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The Presumption of Consent

Is there a general offence of trespass on Crown land? We say no. But one view within DSE holds that you're trespassing if you walk down Collins Street.

On private land, trespass is a well-understood offence. You just can't go onto land owned or occupied by someone else against their wishes. You can't undertake works on their land against their wishes. But what about Crown land?

At many points statutory law requires citizens to obtain consents or permits to enter onto, or undertake activities on Crown land. Statutory law empowers authorities to grant (or refuse to grant) such consents or permits, and makes it an offence for a citizen to undertake those actions without the necessary consent or permit.

Collins Street, 5pm. Are these people really trespassers?

However, our presumption must always be that in the absence of any such regime, a citizen is permitted to undertake whatever actions he or she chooses. That's the Presumption of Consent.

We say – it would be preposterous to suggest that if no regulatory regime exists under statutory law, a citizen is denied authority to enter onto the land or to undertake the action in question.

In short, there is no general offence of trespass against the Crown. If no law requires you to obtain a permit, then no government agency can refuse to grant you that permit, and no agency can prosecute you for failing to have that permit. Perhaps it's like that in North Korea, but not in Australia.

We maintain that the Crown has no general power as landowner to refuse a citizen permission to enter onto or do anything on Crown land, unless some statute or statutory instrument requires the citizen to obtain consent. That's why various Acts relating to Crown land either explicitly require certain activities or developments to obtain permits, or provide a head of power for regulations and tenures which would have the same effect.

In fact, there are so many statutes limiting activities on Crown land, that you'd think it unnecessary for DSE to invent some catch-all provision under the Bluff Act.

The *National Parks Act* 1975 contains explicit provisions prohibiting (in various circumstances) the conduct of businesses, the carrying of guns, fishing, conducting organised tours and so forth. That Act at section 48 empowers the Governor in Council to make regulations with respect to 20 separate classes of behavior and activity, including entry into a Park. These powers have been used to make extensive and detailed regulations. The *National Parks (Park) Regulations* 2003, for instance have 69 clauses plus Schedules and run for 65 pages. **The rationale for all these regulations is that in their absence, the relevant activities and behaviors would be permitted.**

The *Crown Land (Reserves) Act* 1978 contains numerous provisions relating to the occupation and use of Crown reserves under leases and licences, agreements to operate services and facilities, and so forth. At section 13 this Act empowers the Minister to make regulations for various classes of behavior and activity – including, for instance, entry upon the land, and the carrying out of works. The section also provides that any person contravening the regulations is committing an offence. **Again, the rationale for such regulations is that in their absence, the activities and behaviors in question would be permitted.**

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The Presumption of Consent (continued)

The *Safety on Public Land Act* 2004 provides that the Secretary for DSE may by declaration specify activities which are permitted, prohibited or restricted in defined areas of State forest. The Act makes it an offence to contravene a declaration, and contains explicit provisions for enforcement. In the second reading speech the Minister of the day said:-

> *To properly manage these forest values and to protect public safety, a capacity to regulate or restrict activities in particular areas at particular times is required*

- thereby confirming that without the Act, there would be no 'capacity to regulate or restrict activities.'

The *Road Management Act* 2004 includes strict controls over works on those roads which fall within the meaning of that Act. Sections 63 deals with interference to a road:-

> *63 (1) … a person must not conduct any works in, on, under or over a road without the written consent of the coordinating road authority to the conduct of the proposed works.*

Schedule 7 Clause 16 goes into detail about the type of works requiring permits and the manner in which applications are to be considered. **Again, the *raison d'etre* for these provisions is that, in their absence, works would not require a permit.**

Similarly with the *Coastal Management Act* 1995. Under section 37, a person must not use or develop coastal Crown land unless the written consent of the Minister has first been obtained. This one is an 'overlay' requirement – in its absence you would not necessarily be able to able to proceed with your proposed use or development, because there may be some other layer of control under some other Act. Nevertheless, the principle remains: you need consent only because an Act of Parliament says so.

Scraping the Guano…

One view within Department of Sustainability and Environment (DSE) holds that there is an argument to the contrary. In their attempt to make out a case the proponents of this view really have to scrape the bottom of the legislative barrel.

Firstly, they trot out section 190 of the *Land Act* 1958, then section 188A of the same Act, and finally section 9(1)(d) of the *Summary Offences Act* 1966. Let's look at each of them.

190 Penalty for trespasses on Crown lands

> *Every person not licensed or otherwise authorized … who searches upon any Crown land for any gold or minerals … or cuts digs or takes from any Crown lands any live or dead timber gravel stone limestone salt guano shell sand loam or brick-earth or strips or removes bark from any tree on any Crown lands shall … be liable … to a penalty of not more than 2 penalty units.*

Guano?? That's bat-shit. The provision comes straight out of the Land Act 1862. **That's right, 1862. Not 1962.** The 1862 Act provided that the Governor could issue licences to 'cut dig or take' guano and whatever, and that anyone who.proceeds to 'cut dig or take' guano and whatever without a licence is guilty of an offence. Even back then, we had the presumption of consent: unlicensed guano-taking was an offence only because there was a law requiring guano-takers to get a licence.

The only conceivable interpretation which can be put on section 190 today is that it is an offence to act without a licence or authorisation if (and only if) the action in question would otherwise require a licence or authorisation.

Trespass law – U.S. style

Next there's sec 188A of the Land Act 1958.

188A Magistrates' court may order removal of buildings etc.

> *Where any building structure standing crop or improvement or any thing whatsoever is constructed or placed or is found on any Crown land; and the owner of the building structure crop improvement or thing does not within 21 days after demand made … produce to the authorised officer or person a current lease licence permit or other authority …*

Again, there's only one conceivable interpretation of this provision. It can only refer to buildings, structures and so forth which would otherwise require a 'lease, license, permit or other authority.'

And what about Collins Street?

Finally, let's look at the DSE interpretation of section 9 of the *Summary Offences Act* 1966. Talk about scraping the bottom of the barrel.

> *Any person who willfully trespasses in any public place … and neglects or refuses to leave that place after being warned to do so by the owner occupier or a person authorized by or on behalf of the owner or occupier…shall be guilty of an offence.*

Now, if we go to the definition of 'public place' for the purposes of this Act we see it includes public highways – that's right, Collins Street and St Kilda Road and the High Street of every town and suburb.

So, according to one view within DSE, users of Collins Street are trespassers. DSE officers, as 'persons authorized by the owner,' could order them to leave.

If DSE persists in this view, we will have moved from the preposterous to the downright dangerous. ■

Q&A

What do the following areas of Crown land have in common: (a) Wilsons Promontory National Park, (b) Melbourne's Royal Botanic Gardens, and (c) 0.02 ha of frontage to Middle Creek, Leneva

?

Question asked in *Terra Publica* in March 2003 (back then it was called *The Crown Land Circular*). Nine years later, the answer's still pretty much the same…

Sure, we've heard of Wilsons Promontory National Park, and Melbourne's Royal Botanic Gardens. But Middle Creek, Leneva? Well, that's between Wodonga and Beechworth, where it seems 0.02 ha of Creek frontage has been encroached on by someone's back yard since 1905.

Why do we bracket them together?

All three enjoy the highest degree of legal protection available in Victoria. Before they can be sold off or legally used for some other purpose they need a site-specific Act of Parliament. Why does a few square metres at Leneva have the same protection as Wilsons Prom and the RBG? Because it is *permanently reserved*.

The way the Crown Land (Reserves) Act is set up, temporary reserves can be revoked by administrative action, but permanent reserves can be changed only by Parliament itself. When this system was introduced in the 19th Century, its authors no doubt believed that the designation 'permanent' would be applied to the more important reserves, and 'temporary' to the less important. Things didn't always work out that way.

In fact, the temporary/permanent system has two complementary failings. As you'll see by looking at the "Lands Miscellaneous" Bills that come before every session, Parliament must deal with bits and pieces of land such as the backyard at Leneva, the Leongatha South Mechanics Hall (abandoned and unsafe), and a bit of unused dead-end road at Gruyere – parcels whose future could surely be determined through administrative action, within the limits of the planning system.

Conversely, much land of state or regional significance does not enjoy the same level of protection because its reservation is designated 'temporary'. This includes more than a thousand parcels which have been waiting to be assembled into a couple of dozen 'Regional Parks' under LCC recommendations dating back to the 1970s.

The principle is clear and sound: public land of national, state or regional significance should have Parliamentary protection against encroachments, misuse and degradation. The National Parks Act embodies this principle, as do other site-specific Acts like those governing the Royal Botanic Gardens and the MCG.

Crown land of local or neighborhood significance is better dealt with, we would argue, by Ministerial discretion exercised on the advice of local councils. After all, reserves created by subdivision of freehold land typically vest in the relevant municipality.

But the Crown Land (Reserves) Act just isn't playing its part, carrying as it does the burden of well-meaning but nevertheless *ad-hoc* decisions made over the course of a century and a half. There's clearly something wrong with a system which leaves Regional Parks unprotected, but requires Parliament to devote its resources to what can or can't happen in someone's backyard. ■

Q&A

Can a permanent reserve be revoked without an Act of Parliament?

In the answer about Middle Creek Levena, we say revocation of a permanent reserve needs a site-specific Act of Parliament. In fact, there are a few exceptions.

Section 11 of the *Crown Land (Reserves) Act* allows school sites to be revoked on the recommendation of the Minister for Education. It also allows the permanent reserve along a river to be moved – but only if the river has moved onto other Crown land.

More recently, section 11A has been slotted in to allow changes to permanent reserves subject to land agreements under the *Traditional Owners Settlement Act* 2010.

The *Water Act* 1958 (not the current Water Act) provided that when Crown land was vested in the State Rivers and Water Supply Commission, any previous reservation was revoked – permanent or temporary.

Seems to us that these exceptions to the rule simply highlight the faults of the system as a whole. If such ad-hoc departures are acceptable, surely the rationale for the whole regime is suspect. ■

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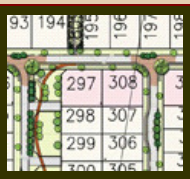

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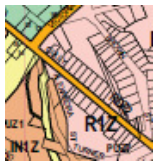

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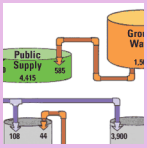

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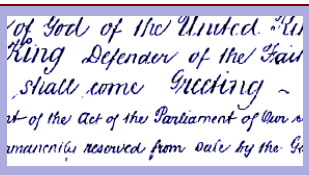

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