

Discussing the Discussion

In Victoria, the public land policy arena is knee-deep in spent discussion papers. Over the next two years we'll get a few more. The good news is: there's a fair chance they'll actually lead to constructive reform.

The [Government has accepted](#) (with some minor qualifications) 30 recommendations from the Victorian Environmental Assessment Council (VEAC), to the effect that the State's public land governance system be thrown out and totally rewritten.



Some recommendations have been accepted 'in principle' or 'in part' – but the variation of most interest to *Terra Publica* is to Rec R7. Here VEAC recommends a discussion paper (singular), but in response the Government offers discussion papers (plural).

We agree. The substance of the reforms warrants a multi-faceted and carefully designed process. What exactly will be put into the public arena; what analyses, what options? In what sequence? How will responses be sought and evaluated? And how will the end result be translated into law; how will those changes be timetabled?

And who will run this consultation? Obviously DELWP will be at its epicentre – but there may well be roles for the Law Reform Commission, the Victorian Aboriginal Heritage Council, the Victorian Catchment Management Council and the Municipal Association of Victoria.

Here's one suggestion for bringing some structure to this process: the discussion papers should reflect the segmentation of the stakeholder community.

The Environment Movement will be particularly concerned about the commitment for a new National Parks Act, expanded to include conservation parks, nature reserves, and marine protected areas. We expect the environment movement will also be seeking reassurance about the abolition of the archaic system of 'temporary' and 'permanent' reserves and its replacement with a system whereby those reserves of higher-importance retain a higher level of Ministerial oversight.

Local Government will surely be concerned with the transposition of Crown land reserves from the current set of purposes (some 1300) onto a rationalised set of about 20 purposes. How exactly will this affect a council's land portfolio?

Both the environment movement and local government will want to know more about the consolidation of legislation governing other Crown land – the tired old *Crown Land (Reserves) Act 1978* (the CLRA), the archaic *Forests Act 1958*, and that legislative zombie, the *Land Act 1958*. It will be a once-in-a-century chance for Victoria to take a leadership role, not just amongst Australian States, but internationally.

Local government as a stakeholder group will also want to know more about Rec R8, which proposes a standardised regulatory regime, somehow coexisting with local laws made under the *Local Government Act 1989*.

Councils will also want input to implementation of recommendation R10, which posits a long-overdue rationalisation of the confused plethora of leasing and licencing provisions, which councils often find themselves attempting to administer.

Continued P2

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Page 2

What is the Crown?

And can I steal its land?

Page 3

We're Working in Wetlands...

Some of our recent consultancy engagements relating to waterways and water infrastructure

Page 4

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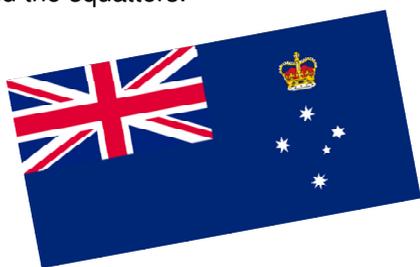
development courses for April-July 2018

Q
&
A

What is 'the Crown'? And can I steal its land?

Question asked by an aspiring adverse possessor.

There was a time when the Crown meant the King of England. And woe betide anyone who attempted to take his land from him – as Governor Bourke demonstrated to John Batman, and various later representative of HMQ Vicky told the squatters.



*Look closely: it's not the Australian flag!
The Crown represents 'the Crown in the Right
of the State of Victoria.'*

In Victoria, the Crown's supremacy over its own land is now codified as section 7 of the *Limitation of Actions Act 1958* (the LAA). It's a supremacy that's been somewhat moderated through the recognition of Native title, and is open to some interpretation. Section 7 reads:

...the right title or interest of the Crown to or in any land shall not be and shall be deemed not to have been in any way affected by reason of any possession of such land adverse to the Crown...

So what is the Crown? Without getting too deep into constitutional law, there are two of them. There's the Crown in the Right of the State of Victoria, and then there's the Crown in the Right of the Commonwealth of Australia. The *Interpretation of Legislation Act 1984* (the ILA) tells us that when

the term 'Crown' turns up in Victorian legislation, it's the former.

And it's the Crown which is the ultimate landlord of Crown leases and licences. One disgruntled tenant attempted to argue that DELWP could not exercise the landlord's power of re-entry, it had to be HMQ Elizabeth herself – or at the very least, the Governor-in-Council. The [Supreme Court of Victoria threw this out](#) as being 'contrary to every consideration of law and practicality.'

But back to adverse possession. That's the body of common law that says I can acquire your land, by taking 'possession' of it for 15 years. Interestingly, the LAA does not protect 'Crown land,' but 'the Crown.' So can I acquire freehold land owned by a public sector agency?

In a [2012 decision](#), the [Supreme Court](#) held that, in defending an adverse possession claim, the Roads Corporation (*i.e.* VicRoads) was entitled to rely on the immunity of the Crown, as specified in the LAA. The key consideration was whether the legislature, in establishing VicRoads, had intended it to be the agent of the Crown.

A further question relates to land owned by defunct companies, taken over by Australian Securities and Investments Commission (ASIC). It has been argued that ASIC is the Crown, therefore land owned by the defunct company cannot be adversely possessed. However in a [recent case](#) the [Supreme Court](#) found otherwise:

Section 601AD(3) of the Companies Act states that ASIC takes only the same property rights that the (defunct) company itself held. The company did not hold as one of its property rights the Crown's immunity from adverse possession claims

So all in all, the answer is NO. Plenty of encroachments onto Crown land (or should we say the Crown's land), but they're not going to result in it being stolen. ■

Discussing the Discussion (continued)

Councils will also have something to say about R14 – where VEAC had foreshadowed a major rationalisation of the ownership of reserves serving purely local purposes – although government has backed away from the radical suggestion that such land not be sold, but gifted. As so often happens, DTF (Department of Treasury and Finance) rules.

The broader Community will want to know how the recommendations could affect their involvement (usually voluntary) and their favourite bits of Crown land. DELWP should be offering them an analysis of the various forms of community participation, such as Crown land committees of management (CoMs), friends' groups, 'section 86' committees, and incorporated associations – and an evaluation of their merits. Of particular value would be a comparison of

CoMs created under the CLRA, and those created under the far more flexible provisions of the *Cemeteries and Crematoria Act 2003*.



Authorities and Agencies will want their own discussion paper, canvassing issues such as Victoria Police's unfortunate reliance on 'implied management' to occupy Crown land police stations; what to do about water authorities issuing leases which fail the test set by Sec 8 of the CLRA, and the circumstances in which hospital boards need consent from DELWP rather than DHHS. ■

We're Working in Wetlands

Waterways aren't what they used to be...

Back in 1881, when Crown land along rivers was reserved for 'public purposes' those purposes were not recreation and conservation, but commerce and stock watering.

What we now see as valuable wetlands were once swamps, whose only purpose was to be drained.

Water was in such plentiful supply that irrigation was via inefficient open channels. Urban waterways were seen as mere drains, and even worse, sewers. And recreational access was often for the privileged few.

Water culture has changed, and the law has changed with it. Land managers find themselves having to manage the transition. Here at The Public Land Consultancy we're pleased to be assisting them...



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Lake Wendouree

For the City of Ballarat, we helped develop policy for allocating licences for private boatsheds at Lake Wendouree



Nullawarre Wetlands

For Warrnambool City Council we advised on responsibility for assets built in part by a long-defunct drainage authority



Glenelg Estuary

For Glenelg-Hopkins CMA, we advised on the policy and legal frameworks governing private jetties

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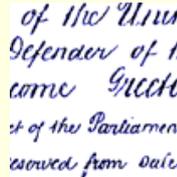
Leases and Licences
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