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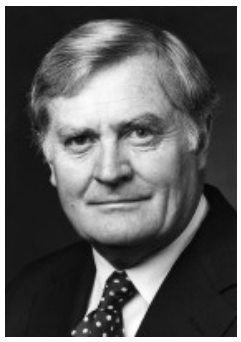
A Commendable Dereliction of Duty

As Minister of Lands in the Bolte Liberal Government, Bill Borthwick had a fight on his hands.



Bill Borthwick

In the aftermath of the 1970 elections, he was committed to setting up the Land Conservation Council. It wasn't the Labor Opposition that stood in his way, it was the Country Party.

As Hansard records, they were incredulous. Decisions about Crown land being made on the basis of independent advice, rather than political lobbying! Dereliction of Duty! *"The Minister is refusing to administer his department… refusing to exercise the powers provided him in the Land Act…"*

The Country Party had learned nothing from the Little Desert fiasco, which had seen the previous Minister lose not only his portfolio, but his seat.

"If an area of Crown land is not being used for forest production, then surely it is logical to make that land available to the adjoining landholder…There is nothing wrong with giving a dairy farmer an additional 100 acres…"

Borthwick was undeterred, and pressed on to set up a system without precedent in Australia. One contributor to the debate described the legislation as "*epoch-making and which future generations will regard as a masterpiece of statesmanship.*"

That was 45 years ago. It could be argued that the LCC (and its successors, the ECC and VEAC) have now done their job. There is little if any Crown land out there waiting to be allocated – either for dairy farms or for National Parks.

Seems to us it's time for the next big step forward in Victoria's public land governance – time for a new Bill Borthwick. Maybe it will emerge through the VEAC investigation into the future of the public land system – set up by the Napthine Government, and extended by the Andrews Government.

The first round of submissions has closed, and we eagerly await developments. ◆

Page 4 *Our calendar of one-day courses and half-day workshops*
July to November 2015

Our Submission to VEAC

The Public Land Consultancy

Dear Victorian Environment Assessment Council

We are pleased to have this opportunity of making a submission to VEAC on matters which we believe long overdue for the government's attention.

We submit that there should be a fundamental restructuring of the governance of Crown land reserves, particularly those reserves of local significance. This should be paralleled by a fundamental rewriting of relevant legislation, notably the *Land Act 1958* and the *Crown Land (Reserves) Act 1978*.

Specifically, we offer 5 proposals:

- There should be no unreserved Crown land in Victoria
- We need to reassign Crown land reserves within a new conceptual framework
- Each Crown land reserve should be categorised according to its level of significance
- Rationalise reserve purposes, and abolish the temporary/permanent system
- Crown land reserves of local significance should be granted in freehold to local government.

On the basis of our extensive experience in this field we firmly believe that these propositions have merit. This experience includes a series of 8 workshops we held at various venues around the State during 2014, attended by 97 officers from 36 municipalities.

Our proposals may well constitute significant departures from long-established practice but, we would argue, that is not a criticism of the propositions, but rather an indictment of decades of political inaction.

If VEAC agrees that the propositions have merit, we would expect them to be aired in the interim report – thus providing a sound basis for wider public consideration in the later stages of the investigation.

David Gabriel-Jones
Principal

22 June 2015

Workshop LIV Friday 18 September

Review of VEAC submissions

Speakers to be advised in next edition

The Public Land Consultancy
ABN 69 067 045 520
Principal: David Gabriel-Jones
Email: terrapublica@publicland.com.au

57/151 Fitzroy Street
St Kilda, VIC 3182
phone: (03) 9534 5128

postal: PO Box 2251
St Kilda West, VIC 3182
mobile: 0412 134 243
www.publicland.com.au

One of our five proposals to the VEAC Investigation

Crown reserves of local significance should be granted to local government, in freehold

In every Victorian municipality one finds public land of unarguably local significance: public halls, tennis courts, ornamental gardens and corner playgrounds. By any objective measure these parcels are of like character – yet some are Crown land and some are freehold land.

We suspect that this arbitrary dichotomy distorts management decisions, and produces irrational outcomes.

Two community groups

One manages a hall on Crown land, the other a hall on freehold land. We can't tell the difference. One group is answerable to a Minister in Melbourne, the other to their local council. One group has its insurance paid by the State taxpayers, the other by the Shire's ratepayers. They both look to their Council for financial assistance. Does it matter? In our view it's a question at least worth asking…

If a municipality disposes of one asset, it can reinvest the asset's value elsewhere; if it disposes of an identical asset nearby it will be, in effect, subsidising the State Treasury.

One community group managing a local reserve is answerable to the local council; its neighbour is answerable to DELWP. An asset which has for generations delivered benefits for its community, but has never produced any revenue for its nominal owner is regarded nevertheless as having a capital value harvestable not by that community, but by the State government.

It was by historic accident that much land of local significance came to be governed by State-level rather than local-level instrumentalities. The 19th Century surveyors drew up their Parish Plans prior to the advance of white settlement, and before the incorporation of municipalities.

Many parcels of Crown land were set aside for civic purposes, to be managed by the local community, before that community had coalesced into civic institutions. At later dates, municipal councils acquired further freehold land, resulting in today's mixed-status asset portfolio whose governance reflects accidents of history, rather than any rational paradigm.

The Victorian Auditor General commented on the resulting dilemma in his 2014 report *Asset Management and Maintenance by Councils*:-

"Some councils indicated they would prefer not to have the responsibility for managing ('gifted') assets, which commonly include buildings and parks and recreational facilities, because they are unable to dispose of them but are obliged to maintain them at a substantial cost."

This is not just a historic issue, but continues to this day. In a parallel report *Oversight and Accountability of Committees of Management*, the Auditor General notes: *"DEPI has … committed to engage with local government to identify opportunities to reassign to councils reserves with local-level values—that is, reserves that are not of regional or state significance."*

We believe it arguable that any such 'reassignment' of local-level reserves should take the form of freehold grants, rather than mere custody.

Recommendation

VEAC should now engage the municipal sector in a dialogue to explore this proposal. To better inform this dialogue, VEAC should circulate a commentary on developments in NSW, where we understand a parallel process of divesting Crown land to local government, in freehold, is now under way. ◆

For our full submission to VEAC, click here.

For past editions of Terra Publica go to www.publicland.com.au/terra_publica_archive.html

Q and A

Can a Crown land reserve have more than one Committee of Management?

Question asked by the corporate counsel for a utility company

Answer – Yes, but not for the same parts of the reserve.

The *Crown Land (Reserves) Act 1978* provides for a Committee of Management to be appointed over 'any land which has been reserved … under this Act.' So a Committee might be appointed for a whole reserve, a part of a reserve, or for multiple reserves. On this point, the Act offers commendable flexibility – as it does on the question of a Committee's composition.

It is silent, however, on the question of overlapping Committee jurisdictions – presumably because nobody thought it possible. It would be unworkable to have two Committees exercising powers over the same land, so the authors of the Act didn't even contemplate the possibility.

Why did the question arise? Here we have one public sector entity (which is Committee for Crown reserves elsewhere) being asked to pay rent over a Crown reserve to another public sector entity. Why should we pay rent, they ask, when we are eligible to control such land for no charge?

We can't comment on inter-agency relationships – but technically it is possible for agency one to have its Committee status revoked for the relevant part of the reserve, and agency two to be appointed as Committee for that part. ◆

Can a Crown land Committee also manage a Council freehold reserve?

Question asked by a Committee Executive Officer

Answer – Yes and No

It depends on the corporate nature of the Committee entity. If it was set up as an independent corporate entity and then appointed as a Crown land committee, the answer is yes. If it was set up as a Committee under the Crown Land (Reserves) Act itself, the answer is no.

Municipal Councils, statutory authorities, and incorporated associations are all set up under heads of power other than the CLR Act, and governed accordingly. The CLR Act allows them to be appointed as CoMs, but does not prevent them from taking on other functions, unrelated to the Crown reserve. The local Conservation Society (Inc) can be appointed as CoM for the Crown land reserve *and* be engaged by the council to manage the freehold reserve next door.

On the other hand, committees established under the CLR Act itself, and incorporated under section 14A of that Act are creatures of the Act, and cannot accept functions or exercise powers outside that Act.

So if a Crown land CoM wants to manage a nearby freehold reserve, it has to do something like this: All the members of the Committee have to form a new entity under the *Associations Incorporation Reform Act 2012*, then they have to resign as a Crown land CoM, then DELWP has to reappoint the new corporate entity as CoM, and the owner of the freehold land (maybe the local council) has to enter into an appropriate form of agreement with the new corporate entity for it to take on management of the freehold reserve. ◆

An Historic Photo?

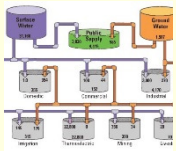
Will a single photo change history? Perhaps not – but it may well affect the way in which Victoria's municipalities expend many millions of dollars on road maintenance.

We refer to a picture of a trip hazard in Echuca. The lady who tripped claimed it to be 30 to 35 mm high; the Council contractor measured it at 10 to 12 mm. The case went to the County Court, and from there to the Supreme Court of Victoria Court of Appeal, which commented on the dearth of case law testing the statutory defences in the *Road Management Act 2004* :-

> "As we have said, the trial judge considered that the plaintiff had a case in negligence which was arguable or better, but he found that the 'unfortunate plaintiff' failed because of statutory defences under the Road Management Act.
>
> "The trial judge was referred to no applicable Victorian authorities on the relevant statutory provisions and there are none cited in the respective written cases. The trial judge repeatedly referred to drafting problems, lack of clarity and difficulty in construing those provisions…"

When the Court of Appeal hands down its decision, we'll be considering a series of workshops around the State, specifically on those statutory defences. ◆

Our One-day Training Courses
July to November 2015



Land Law for
Service Utilities
Tuesday 14 July FULL
Tuesday 17 November

Land Law for Managers of **Rivers and Lakes**
Thurs 16 July

Managing
Volunteers and Grants
Wed 22 July

Land Law
Roads, Streets and Lanes
Thurs 27 August

Crown Land
Law, Policy and Practice
Wed 2 September

Leases and Licences
of Public Land
Tues 15 September

Land Law and
Coastal Adaptation
Wed 16 September

Referral Authorities
and the Planning System
Thurs 17 September

Offences and Enforcement
on Public Land
Tues 13 October

The Law and
Subdivisions
Wed 14 October

Native Title
and Aboriginal Heritage
Tues 20 October

Easements
and Restrictive Covenants
Tues 27 October

Environmental Law
for Councils as Land Managers
Wed 25 November

Risk Management
and the Law
Date to be fixed

Cost $550 per person
including GST, Course notes and working lunch.
Discounts for host organisations

Enrolments and Enquiries – Jacqui Talbot – jacqui@publicland.com.au

Unless otherwise noted, all courses are at **Law Institute of Victoria**, 470 Bourke Street Melbourne

All courses are of one-day duration; starting time 9:00 am, finish 4:30 pm

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