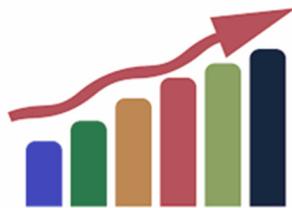


Strategic Incrementalism

The public land governance regime is subject to frequent change. Such changes can take three forms.

Firstly, there's the Great Leap Forward. Then we have *ad hoc* tweaking and one-off knee-jerk responses. In between, there's Strategic Incrementalism.



Let's look at each of them. The Great Leap does indeed happen, from time to time. And usually it's a leap *forward*. Think of Minister Bill Borthwick and his 1970 Little Desert intervention. Or the Cain Government's renaissance of Southbank. Think of the High Court's 1992 decision on Mabo, or the Brumby Government's 2004 decision to relieve road managers from the common law of negligence.

The *ad hoc* amendment may well be positive, and useful – like the 1994 amendment to the definition of *government road*, discussed on page 3. It might be long overdue housekeeping, like the 2016 amendment to the Land Act (section 148(1)) relating to the distance bees can fly from their hive.

At worst, the *ad hoc* amendment might be mere political window dressing – like the 2012 renaming of the Associations Incorporations Act as the Associations Incorporations *Reform* Act.

It used to be worse: whole Acts were little more than knee jerk responses to one-off problems: on the statute books we still find the *St James Church Land Act 1906*, and the *Mooroopna Racecourse Land Act 1907*.

Then we come to strategic incrementalism. Making changes bit by bit, one by one, but in some deliberate overall direction.

The best example is perhaps the *National Parks Act 1975*. Check it out: the current Act is numbered version 171. Sure, many of the amendments were mere machinery changes, but 32 of the 170 were actually building the parks portfolio. Over 45 years, we have seen the national parks system expand, incrementally but systematically.

Some legislative amendments are, we hope, individual steps along the way towards some longer-term goal. The *Caulfield Racecourse Land Act 2017* might be a pointer to the wider multi-purposing of urban Crown land. The *Cemeteries and Crematoria Act 2003* might be a pointer to reforming Committees of Management established under the *Crown Land (Reserves) Act 1978*. The *Marine and Coastal Act 2018* is certainly a step forward in the arduous process of reforming coastal governance – but there's a fair way still to go!

We are now heading into a new round of public land legislative reform – courtesy of the 2017 VEAC recommendations. Here at *Terra Publica* we may hope for the Great Leap Forward (that's what's really required), but we'll settle for strategic incrementalism. So long as we don't see more rounds of *ad hoc* window dressing. Time will tell. ■

Page 2

Reconfiguration of Middle Suburbia –An Invitation for Minister Richard Wynne

Page 3

Can I access my property across an abutting Crown land reserve?

Page 4

Professional Development courses for Nov 2019 – April 2020

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This article is in response to Minister Wynne's talk to the annual Evan Walker Conversation:

'PLAN MELBOURNE - how well is it working to preserve our city's liveability and to house its rapidly growing population?'

Reconfiguring Middle Suburbia

Planning Minister Richard Wynne wants 20 minute mixed-use neighbourhoods. He wants 70% of Melbourne's growth to happen within established urban areas. Let's hope he gets something more than just press releases.

Point at any middle suburb of Melbourne, We guarantee to find you an underutilised precinct crying out for redevelopment.

Here is government land blighted by the monocultural economics of Treasury and Finance. Here is a row of semi derelict retail shops; a bleak at-surface council carpark, and road reserves laid out in an era when land was there to be wasted. Not to mention rubbish-strewn back lanes. And walk-up six- or eight-pack flats inhabited by the very people Minister Wynne wants to see better accommodated.

Any third-year planning student could redesign this as a better functioning precinct. Population doubled, trebled or even quadrupled. Let's have some pedestrian and cycling paths. Housing diversity. Usable public spaces, with safe playgrounds and pocket parks and canopy trees...

Any decent developer could build it – but only if the site is consolidated! But no developer has the power or the inclination to attempt to bring all the constituent parcels into single ownership.

Who does have the power? Local councils could do, if only they were encouraged by the State Government. The tools are already in the tool-kit, standing idle. Minister: come to our Middle Suburbs Reconfiguration workshop and learn all about it!

RECONFIGURING MIDDLE SUBURBIA

Thursday 5 Dec 2019

9:00 a.m. – 12:30 p.m.

Cliftons Conference Centre, Melbourne

- **Marcus Spiller** (Principal and Partner, SGS Economics & Planning) *Who will reconfigure Melbourne – State or Local government?*
- **A Senior Council Officer** *Practical examples of reconfiguring urban creeks, car parks, council properties, back lanes...*
- **Richard O'Byrne** (Parks and Leisure, Australia) *Multiple-use public open space*
- **David Gabriel-Jones** (The Public Land Consultancy) *Moving from planning to implementation: the reconfiguration toolkit*

Does freehold land have access rights onto an abutting Crown land reserve?

Question arising in some recent consultancy work

Many parcels of Crown land, both reserved and unreserved, are traversed by physical roadways. Some of these roadways provide practical access to abutting properties.

It is important that such roadways do not automatically develop into legal points of access: to do so would inhibit government's ability to make decisions about the future use and occupation of the Crown land.

Therefore, as a general rule, properties abutting Crown land should not be seen as having legal rights of access across their boundary with the Crown land.

There are various exceptions, the principal one being where the Crown land is a 'road' within the meaning of the *Land Act 1958*. In this case abutting properties have always enjoyed rights of access across the Crown boundary – long before section 9 of the *Road Management Act 2004* (the RM Act) – of which more later.

Crown land can acquire the legal status 'road' by various means:

1. It can be 'proclaimed' as a road under section 25(3)(c) of the *Land Act 1958*. Originally, this was the only way Crown land could become a 'Government Road.'
2. It can be shown on a plan held in the Central Plan Office, whether it had been proclaimed or not. This is the effect of section 25(5) of the *Land Act 1958*, inserted into that Act in 1994 to ensure that all Government roads were recognised as such, even those which had not been formally proclaimed.
3. **It can be reserved for the purpose 'road' under the *Crown Land (Reserves) Act 1978* (the CL(R) Act), or predecessor legislation dating as far back as 1862.**

Land under the CL(R) Act may be reserved for many different public purposes. All such reserves may have physical roadways on them (which may or may not be roads for the purposes of the *Road Safety Act 1986*, but that's another matter). One of those is significantly different from the rest, and that is the purpose 'road.'

The 1994 amendment which undid the need for a government road to be proclaimed, also expanded the definition of 'road.' It now includes land reserved under the CL(R) Act for the purpose 'road.' Thus when the Land Act uses the word 'road' it applies, amongst other things, to Crown land reserved for that purpose under the CL(R) Act.

Continued – page 3

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in Melbourne and each of the 5 RRV regions:

- Thurs 5 March 2020 – Melbourne
- Thurs 19 March 2020 – Ballarat
- Thurs 23 April 2020 – Wangaratta
- Mon 4 May 2020 – Traralgon
- Tues 12 May 2020 – Geelong
- Thurs 28 May 2020 – Bendigo

Continued from page 2 ...

Access onto an abutting Crown Reserve

This fact has been recognised in the courts. In *Bass Coast v King* (Court of Appeal, 1997) the court accepted evidence from the Surveyor General that the term *government road* meant Crown land which had been ‘reserved or proclaimed as a road.’ This phrase was cited as recently as June of this year, in *Gray v Minister for EE&CC* (Supreme Court, 2019).

The consequences of this are significant. According to the CL(R) Act, a temporary Crown reserve can be revoked by Order in Council. However, where the reserve purpose is ‘road,’ we believe revocation must involve formal discontinuation processes under the *Land Act 1958*, the *Local Government Act 1989*, or the *Planning and Environment Act 1987*. The legal principle here is that later legislation (e.g. the 1994 amendment to the Land Act) prevails over earlier legislation (the CL(R) Act 1978). This principle was central to the case *Calabro v Bayside City Council* (Supreme Court, 1999).

Likewise, and of more relevance to the question under discussion, abutting properties have rights of access across the boundary with such a road – just as they do across the boundary of any government road.

In 2004 there was an attempt to codify this into statute as section 9 of the RM Act. This is an extremely poorly drafted section, which we hope will be rectified in due course. It provides that ‘an owner or occupier of any land which adjoins a road is entitled as of right to access the road from that land.’

The fault in section 9 is that it applies to ‘roads’ as defined by the RM Act. That definition encompasses not only road reserves, but also physical roadways in State Forest, National Park, unreserved Crown land, Alpine Resorts, and Crown land reserved for any purpose – whether that purpose is ‘road’ or not.

This was never the intention of Parliament. To the best of our knowledge, this mistake has not yet resulted in some abutting owner claiming access rights across the boundary with these types of Crown land. If and when such a claim is made, we can expect to see a court addressing the difference between a road reserve and a physical roadway – a difference which eluded the authors of the RM Act.

Finally – let’s mention two more exceptions to the general rule. Abutting freehold may have rights of legal access to Crown land (other than a road) in two cases – something called an easement of necessity, and through section 6 of the *Subdivision Act 1988*. But in each case, folks – that’s another story. ■



Professional Development for Water Authorities

We are pleased to provide in-house training for many water authorities around the State

Wannon Water has engaged us to present our one-day ‘Service Utilities’ course at Warrnambool

Gippsland Water engaged us to run two presentations of ‘Planning Law’ in their Traralgon office

North East Water engaged us to present two courses in Wodonga:

- Land Law for Water Authorities
- Planning & Environmental Law

‘FPET’ assessments by the Surveyors Registration Board

Restrictions on Title

- 5.5 cadastral points
- development planning point

Roads Governance

- 5.0 cadastral points
- 1.5 development planning points

Coastal Land Management

- 5.0 cadastral points
- 1.5 development planning points

Crown Land Law, Policy, Practice

- 4.0 cadastral points
- 2.0 ‘other’ points

Law Relating to Subdivisions

- 4.0 cadastral points
- 2.5 development planning points



Our Forthcoming One-day Training Courses
November 2019 – April 2020



**Crown Land
Law, Policy and Practice**

Tuesday 12 Nov 2019 –
Traralgon
Thursday 13 Feb 2020 –
Melbourne



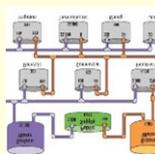
Roads Governance

Tues 26 Nov 2019 – Werribee
Thursday 19 March 2020 –
Ballarat
Thursday 23 April 2020 –
Wangaratta



**Coastal
Land Management**

Wed 13 November 2019 –
Frankston



**Land Law for
Service Utilities**

Mon 11 Nov – Wannon Water
Mon 18 & Mon 25 Nov 2019 -
Barwon Water



**Native Title
and Aboriginal Heritage**

Thurs 28 November 2019-
Melbourne



Risk Management Law

Tues 11 February 2020 –
Melbourne



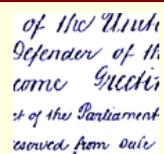
**Referral Authorities
and the Planning System**

Tues 18 February 2020 –
Melbourne



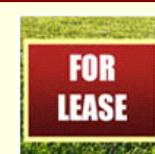
**The Law relating to
Subdivisions**

Thurs 20 February 2020 –
Melbourne



Restrictions on Title

Mon 24 February 2020 –
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(Venue: Russell Kennedy)



**Leases and Licences
of Public Land**

Thurs 27 February 2020 –
Melbourne



**Road Closures and
Discontinuations (half-day)**

Fri 13 March 2020 –
Melbourne



**Offences and
Enforcement on Roads**

Mon 20 April 2020 –
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(Venue: Russell Kennedy)



**Encroachments onto
Public Land (half-day)**

Fri 27 March 2020 –
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**The Law relating to
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If required, The Public Land Consultancy can obtain formal legal advice from one of its legal associates.