, 9.30am – 12.30pm Wed 8 Mar, 9.30am – 12.30pm</p>
	<p>Restrictions on Title <i>Presenter: Nick Sissons</i></p>	<p>Tues 21 Mar, 10am – 1pm Wed 22 Mar, 10am – 1pm</p>
	<p>Referral Authorities and the Victorian Planning System <i>Presenter: Mark Bartley</i></p>	<p>Tues 28 Mar, 10am – 1pm Wed 29 Mar, 10am – 1pm</p>

Cost:
\$495 including GST,
course notes and certificate
of attendance

Accreditation: These courses
are eligible for CPD points for
lawyers, planners, valuers, and
FPET for surveyors.

Enquiries and Registrations:
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fiona@publicland.com.au

*All these courses can be presented in your own offices.
Discounts for host organisations*

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. If required, The Public Land Consultancy can obtain legal advice from one of its associated law firms.