T E R R A   P U B L I C A
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Auditing the Peppercorns

Geelong Town Hall occupies Crown land under a lease dated 1855. The term of the lease is 999 years, and the rental is one peppercorn per annum, if demanded.

We see nominal rentals elsewhere around the State, but perhaps not quite so generous: until recently the VRC leased Flemington Racecourse for one shilling per annum.

Pink

Green

Tellicherry Black

More typically, we find nominal rentals applied to 'worthy cause' Crown land tenures. Leases and licences held by community groups, such as sporting clubs and incorporated associations usually incur a rental well below market value.

For public land managers, this presents policy complications not seen in the commercial world. Over there, the market rules: the laws of supply and demand. One primary goal of private sector landlords is maximisation of monetary returns.

Public land managers have to work through two related issues: which tenants should be regarded as 'worthy causes,' and by how much should we discount the market rent which would otherwise apply? Consider, for instance, the amateur sporting body whose clubrooms transform, step by step, into a licensed functions venue. At what point did it become commercial?

In many circumstances a discounted rental should be seen as an implied subsidy – and what's more, it's a hidden subsidy. It's not brought to account. If a council presents a cheque to a club, it is visible, and appears on the books of both the giver and the recipient. But the implied subsidy hidden in the discounted rental goes unquantified, unrecorded, and unaudited at both ends of the transaction.

It's a scenario which the Victorian Auditor General's Office has identified, but has never really analysed. VAGO has defined grants to include 'gifts, donations and subsidies' but in a series of reports (1996, 2005 and most recently May 2022) it's only the actual cash handouts that have been audited. It has fallen to individual municipalities to address the propriety of the implied subsidy.

This presents a particular problem, we would argue, in cases where the hidden subsidy flows on to some beneficiary other than the worthy-cause club or association. Consider for instance the golf club that sub-leases part of its clubhouse for a commercial restaurant, or the yacht club that runs pokies. Ratepayers' assets are surreptitiously finding their way to the likes of James Packer.

Monash Council and Brimbank Council are amongst municipalities which have identified this issue, and are starting to address it. In 2019 Brimbank decided to charge clubs that operate pokies on council land full commercial rents. In December 2022 Monash threatened to remove local sports clubs from their ovals and clubhouses unless they terminated their links to gambling.

Malabar Black

Sarawak White

Muntok White

So here's our submission to Mr Andrew Greaves, Victorian Auditor-General: Sir, extend your scrutiny of Council grants to include hidden subsidies. You are absolutely certain to find some peppercorns well past their use-by dates. ◆

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The fiction of INDEFEASIBILITY

It's a great word, isn't it: '*Indefeasibility*'? That which cannot be defeated, revoked, or made void. Supposedly, it is the cornerstone of our Torrens title system. If you have a title, you can believe it. BUT now we come to the BUT…

The *Transfer of Land Act 1958*, having enshrined the principle of indefeasibility in section 41, then goes on to undermine it in section 42. One statutory exception to indefeasibility has recently been tested in the Supreme Court of Victoria Court of Appeal, and that's section 42(2)(b) – your indefeasible title is vulnerable to adverse possession.

Search high and low through legislation and you won't find what's meant by *adverse possession* – it is a concept from common law, dating back to mediaeval England. In Victoria, it means that if I take possession of your land, exclusively and without your consent, and I get away with it for 15 years, then I can claim ownership of it.

Parliament has put in place various statutory protections against adverse possession. We find most of these protections in the *Limitation of Actions Act 1958* – including protection for 'the Crown.' So, there is no adverse possession against Crown land – and, as the Courts have confirmed, there is no adverse possession against freehold land owned by an agency which can claim to represent the Crown. In a 2012 case, *Roads Corporation v Pearse*, the Supreme Court of Victoria found that Mr Pearse could not claim freehold from VicRoads, even though he had fenced it in for well over 15 years.

But what about the opposite? What if the encroachment is made by the Crown, onto somebody else's private freehold? Take a look along any government road: fences are often built in the wrong place. They may be many metres away from the title boundary, or mere millimetres. And they may well have been like that for longer than 15 years.

That brings us back to the Court of Appeal. Just last December, the Court found that CityLink had acquired a strip of private land through adverse possession. The fence in question was an 8-metre-high concrete sound barrier wall – but we suspect that the judgement in this case could also apply if it were a mere post-and-wire livestock fence beside a country road. The Court considered factual possession, the intention to possess, and whether possession was open and manifest. Surely the same analysis could be applied to roads all over the State, with the same end result.

There well may be cases where some strip of land should be added to the road reserve. Road widenings, splay corners, and road realignments are commonplace. Often, they will involve the formalisation of some situation which has been in place for more than 15 years. The acquiring agency may be 'the Crown' in the form of the Department of Transport, or some local Council.

But, we say, such changes of land ownership should it happen through normal processes of acquisition, not through the weird and wonderful workings of the common law. ◆

References:

Roads Corporation v Pearse, Nov 2012, VSC 527
Bottos v Citylink, Dec 2022, VSCA 266

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 legal advice from one of its associated law firms.

Q & A

"We have a little-used road occupied by an abutting landowner, but DEECA won't issue an Unused Road licence. How can we authorise it?"

Question asked by a rural municipality

Unused government roads are a normal feature of the rural landscape, but DEECA no longer issues UR licences, citing 'other priorities.' Nevertheless, a council can put together a package that delivers much the same outcome.

We start with section 121 of the *Road Management Act 2004*, which allows agreements to be set up with abutting owners relating to works, maintenance and risk allocation. Simultaneously, Council can transfer responsibility for weeds and pests, using section 22 of the *Catchment and Land Protection Act 1994*, and specify arrangements for fences and gates through Clause 10 of Schedule 11 of the *Local Government Act 1989*.

The road we are envisaging here will not pass the test 'reasonably required for general public use' as set by section 17 of the Road Management Act, so it should not be listed in Council's road register.

Any agreement with the landowner would have to reflect the fact that the road remains a public highway, and that the public cannot be totally locked out. Allowance may have to be made for emergency services and utilities. It's not essential for the arrangement to incur a periodic payment, but the road will become occupied land for the purposes of rate calculations.

Consideration should also be given to future scenarios – such as a need arising for the road to be opened up, or a change of ownership of the abutting land. It might be worthwhile locking the arrangement in, thorough a '173 Agreement.' ◆

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.

Welcome to a New Course Presenter

Bridgid Cowling

BSc(Hons), LLB(Hons)
Special Counsel at Arnold Block Leibler

Bridgid has a diverse practice covering native title, charities and public interest law. She has advised Aboriginal Land Councils and Native Title Representative Bodies in Victoria and interstate .
She has had many years of experience working with remote and urban Indigenous communities.

Bridgid will be presenting our intensive short course on:

Native Title and Aboriginal Heritage

Session One (3 hours)

- **Colonisation and Country**
- **Mabo and the Commonwealth Native Title Act 1993**
- **Native Title Claims and determinations in Victoria**

Session Two (3 hours)

- **Victoria's Traditional Owner Settlement Act 2010**
- **Recognition and Settlement Agreements, and Land Use Activity Agreements**
- **The Aboriginal Heritage Act 2006 and Regulations 2016**

For more details,
click here

Training Courses, Feb-April 2023

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

	Course	Dates
	Coastal Land Management *Presenter: Richard O'Byrne*	Tues 28 Feb, 10am – 12pm Wed 1 Mar, 10am – 12pm Thurs 2 Mar, 10am – 12pm
	Land Law and Subdivisions *Presenter: Mark Bartley*	Tues 28 Feb, 10am – 1pm Wed 1 Mar, 10am – 1pm
	Native Title and Aboriginal Heritage *Presenter: Bridgid Cowling*	Wed 1 Mar, 9.30am – 12.30pm Wed 8 Mar, 9.30am – 12.30pm
	Crown Land Governance *Presenter: David Gabriel-Jones*	Tues 7 Mar, 10am – 12pm Wed 8 Mar, 10am – 12pm Thurs 9 Mar, 10am – 12pm
	Restrictions on Title *Presenter: Nick Sissons*	Tues 21 Mar, 10am – 1pm Wed 22 Mar, 10am – 1pm
	Referral Authorities and the Planning System *Presenter: Mark Bartley*	Tues 28 Mar, 10am – 1pm Wed 29 Mar, 10am – 1pm
	Leases and Licences Of Public Land *Presenter: Richard O'Byrne*	Tues 4 April, 10am – 12pm Wed 5 April,10am – 12pm Thurs 6 April, 10am – 12pm
	Risk Management and the Law *Presenter: Michael Beasley*	Tues 27 April, 1pm – 4pm Wed 28 April, 1pm – 4pm

Some of the Councils which have joined up to our Retainer scheme

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.

Enquiries and Registrations:
Fiona Sellars
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All these courses can be presented in your own offices.
Discounts for host organisations

New Course Coming Soon	*New Course Coming Soon*
Land Information and its Interpretation	Geographic Place Names