TERRA PUBLICA
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ADDENDUM

In our January 2013 edition, *Terra Publica* looked at some of the law relating to fences – particularly fences of public land, such as roads, reserves and parks. The article focused on the anomalous section 21 of the *Crown Land (Reserves) Act* 1978.

A few readers have pointed out that in our scan of legislation, we omitted to mention what the *Road Management Act* 2004 has to say on the subject of fences. Our apologies for this oversight.

Schedule 5 of the Road Management Act provides that road authorities are not required to contribute to road fencing. This provision postdates and thus overrides sec 21 of the Crown Land (Reserves) Act, which would otherwise make those authorities liable for 50% of their fencing costs.

So in relation to roads, the anomaly covered the period from 26 Jan 1995 (when the amendment to the CL(R) Act was proclaimed) through until 1 July 2004 (when the RM Act was proclaimed). Fortunately, nobody seems to have noticed, and no harm was done.

The same can't be said for parks and reserves. Councils have 'care control and management' of Crown reserves, and Parks Victoria has 'care control and management' of National and other parks. Consequently, section 21 would appear to continue to apply, unmitigated by any subsequent legislation that we're aware of. Indeed the most literal reading of section 21 could hold it to apply to a council's freehold reserves.

As we concluded in the January article, what's needed is a rewriting of section 21, to make it correspond retrospectively to the long-accepted policy position, as confirmed in the Department of Justice discussion paper.

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

57/151 Fitzroy Street
St Kilda, VIC 3182
phone: (03) 9534 5128

postal: PO Box 2251
St Kilda West, VIC 3182
fax: (03) 9593 9085
www.publicland.com.au

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Billions of Dollars

($ 6.5 billion, more or less)

Such a handy phrase to throw into any discussion with a politician: "billions of dollars." It tends to attract their attention.

Water and electricity authorities threw it in to the debate back in 2003, when the *Road Management Act* 2004 was being framed – and thereby avoided their infrastructure in road reserves being subject to total control by road authorities.

Victoria's municipalities now need to throw the same phrase into the review of the *Fences Act* 1968 currently being conducted by the Department of Justice (DoJ). To be precise, $ 6.5 billion – give or take a few billion.

There are 130,000 miles of local road in Victoria. So there are 260,000 miles of fencing along roads. Or 260 million linear metres. If front fences cost $50 per metre, that's $ 13 billion worth of fencing. And if the burden of this cost falls 50-50 on the parties either side of the fence, then a $ 6.5 billion liability has just landed on our state's long-suffering municipalities.

We haven't even started to factor in the 22,000 kilometres of arterial road controlled by VicRoads. Or the 60,000 kilometres of fences on Crown land boundaries.

But as everyone knows – the cost of front fences is not shared 50-50: it's 100% the landowner and 0% the council, isn't it? Same with fences alongside Crown land and National Parks: 100% the landowner and 0% Parks Victoria or DSE. At least that's how it's supposed to be.

Traditional interpretations of the *Fences Act* 1968 support this view. The Act places fencing obligations not on owners, but on 'occupiers'– and road authorities have always been deemed not to be 'occupiers' of road reserves. Parks Victoria has been deemed not to be an 'occupier' of parks. Proponents of this interpretation cite *Noarlunga v. Coventry* – a case in the South Australian Supreme Court, where the Court held that the council could not be said to be an 'occupier' of the land. Or the English jurist Lord Halsbury, who decreed in *Lambeth Overseers v. London County Council*, that 'the fact that a park is vested in the County Council does not make them the occupiers'.

Trouble is, common law made by the courts gets trumped by statutory law made by parliaments. And the prevailing common-law view of 'occupiers' was overturned by a sneaky little statutory-law amendment to the *Crown Land (Reserves) Act* 1978 made by Parliament way back in 1994.

Up until 1994 section 21 of the CL(R) Act had provided that public land managers were to be regarded as occupiers for the purposes of the Fences Act – but only in relation to 'give and take' fencelines along watercourses. In 1994, tacked on to the bottom of the *Crown Lands Acts (Amendment) Act* 1994 we find a provision extending the meaning of section 21 to make public land managers the 'occupiers' in relation to all fences covered by the Fences Act. Here is the section as it has stood ever since the amendment was proclaimed in early 1995:-

> **21 Trustees of reserves to be deemed occupiers**
>
> The word *occupiers* in section 3 of the **Fences Act 1968** shall for the purposes of that section be deemed to include the trustees or persons having the care control or management of any land whether permanently reserved or not.

Councils are legal 'persons' having care control or management of local roads. VicRoads is a 'person' having care control or management of arterial roads. And Parks Victoria is a 'person' having care control or management of National Parks. So they are occupiers for the purposes of the Fences Act, Lord Halsbury notwithstanding. End result: they're up for 50% of the cost of fences. $ 6.5 billion.

But can we quibble about the phrase 'trustees of reserves' in the heading? No, because pre-2000 headings don't count (*Interpretation of Legislation Act*, 1984). What about the exemption for Crown land which we find at section 31 of the *Fences Act* 1968? Well, a good silk would argue that Acts dated 1968 get trumped by Acts dated 1994.

One of the more surprising aspects of this fiasco is that the Parliamentary Law Reform Committee didn't even notice it in 1998, when it conducted an earlier review of the Fences Act. It seems someone back then took a look at the *Crown Land (Reserves) Act* 1978 as originally enacted – not as it had been

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Billions of Dollars continued…

amended. An elementary mistake for which there really is no excuse. The error appears as a footnote on page 75 of the Parliamentary Committee's report.

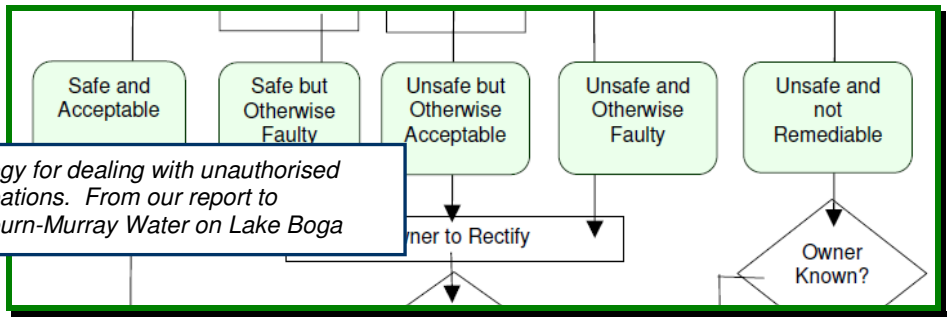
So we reckon there's a fair case for quite a few landowners around the State to claim half the costs of their boundary fences from their local Council, or from VicRoads, or Parks Victoria. $ 6.5 billion.

But wait a minute… As we keep saying, here at *Terra Publica*, policy should drive legislation, not *vice versa*. The argument we've just outlined above is not intended to fuel landowner claims against the taxpayer, but the reform of Crown land law. Let's rewrite section 21 of the CL(R) Act to reflect the long-accepted policy position, no change to which is mooted in the DoJ discussion paper.

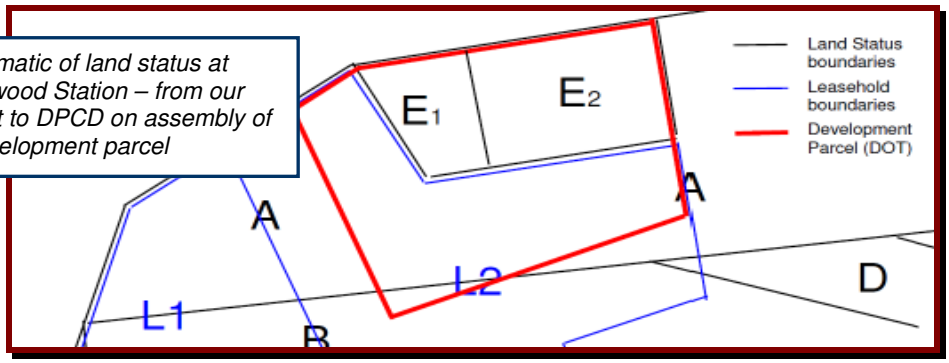
While we're at it, we might also bring section 402 of the *Land Act* 1958 out of the 19th century (see **Q2** on p3) – and we might as well reform 'give and take' fences alongside rivers (see **Q1** on p3). ■

The Power of the Diagram

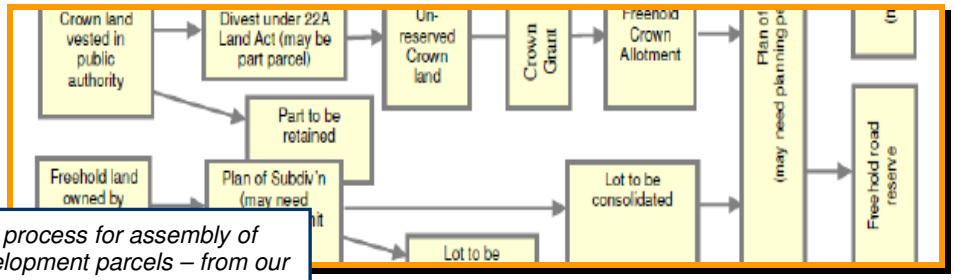
They say a picture tells a thousand words. We haven't calculated the exact ratio in our consultancy reports, but it could well be one diagram, flow-chart, or schematic per thousand words. They're not an alternative to the words, but an aide to get a perspective on complex bodies of law, development sites, or decision-making processes. Here are clips from an assortment…



Strategy for dealing with unauthorised occupations. From our report to Goulburn-Murray Water on Lake Boga



Schematic of land status at Ringwood Station – from our report to DPCD on assembly of a development parcel



One process for assembly of development parcels – from our report to Places Victoria on the Murray frontage at Mildura

New Associates at The Public Land Consultancy

Grant Arnold

Grant Arnold joins us from DSE, where he has been managing that Department's statutory and strategic input into Victoria's land use planning system.

Earlier, Grant was Director of Agriculture Policy with Department of Primary Industries (DPI).

His experience and skills in environmental, natural resource, public land and agriculture policy will add value to the services we provide for local government and statutory authorities.

Contact Grant at Grant@publicland.com.au

Richard O'Byrne

Richard O'Byrne comes to us from Parks Victoria, where he managed the Bays and Maritime Division.

For the past four years he has been a member of the Central Coastal Board.

Richard's extensive expertise in coastal planning and management will be invaluable for our many coastal clients.

Richard will be developing and presenting our new training course 'Managing Volunteers and Grants.'

Contact Richard at Richard@publicland.com.au

Q1 Can neighbors agree on 'Give and Take' fencelines?

Question asked by a CMA officer concerned about riparian vegetation and erosion control.

Answer: Yes and No. If the fenceline in question separates two freehold properties, neighbors may (by mutual agreement) put the dividing fence wherever they please. They'd be well advised to have some written agreement in place (a lease being the most formal option) to prevent an adverse possession claim being made 15 years into the future.

If their freehold-freehold boundary happens to be a watercourse, the *Fences Act* 1968 (section 5) allows neighbors to agree on a give-and-take fenceline without risking adverse possession. The Department of Justice discussion paper explores the possibility of this provision being extended to situations other than watercourses.

BUT – if the boundary is a freehold-Crown boundary, the situation is rather more complex – even where the freehold owner is also the licensee of the Crown land. The law here recognises cadastral boundaries, regardless of the position of the fence. The Crown land manager has no power to deem that the rights of the public, or the reach of regulations, or the authority of some Committee of Management are extended by the give, or curtailed by the take, of the mutually-agreed fenceline.

As our CMA questioner pointed out, on riparian land we often want to place the fences on practical alignments rather than on cadastral boundaries. What's needed is legislative reform – which you'll find discussed in the 2008 paper we did for DSE on riparian management. ■

Q2 Where there's no fence alongside a government road reserve, DSE must give the landowner an unused road licence – right?

Question asked by a DSE officer at one of our training courses.

Answer: No, wrong. We don't know how widespread this misunderstanding is, but we know how it arises. Section 402 of the *Land Act* 1958 is so badly drafted that it invites such misinterpretation:-

402 Right to enter and use an unused road

(1) Where the land on one side only of an unused road is fenced off from such road the occupier of any unfenced private land on the opposite side of such road shall obtain a licence under Division 8 of Part I or section 138 of this Act to enter and use the whole of such road to the extent to which his land abuts thereon.

The landowner "shall obtain" a licence! Makes it so easy to infer that the Minister "shall grant" a licence – but there's no way in the world the Land Act was ever intended to compel the Minister to do anything as a result of some arbitrary action by a landowner. If this was indeed the effect of section 402, landowners all around the countryside would be tearing down their fences in order to force the Minister's hand.

When DSE gets around to fixing the Land Act, we will be happy to provide them with a re-written section 402. Our new wording will clearly state that if an occupier of land abutting an unused road carries stock on that land, then he/she must either (a) obtain a licence or (b) construct a fence. Simple.

Meanwhile, we wouldn't want the misunderstanding appearing in a briefing note from DSE to Minister Ryan Smith, would we? ■

Correction.

The Anglican Diocese of Melbourne has asked us to correct a mistake in our December 2012 edition. There we said that the Anglicans planned to sell their church at Williamstown. It seems they intend to sell only the land around the church. Our point remains: whatever land they're selling, they acquired it from the taxpayer for nothing, despite the separation of church and State, and in a manner not available to, say, Muslims.

Our Training Course Program
February to April 2013

Wednesday 20 Feb	**Crown Land Law** *Presenter – David Gabriel-Jones* *Principal, The Public Land Consultancy*
Monday 25 February	**Roads, Streets and Lanes** *Presenter – Andrew Walker, Victorian Bar*
Wednesday 27 Feb	**Land Law for Service Utilities** *Presenter – Tom Vasilopoulos, Victorian Bar*
Thursday 28 February	**Environmental Law - *A Strategic Overview*** *Presenter –Brendan Sydes, Principal Solicitor, EDO*
Friday 1 March	**Risk Management** *Presenter – Michael Beasley, Solicitor*
Monday 4 March	**Native Title & Aboriginal Heritage** *Presenter – David Yarrow, Victorian Bar*
Wednesday 6 March	**Coastal Land Law** *Presenter – David Gabriel-Jones Principal,* *The Public Land Consultancy*
Wednesday 13 March	**Rivers and Lakes** *Presenter – David Gabriel-Jones* *Principal, The Public Land Consultancy*
Monday 18 March	**Planning Law - *A Strategic Overview*** *Presenter – Andrew Walker, Victorian Bar*
Tuesday 19 March	**Leases and Licences of Public Land** *Presenter – Karen Hayes, Property Officer, City of Yarra*
Friday 22 March	**Subdivisions Law** *Presenter, Dr David Mitchell, LS* *Director, Land Centre, RMIT University*
Wednesday 27 March	**Volunteers and Grants** *Presenter – Richard O'Byrne,* *Associate, The Public Land Consultancy*

All these presentations are at
the **Law Institute of Victoria**, 470 Bourke St, Melbourne

Enquiries and Registrations: Lesley Simons – lesley@publicland.com.au – phone 9534 5128

Cost: *$495 including GST, course notes and working lunch.*
Discounts for course hosts.

All Courses are one-day duration; 9:00 a.m. to 4:30 p.m.

For details of all these courses:
www.publicland.com.au/professional_development.html