

THE STARS AND THE SILENCE

That's what astounds international visitors to Wyperfeld National Park: the night sky. The stars and the silence. Nothing like that in Tokyo or Seoul.

Under the Napthine Government's new tourism policy, many more tourists could soon be amazed by our National Parks. A commendable aspiration – but the devil's in the detail.

Since at least 1985 public land managers have talked about 'Limits of Acceptable Change.' That's not only the title of the seminal U.S. work on the subject by George Stankey *et al*, but also a phrase which neatly encapsulates the dilemma. In Victoria's National Parks, what change is acceptable?



Stonehenge, Wiltshire

The old visitor facilities (now replaced) compromised the very values they were supposed to celebrate.

The media statements have been released, the guidelines are up on the DSE website – and now the hard work starts. We foresee a series of major issues which still have to be worked through.

It is notoriously difficult to balance the government-determined and the developer-determined segments of public land proposals. Government over-specification can undermine commercial viability: when DSE packaged up some forest sites for development, the private sector responded with a Wyperfeld-strength silence. The same happened at Argyle Square, Carlton (see TP, Sept 2011).

At the core of the problem lies the apparatus for planning public land. Planning schemes are well understood and robust mechanisms for responding to developer-initiated proposals on private land, but something more is needed on public land.

In a National Park, or at the St Kilda Triangle, or above Jolimont rail yards we need to go further. The public at large demands and deserves input to defining the public-benefit outcomes. The very vocal objectors to the Triangle development would have had much weaker grounds for protest if they'd previously been given a meaningful role in defining the development parameters.

By the time the Triangle proposal went out for approval, it was already a well-defined plan, put together essentially behind closed doors by the preferred developer. And that brings us to the reason private investors invest – profitability.

If government requires public benefit outcomes from a private sector development, those benefits may have to be paid for. This may take the form of capital grants, operating subsidies or less-than-market land rentals. At the St Kilda triangle, the nominal ground-rental alone was insufficient to offset the unprofitable public benefits; what proved necessary was a further \$20m grant for refurbishment of the Palais.

There are a couple more issues to be addressed before National Parks welcome all those plane-loads of tourists. The first relates to intellectual property. How will DSE balance the entrepreneur's need for confidentiality against the government's requirement for public exhibition?

On Crown land, the enterprising investor is faced with the threat of having his/her bright idea put out to public tender. A notable exception occurs where the proponent already owns some essential part of the whole, making the public land component unattractive to any other bidder. So it was at the Werribee South marina – the Crown land lease could only reasonably be held by the owner of the abutting freehold.

Then there's the lease duration. There are more innovative ways of assuring investor security than by offering ever-longer lease terms, or by granting non-competitive lease renewals (which is the reason Arthurs Seat chair lift fell down, multiple times). As we've argued before (TP, May 2006) what's needed is recognition of tenant's residual interest.

Finally – looming over the whole debate is the specter of the Seal Rocks. An incoming government had a mandate to kill the project off, but the opinion of the electorate could not overturn the poorly-constructed contract, and taxpayers had to fork out \$55 million in compensation. Ironically, the forces of nature then ripped off the roof, taxpayers subscribed a further \$7 million, and the government resumed full control. It would have been cheaper, certainly, to offer the tourists stars and silence. ■

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- Converting Crown tenures to freehold

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- Our Training Schedule April to June 2013

Turmoil in the Building Industry

*Maladministration, overspending,
corruption and misconduct...*

*Harsh words – all from official reports into
the Victorian Building Commission and the
Building Practitioners Board.*

*What was so wrong with Victoria's Building
Control system? How should it be working?
What do councils need to know about the
new Victorian Building Authority ?*

BUILDING LAW AND REGULATION

*A One-day Overview of Building
Controls in Victoria*



Presenter: Tom Vasilopoulos

*LLB, M App Sc, Grad Dip Building Surveying, Building
Surveyor and Building Inspector*

Tom has over 20 years experience in local
government including 5 years as In-house
Solicitor for Moonee Valley City Council.

He has regularly appeared in the Building
Appeals Board, VCAT, the Coroners Court,
Magistrates' Court and the County Court as
instructing solicitor or as an informant.

For more details, go to
www.publicland.com.au/professional_development

Tuesday 30 April
Law Institute of Victoria
470 Bourke St Melbourne

Registrations and Inquiries
Lesley Simons
lesley@publicland.com.au

*Over coming months we'll be rolling out
a series of workshop training courses
for Victoria's coastal managers*



- ❖ **Authority over Coastal Lands
and Waters**
*How responsibility for coastal lands and
waters is assigned and how power is
exercised; the roles of Councils, Coastal
Boards, DSE, Parks Victoria and Port
Authorities*
- ❖ **Coastal Managers
and Coastal Tenants**
*The structures, powers and duties of
Crown land managers and Port
Authorities; Leases, licences and
Permits to use and occupy coastal lands
and waters*
- ❖ **On-shore and Off-shore
Development**
*Approvals needed under the Coastal
Management Act, Crown Lands Acts,
Native Title Act, and Planning Acts*
- ❖ **Climate Change**
*Risk obligations, risk assignment,
insurance; How the governance of the
coast may respond to climate change and
rising sea levels; What's happening at
State and Federal Government levels.*

Land Law and Coastal Adaptation

*Presenter – Richard O'Byrne
Associate, The Public Land Consultancy*

- Tues 23 April Port Phillip (in-house)
- Mon 13 May Melbourne (LIV)
- Tues 21 May Warrnambool
- Thurs 30 May Sale

Inquiries and registrations
lesley@publicland.com.au

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.

Q & A Questions raised during our recent workshops with the State Revenue Office

Which Crown land is subject to Land Tax?

Double negatives we can handle, but the answer to this question gets us into quadruple and even quintuple negatives.

First negative – No, Crown land is exempt from land tax (*Land Tax Act 2005*, section 79(1)).

Second negative – However, the exemption does not apply if the Crown land is held under a lease (*Land Tax Act 2005*, section 79(2)(a)).

Third negative – unless that lease is a retail premises lease within the meaning of the *Retail Leases Act 2003* (*Land Tax Act 2005*, also section 79(2)(a)).

Now we need to know whether the land is 'retail premises,' so we turn to section 4(1) of the *Retail Leases Act 2003*. Here we find that retail premises are premises used wholly or predominantly for 'the sale or hire of goods by retail or the retail provision of services.' BUT then we come to...

Fourth negative – Unless those retail premises fall into one of several categories of exemption, amongst which are classes of lease specified in a Ministerial determination under section 5(1).



One such Ministerial determination serves to exclude local council premises that are leased by councils for certain community purposes – but it includes (or at least implies) a...

Fifth negative – An exemption for a community purposes lease does not necessarily apply to any sub-lease.

Where does that leave us? If it's Crown land it's exempt; but if it's leased Crown land it's not exempt, unless it's a retail lease in which case it is exempt; however if it's a lease of Crown land from a council for community purposes it's not a retail lease and

therefore not exempt, although a sub-lease under it might still be a retail lease and therefore exempt..

We're not at all sure that's what the legislature intended when it put all this in place. ■

Can a tenant of Crown land obtain full freehold ownership?

It's a question which arose because another third negative in the *Land Tax Act 2005* (see the previous Q&A) applies where the Crown land is held under a licence which includes a right of acquiring the fee simple (section 79(2)(c)).

Strange, because to the best of our knowledge there are no such licences, and never have been.

Once upon a time there were time-payment leases which included a right of acquiring the fee simple, but we doubt that any still exist. The *Land Tax Act 2005* recognised them up until 2009, when the relevant provision was repealed, but somehow the corresponding reference to licences remains.

The same curious reference appears in the *Fire Services Property Levy Act 2012*, which applies not only to Crown land leases (which certainly do exist) but also to Crown land licences with a right to fee simple (which, to the best of our knowledge, don't).

When they existed, these time-payment leases were used for 'selection purchase allotments.' Rentals were set by (yes *by*, not *under*) the *Land Act 1958* at exorbitant figures such as one shilling per acre per annum – which could be discounted down to 'twopence and two-fifths of a penny' in the case of poorer quality land.

We were thinking of applying for one – but unfortunately this whole slab of the Land Act was repealed in 1994.

So the answer to the question is yes – but not as an entitlement under their lease or licence. The tenant would have to negotiate a heap of other obstacles, including the payment of something more than twopence and two fifths of a penny. ■

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In the coming weeks we have in-house courses slated for the State Revenue Office, and Horsham, Darebin, Wellington and Port Phillip Councils.

Our Training Course Program
April to July 2013

<p>Managing Volunteers and Grants Programs Presenter – Richard O'Byrne Associate, The Public Land Consultancy</p> <ul style="list-style-type: none"> • Wed 15 May Melbourne (LIV) 	<p>Land Law for Managers of Rivers and Lakes Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</p> <ul style="list-style-type: none"> • Thurs 23 May Horsham • Tues 4 June Melbourne (LIV)
<p>Leases and Licences of Public Land Presenter – Karen Hayes, Property Specialist</p> <ul style="list-style-type: none"> • Tues 7 May Melbourne (LIV) • Thurs 16 May Horsham 	<p>Crown Land Law Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</p> <ul style="list-style-type: none"> • Mon 25 March State Revenue Office • Thurs 18 April Melbourne (LIV) • Thurs 9 May Horsham
<p>Planning Law a strategic overview Presenter – Andrew Walker, Victorian Bar</p> <ul style="list-style-type: none"> • Mon 20 May Melbourne (LIV) 	<p>Building Law Presenter – Tom Vasilopoulos, Victorian Bar</p> <ul style="list-style-type: none"> • Tues 30 April Melbourne (LIV) more information – see Page 3
 <p>Roads, Streets and Lanes Presenter – Andrew Walker, Victorian Bar</p> <ul style="list-style-type: none"> • Mon 22 April Melbourne (LIV) • Thurs 2 May Horsham • Mon 27 May Melbourne (LIV) • Wed 12 June Darebin (in-house) 	 <p>Coastal Adaptation Presenter – Richard O'Byrne Associate, The Public Land Consultancy</p> <ul style="list-style-type: none"> • Tues 23 April Port Phillip (in-house) • Mon 13 May Melbourne (LIV) • Tues 21 May Warrnambool • Thurs 30 May Sale
<p>Native Title & Aboriginal Heritage Presenter – David Yarrow, Victorian Bar</p> <ul style="list-style-type: none"> • Wed 29 May Melbourne (LIV) 	<p>Environmental Law A Strategic Overview Presenter – Brendan Sydes, Principal Solicitor, EDO</p> <ul style="list-style-type: none"> • Melbourne (date and venue to be arranged)
<p>Risk Management Law on roads and public land Presenter – Michael Beasley, Solicitor</p> <ul style="list-style-type: none"> • Fri 31 May Melbourne (LIV) 	<p>Subdivisions Law Presenter, Dr David Mitchell, Director, Land Centre, RMIT University</p> <ul style="list-style-type: none"> • Fri 7 June Melbourne (LIV)
<p>Enquiries and Registrations: Lesley Simons – lesley@publicland.com.au – phone 9534 5128 Cost: \$495 including GST, course notes and working lunch. Discounts for course hosts. All Courses are one-day duration; 9:00 a.m. to 4:30 p.m.</p>	

For details of all these courses:
www.publicland.com.au/professional_development

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inc GST, course notes and working lunch.
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LIV is Law Institute of Victoria
470 Bourke St Melbourne
(walking distance from
Southern Cross Station)