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Congratulations Mr Premier

(Probably Daniel Andrews, just possibly Matthew Guy)

Terra Publica is leaping two months into the future. Whether the November election returns the Andrews Government or hands Victoria over to Matthew Guy, there is plenty of work to be done in relation to public land. Here's our advice to various incoming Ministers…

Attention Minister for Environment

(probably Lily D'Ambrosio, possibly James Newbury)

Dear Minister D'Ambrosio (or will it be Minister Newbury?). Within your portfolio you already have a series of major reforms under way, but here is another one to add to the list: Tenant's Residual Interest.

The reforms already in the pipeline stem from the 2017 report of Victorian Environmental Assessment Council (VEAC), (click here) which recommended a comprehensive rewrite of Crown land legislation. The rewrite presents an opportunity to fix a few longstanding faults not addressed by VEAC.

Tenant's residual interest. That's an idea which allows commercial enterprise to function on public land. Let's think about the restaurant on the foreshore, or the caravan park on the river frontage, or the boat repair business in the yacht club. Or indeed (the old) Arthurs Seat Chairlift.

On private land such arrangements are entered into on a fully commercial basis. Sure, the proponents may have to comply with the relevant planning scheme, but tenure and financing arrangements are not open for public scrutiny. Whether the tenancy is awarded through competitive tender is entirely a matter for the landlord. Nevertheless, we know that capital costs are normally borne by the landowner as landlord, with the tenant bearing only the costs of chattels and fittings. It's not like that on public land.

On public land DELWP insists, quite correctly, that competition policy should apply to the awarding of leases. From time to time the foreshore restaurant, the riverside caravan park and the boat repair business should be opened up to competition. The impediment is the outgoing tenant's unamortised investment.

In public land it's far more likely that capital costs are borne by the tenant, not the landlord. The restaurant needs new kitchens, the caravan park needs new toilets, the boat business needs to rebuild the slipway. It won't be the public land manager footing the bill, it will be the tenant. And why should the tenant invest money if the lease term is about to expire?

Why did the previous Arthur's Seat Chairlift fall down? Twice!

Because the Crown lease failed to recognise Tenant's Residual Interest.

What we have is a formula for allowing leased premises on Crown land to run down. The tenant will put in money only if the lease term is renewed. The landlord has a difficult choice: either allow the premises to run down, or ditch competition policy.

In NSW they avoid this dilemma through recognition of Tenant's Residual Interest:

"… where a capital improvement is proposed, which is not a major redevelopment, and the available or remaining term of tenure is insufficient to allow full amortisation, either an extension of term or an agreed residual value of the improvement may be negotiated to enable the capital improvement to be fully amortised, or reflect the holder's interest at the end of the tenure..."

Over to you, Minister! ◆

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Attention Minister for Roads
(probably Ben Carrol, possibly Stephanie Ryan)

Dear Minister: There are quite a few road related problems for you to address in the text term of government…

We have two distinct meanings of the word 'road.' In some Acts it means a physical trafficable roadway, in others it means the road reserve. Out there in the real world, we often find them going hand-in-hand: Bourke Street is a road reserve containing a trafficable roadway.

But the *Road Management Act 2004* (the RM Act) frankly gets them a bit mixed up. The RM Act has served us well for the past 18 years, but it is due for some further revision.

Biggest problem – it can't be read in isolation. It overlaps with five Crown land Acts, and the remnants of the *Local Government Act 1989*.

Most road reserves come under the RM Act, but some don't. Some roadways which are outside road reserves come under the Act, but most don't. Time for a bit of a rethink.

A body of road-related law survives in the remnants of the *Local Government Act 1989*, even though most of that Act has been transposed into the *Local Government Act 2020*. In the old Act we find a suite of powers under which municipalities manage those roads assigned to them through the RM Act. One problem is an extremely odd definition of the word 'road,' another is the mismatch between the public consultation provisions of the old and the new Acts.

A further problem crying out for revision is the body of law relating to road closures and discontinuations. These are enabled under at least four Acts, which have entirely inconsistent provisions relating to public consultation, approvals, judicial review, and compensation.

Perhaps the worst road-related problem is the frequent mismatch between a road's true owner and its registered proprietor. Time and time again we see people imagining they can believe their title documents. It really shouldn't be too difficult to sort this one out. ◆

Attention Attorney-General
(probably Jaclyn Symes, possibly Michael O'Brien)

Dear A-G: The next four years present an opportunity for lawyers and the courts to extend their remit over public land.

(Some may query the wisdom of giving lawyers more scope, but we are taking the positive view.)

If a citizen disagrees with their council in relation to a planning permit, or some local law, or their rate notice, they might head towards VCAT. But if they object to Council's road management plan, or the leasing arrangements for the local public hall, they won't even get in the door.

It seems that government decides whether an Act should enable review by VCAT at the time that Act is being drafted. Five Crown Land Acts are about to be rewritten, so perhaps we will see consideration of this issue. Perhaps not.

Then there's the question of regulations made under various Acts. For the past 50 years it has been considered desirable that regulations should sunset after 10 years, so forcing their reconsideration. That's the essence of the *Subordinate Legislation Act 1994*. But (yes, here's the *but*…) Crown land regulations don't sunset. They just keep rolling on, and thereby can undermine more modern Local Laws.

And finally, Ms (or possibly Mr) Attorney General, we come to oddities of the common-law, left over from medieval England, and waiting to be brought into the 21st Century. Here we are thinking about something called the *doctrine of accretion*, which deems that some property boundaries may move, or on the other hand, they may not.

And let's take a look at the common law notion of the *public highway*, a nebulous concept which, despite its antiquity, continues to keep the State's courts busy.

And a final one for you, A-G. Offenders on public land cannot be identified by their car number plates. It's down to something called the reversal of the onus of proof. It makes the *Land Conservation (Vehicle Control) Act 1972* totally unworkable. And it needs fixing. ◆

The Public Land Consultancy acknowledges that our core work relates to the lands of Victoria's Traditional Owners. We promote recognition of Indigenous rights through study, policy and the law.

Attention Treasurer (probably Tim Pallas, possibly David Davis)

One reform has already been made, but passed unnoticed…

Dear Treasurer: as you know, Crown land administration comes under your colleague the Minister for Environment and Climate Action (via DELWP) but its disposal and sale comes under you (via DTF).

And here we find plenty of scope for reforms. For instance, last year Treasurer Pallas dumped one ideologically driven 'reform' made by the Kennett Government in 1998.

Back then, the plan was to subject public land to the mechanisms of the private sector, to market forces. One result was the great sell-off of surplus Crown land, another was the Capital Asset Charge (CAC). Here's what it was all about…

All over the state we find sub-optimal portfolios of land held by public sector agencies. Each year your typical municipality or statutory authority will acquire some properties and dispose of others, but such transactions are usually driven by operational requirements or *ad hoc* external events.

Some councils and agencies have asset management strategies, but overall, public land lacks a coherent body of supporting political or economic theory.

You just can't transpose private sector economic theory onto public land. It just doesn't work. One example is the 'Tragedy of the Commons' claptrap; another is (or was) the Capital Asset Charge.

Your private sector portfolio manager is constantly evaluating the performance of individual assets. If one property is not performing, then it will be put to another use, or refurbished, or sold. The test comes down to arithmetic – a function of interest rates, operational income and expenditure, and movements in capital value.

One way or another, for better or for worse, market economics will force a manager's hand. But how about portfolios of Crown land assets?

We are certainly not suggesting that a conservation reserve or a public hall or a council depot or a railway siding should be blighted by private sector economic theory. But we need a different framework for identifying the commercial and non-commercial values of public land, and ensuring their optimisation.

Back in 1998 the Kennett Government introduced an 8% Capital Asset Charge (CAC) on government agencies' portfolios. Hey Presto! Portfolio managers would now feel the pain of under-performing assets, exactly as if they'd had to borrow the capital at 8%.

The pressure would be on to dispose of the under-performing and reinvest in the better performing. Trouble is, the scheme was nothing but creative accounting.

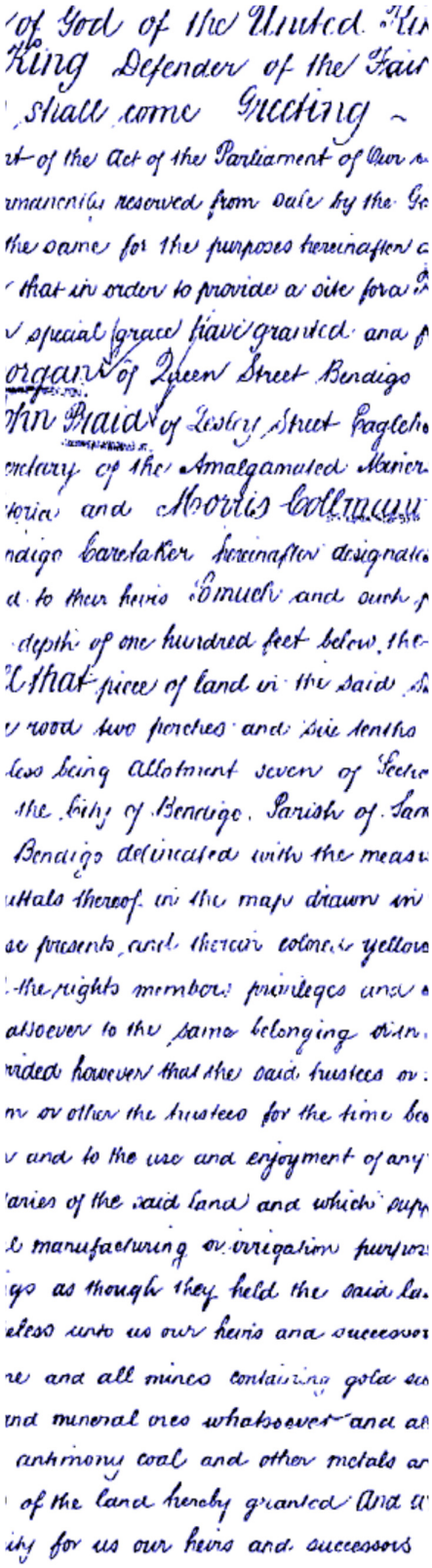
As Treasury collected the 8% with one hand, it handed it back again through annual appropriations with the other. No government agency suffered from holding under-performing assets.

The conjuring trick was exposed back in 2003, when the Education Department miscalculated its liability to Treasury's left hand, and ran straight off to Treasury's right hand for a top-up. As the Auditor General observed: *'this brings into question whether the intended objectives of the charge (from both financial and asset management perspectives) are being achieved.'*

Two decades later, Treasurer Tim Pallas has finally dumped the CAC. But agencies with mixed Crown land / freehold land portfolios are still adversely affected by his Department's Asset Management Policy.

Consider an agency which needs to cut back its footprint: If it sells this freehold site, it pockets the full land value; if it sells that Crown land site, it pockets nothing: the proceeds are credited to the consolidated fund. End result: distorted asset management, and sub-optimal land use.

Attention Treasurer (probably Tim Pallas, but just possibly David Davis): there's still room for further reform! ◆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Q & A
Can I get a *Conditional* Crown Grant?

Question raised by a developer hoping to acquire Crown land on the cheap

A Crown grant is the instrument which converts Crown land to freehold. It is not a contract – there is only one signature at the bottom, and that's the signature of the Governor in Council.

On the face of it, the dealing is a unilateral grant, but in reality, it's a sale between two parties – the Crown as vendor and some purchaser. Grants are issued under the *Land Act* 1958, although subsequent dealings occur under the *Transfer of Land Act 1958*.

All Crown grants contain conditions – but some are more conditional than others. A typical handwritten 19th Century grant includes phrases such as… *Reserving and excepting nevertheless unto us our heirs and successors all gold and silver …*

Conditions in grants were also an early attempt to shape the uses to which land would be put – in other words, an early attempt at land use planning.

"…the said land hereby granted shall be at all times hereafter maintained and used only as and for a site for one Villa Residence and its offices to be built of stone or brick…"

These planning-type condition were largely revoked by the *Crown Grants (Removal of Conditions) Act, 1972* – although nobody went back and amended the actual grant documents.

'Any condition provision declaration or restriction (in the form of such-and-such words) contained in any Crown grant issued in respect of (any land in such-and-such places) shall be null and void.'

So – why is a 21st Century developer interested in this very old-fashioned form of instrument? Because the more restrictive the condition, the lower the valuation. It's a device for buying Crown land on the cheap. But Department of Treasury and Finance (DTF) is most reluctant to sell at anything less than full valuation.

And there's another catch. Unlike a covenant on title, or a planning scheme zoning, the condition can't be lifted by a court or a council. DTF will remove the condition only on payment of the remainder of the full purchase valuation. ◆

Training Courses, Oct-Dec 2022

NOTE: some courses are three sessions, each of 2 hours duration; others are 2 sessions, each of 3 hours duration.

	Roads Governance *Presenter: David Gabriel-Jones*	Tues 18 Oct, 10am – 12pm Wed 19 Oct, 10am – 12pm Thurs 20 Oct, 10am – 12pm
	Land Law and Subdivision *Presenter: Mark Bartley*	Tues 18 Oct, 10.30am – 1.30pm Wed 19 Oct, 10.30am – 1.30pm
	Restrictions on Title *Presenter: Nick Sissons*	Tues 8 Nov, 10am – 1pm Wed 9 Nov, 10am – 1pm
	Crown Land Governance *Presenter: David Gabriel-Jones*	Tues 15 Nov, 10am – 12pm Wed 16 Nov, 10am – 12pm Thurs 17 Nov, 10am – 12pm
	Leases and Licences Of Public Land *Presenter: Richard O'Byrne*	Tues 22 Nov, 10am – 12pm Wed 23 Nov, 10am – 12pm Thurs 24 Nov, 10am – 12pm
	Roads Governance *Presenter: David Gabriel-Jones*	Tues 22 Nov, 10am – 12pm Wed 23 Nov, 10am – 12pm Thurs 24 Nov, 10am – 12pm
	Referral Authorities and the Planning System *Presenter: Mark Bartley*	Tues 29 Nov, 10.30am – 1.30pm Wed 30 Nov, 10.30am – 1.30pm
	Native Title and Aboriginal Heritage *Presenter: Anoushka Lenffer*	Wed 30 Nov 9.30am –12.30pm Wed 7 Dec 9.30am – 12.30pm
	Land Law for Managers of Rivers and Riparian Land *Presenter: Jo Slijkerman*	Mon 5 Dec 10:30 – 12:30 Tues 6 Dec 10:30 – 12:30 Fri 9 Dec 10:30 – 12:30

Thank you to some recent clients

Cost:
$495 including GST, course notes and certificate of attendance

Accreditation: These courses are eligible for CPD points for lawyers, planners, valuers, and FPET for surveyors.

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All these courses can be presented in your own offices. Discounts for host organisations