

So, it's the Twenties

So it's the Twenties, again.

What will the decade bring? The big movements of the 2020s must include a response to climate change, and a response to population growth. And many more challenges, we're sure – but those two in particular will impact on public land, on what we call *Terra Publica*.

Public Land, Private Land

We predict that these responses will inflame an established trend in the underlying-philosophy of land law. In short, we will see a redefinition of the distinction between public land and private land.



Oops – wrong Twenties

It's a debate several centuries old, and intercontinental. In the 1770s William Blackstone described English private property rights as granting 'sole and despotic dominion' to the 'total exclusion of the right of any other individual in the universe.'

By 1866, views were changing. John Stuart Mill posited 'no man made the land... it is the original inheritance of the whole species... The land of every country belongs to the people of that country.'

America follows the Blackstone view. The US contribution to property theory includes the doctrine of 'manifest destiny', ideology-laden Supreme Court judgments on 'eminent domain', and disputed academic treatises such as the 'tragedy of the commons.'

In the UK, the J.S. Mill view has some traction, fuelled by *ramblers* (the people we'd call bushwalkers). Their Kinder Scout trespass in 1932 led, eventually, to the *Countryside and Rights of Way (CROW) Act 2000*. It's legislation which complements heritage protection systems which (up to a point) prevent the

desecration of old buildings. In the UK the land in any 'National Park' is private land, subject to constraints which we'd describe as heritage or protected landscape overlays.

Back to Australia...

Australia is uniquely positioned to redefine the distinction between public land and private land. We have a spasmodic but steady history of legislative interventions – some emanating from public opinion, some from High Court rulings, and some from natural disasters.

In the early nineteenth century Australia rejected a proposal for a landed aristocracy. Later we embraced Deakin's views on the ownership of water and waterways. Then the expanding national parks movement, epitomised by the 'Little Desert' election of 1970. The mid-twentieth century saw private property rights overlaid by environmental and planning statutes – laws which aim to protect the wider public interest. More recently, the Mabo decision led us to kill off *terra nullius*, a cornerstone of freehold title.

Back to 2020. Victoria is poised to make a seminal contribution to this repositioning of the public land private land interface. We are about to see a set of proposals for the rewriting of the statute book as it applies to Crown land. We are about to see papers from VEAC on the efficacy of the coastal reserve system.



We await the Government's proposals for the rewriting of those parts of the *Local Government Act 1989* relating to roads. And their response to VEAC's look at the marine environment.

Let's hope for a sound 2020's response. Not a lot of 1920s flappers dancing the Charleston. ♦

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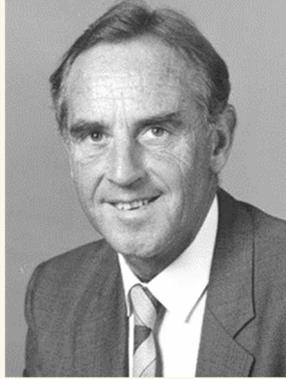
Vale
John Cain

Page 3 Questions and Answers

- *Can we remove native vegetation?*
- *Can a farmer put a pipe across an unused road?*

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Our Calendar of Professional Development Courses for February 2020



Vale John Cain
Premier 1982 to 1990

*John Cain will be remembered
on public land.*

*He forced sporting clubs using public land
to accept women members*

*His government reimagined public land,
from the docklands and Southbank to the
alpine resorts*

*His government rewrote legislation
governing planning, subdivisions,
and water*

*He kept the Grand Final at the MCG, when
the AFL wanted to move it to their private
ground at Waverley*

*He kept the Australian Open in Melbourne,
by building the National Tennis Centre at
Flinders Park – superseding the privately-
run courts at Kooyong.*

Q and A

We are managing a trail on Crown land. Can we remove native vegetation?

Question asked by a regional mountain bike club

DELWP and Parks Victoria (PV) are unlikely to require a planning permit to remove vegetation associated with the maintenance of mountain bike trails or the enhancement of previously cleared, used or informally constructed but unauthorised trails on land under their control – unless there was an ESO overlay. This would also apply to a person or body authorised or contracted by DELWP or PV.

But the native vegetation clearing would have to be done in accordance with the *Procedure for the removal, destruction or lopping of native vegetation on Crown land* (May 2018). Offsets specific to the native vegetation removal would not be required, but both DELWP and PV are required to record native vegetation removed through new activity and report on those activities that counterbalance clearing undertaken under the Procedure.

Vegetation removed through maintenance activities (e.g. maintaining existing recreation trails that have been accepted by the land manager) does not have to be accounted for or reported. ◆

Congratulations
to Tendai Mhasho, Property Officer with Southern Grampians Shire Council.

Tendai has completed her Certificate in Public Land Governance by submitting an essay on the subject of Grange Burn, the watercourse that runs through Hamilton.

Her essay explores the multiple values of the stream and the mechanisms by which Council and various other agencies manage them.

All in all, it's a nice guide to the broad range of value systems – sometimes competing – which a rural property officer has to understand, and reconcile. ◆

A farmer wants to put an irrigation pipeline across an unused government road. Can we authorise it?

Question asked by a rural municipality

For a pipeline crossing a normal open road, Council is responsible authority (RA) under the Planning and Environment (P&E) Act and Coordinating Road Authority (CRA) under the Road Management (RM) Act.

In this case we would be looking at:

- A planning permit (from Council as RA)
- A 'works on roads' permit - sec 63 RM Act (from Council as CRA)
- A sec 121 RM Act agreement (from Council as CRA), possibly linking to a sec 173 agreement (from Council as RA).

However, for an Unused road (capital 'U'), Council is still RA under the P&E Act, but there is no CRA, because Unused roads are not roads for the purpose of the RM Act (see sec 3A, Land Act). So here we're looking at:

- A planning permit as for any normal road
- A 173 agreement from Council (there can't be a sec 63 works on roads agreement, or a 121 agreement, because the RM Act does not apply).
- Permission to use the road for this purpose. This permission comes from DELWP as administrator of URs, and as landlord for UR licences. DELWP may want to issue a licence for this usage (sec 138 Land Act) OR may consider no licence is necessary because of a general exemption for utilities made under sec 138A(11) of the Land Act (see p.1704, Government Gazette 18 July 2002).

Note that URs may be subject to multiple simultaneous licences, provided they don't conflict with each other. ◆

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 formal legal advice from one of its legal associates

Our Forthcoming One-day Training Courses
February 2020

Coming soon: Our full calendar through to July



Tuesday 11 February
Cliftons, Melbourne

Risk Management Law

*The risks, the liabilities, the responses...
Essential learning for managers of roads and
public land*



Thursday 13 February
Cliftons, Melbourne

Crown Land Governance

Full ... call us for details of
future presentations

*Law, policy and practice as it relates to Crown
land reserves and facilities controlled by
councils and statutory authorities*



Tuesday 18 February
Cliftons, Melbourne

Referral Authorities and the Planning System

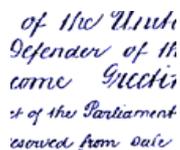
*An overview of planning law for professional
officers handling planning referrals*



Thursday 20 February
Cliftons, Melbourne

The Law relating to Subdivisions

*Mapping out the complexities of the
Subdivision Act 1988 and related legislation*



Monday 24 February
Russell Kennedy
Melbourne

Restrictions on Title

*A detailed explanation of easements,
covenants and restrictive Crown grants*



Wednesday 26 Feb
**(in-house presentation
for Breese Pitt Dickson,
surveyors)**

Roads Governance

*The law relating to roads, streets and lanes...
Essential learning for engineers, planners,
property officers and land managers*



Wednesday 26
February
Cliftons, Melbourne

Statutory Approvals

*for developments on public land
Mapping out the consents: tenure, planning,
environmental, Aboriginal, heritage...*



Thursday 27 February
Cliftons, Melbourne

Leases and Licences

*How your portfolio of halls, neighborhood
houses, and sporting grounds can be leased
and licensed to community groups*

Cost

Full day courses - \$550 per person
including GST, Course notes and working lunch.
Discounts for host organisations
starting time 9:00 am, finish 4:30 pm

Enrolments and Enquiries

Jacqui Talbot jacqui@publicland.com.au

For details of all these courses go to
www.publicland.com.au/professional-development