

January is Janus-month.

Time to look both backwards and forwards

The ancient Romans left us quite a legacy, including the names of the twelve months. There was a pantheistic culture, with a separate god for just about everything. The one we celebrate every January is this two-faced deity, Janus...



Looking backwards

In 2021 The Public Land Consultancy handled a fascinating bunch of enquiries from our clients. Here's just a small selection...

The most important piece of work we did in 2021 related to the land rights of the Dja Dja Wurrung people of Central Victoria. We undertook an audit of 44 agencies' compliance with the Land Use Activity Agreement (LUAA) entered into by the State Government, under the *Traditional Owners Settlement Act 2010*.

In this case we were engaged by the Land Justice Unit in the Department of Justice and Community Safety. The work involved a performance review of public sector entities (yes, 44 of them) which are obliged under the LUAA to recognise the Dja Dja Wurrung as, in effect, joint owners of Crown land across a dozen municipalities.

Still on the regional-scale, Better Boating (that's an offshoot of the Department of Transport) engaged us to assist with their planning for new recreational boat launch sites in Port Phillip and Westernport.

Other government sector clients included the Level Crossing Removal Project, the Victorian School Buildings Authority, the Greater Metropolitan

Cemeteries Trust, the Westgate Tunnel Project, and the Barwon Coast Committee of Management.

Down at the local scale, we found ourselves advising on pocket parks, beach boxes, school playgrounds and stormwater drains.

Roads figured prominently on our 2021 list of engagements. At one end of the rural-urban spectrum Alpine Shire sought assistance with the proposed Great Valley shared pathway. At the other end of the spectrum, Glen Eira Council asked about laneways being converted into community gardens. Perhaps the most unusual request was from City of Greater Ballarat, which asked about a corridor in a shop, which somebody was claiming to actually be a road.

In 2021 we welcomed a few more municipalities to our retainer scheme, under which council staff can get advice without having to go through formal procurement processes.

The year also saw us commence a program of on-line 'Lunchtime Conversations' – which have been surprisingly well-attended. Over 100 people attend these chats on subjects like pocket parks, riverside camping, road deviations, utility easements, and delegated management.

Looking forwards

So what will 2022 bring? Perhaps we need to consult Apollo, Fortuna or Minerva.

The big item on the horizon is surely the release of DELWP's long-awaited plans for rewriting the Crown land legislation.

Meanwhile, things are already busy here, with work coming in from Frankston (a policy for dealing with encroachments), Ballarat (reconfiguration of a neighbourhood laid out in the gold rush), Mildura (an insurance claim at the Vic-NSW border), Baw Baw (permanent caravan park residents), and Boroondarra (a drain which should be a creek).

Fiona Sellars will keep our calendar of training courses filled (see page 4) – both scheduled courses and in-house specials.

And our friend *Lex Loci* will continue to tell us all about his travels around the State. ♦

Page 2... Q and A

Should the community group be a tenant or a CAC?

Page 3 ...

Risk Management – The Take-Home Messages

Page 4

Our schedule of Training Courses for early 2022

Questions and Answers

Lease or CAC?

Question asked by a property officer from a major Victorian city.

A Council wants to set up governance arrangements for a community facility. The facility might be a sports ground, a public hall or a conservation reserve. The community has the competence and the willingness to use it and to manage it. Do we head in the direction of a lease, or a Community Asset Committee (CAC)?

These are two fundamentally different forms of legal relationships.

A lease is a landlord-tenant relationship.

It is appropriate for circumstances where the community group is a stand-alone corporate entity. It might be a company established under the *Corporations (Victoria) Act 1990*. It might be a church set up under its own legislation – such as the *Baptist Union Incorporation Act 1930*. But it is most likely to be an incorporated association, set up under the *Associations Incorporation Reform Act 2012*. Whatever its origins, it is an independent corporate entity answerable fundamentally to its own membership.

In this case the lease is a formal legal contract between the two parties – Council as landlord and the incorporated entity as tenant. The lease will set out the rights and obligations of each party. A key part of this contractual relationship will be a ‘consideration’ in the form of a rental. A lease runs for a defined term or duration, and cannot be unilaterally terminated.

In the case of a lease, the asset in question will be some form of real estate, over which Council has some authority. Perhaps the Council owns it in freehold, or perhaps the Council is Committee of Management under the *Crown Land (Reserves) Act 1978*.

A Community Asset Committee (CAC) is a delegated authority arrangement.

It is appropriate where we want to empower people to manage a Council facility, but they are not formed up into some independent legal entity. In this case the Council itself creates the entity, under section 65 of the *Local Government Act 2020*. In a legal sense, a CAC is a part of the Council itself.

As for money changing hands, it is most likely that the Council will be funding the operation of the community facility, perhaps by making a line of expenditure available to the CAC. It is also possible that the facility will be profit-making,

and the CAC will oversee a line of revenue flowing into the Council funds.

But either way, there is nothing that might be described as a rental. As for duration, that is entirely up to the Council to determine. A CAC can be dissolved in the same manner as it was created – by a resolution of the Council.

In the case of a CAC, the *Local Government Act 2020* does not define the nature of the ‘Asset’ to be managed. It’s likely to be real property, but it may be some other form of asset – such as street trees, or gym equipment, or the meals-on-wheels vans.

One arrangement we think could work well involves both forms of governance relationship. Council sets up a CAC to manage a series of venues; the CAC’s job is to arrange leases (or licences, or permits) on Council’s behalf, to various user groups – which may well be Incorporated Associations.

Whether were talking about leases or CACs, a fundamental element of any arrangement will be a sound working relationship between someone in the Municipal Offices and someone in the community group. If that works, the governance arrangements are more likely to work. ♦

Our Council is a Committee of Management, so why is there no actual committee?

Question asked by a council officer involved in the management of several Crown reserves

When we think of a committee, we imagine a bunch of people sitting around a table. And we remember the joke about the horse and the camel – but that’s another matter.

The *Crown Land (Reserves) Act 1978* recognises ‘Committees of Management’ for Crown reserves. A Committee can be a bunch of individual people, but it may also take various other forms: a municipal council, a body established for a public purpose, or a not-for-profit company. You’ll find the full list in section 14 of the Act.

Now we know that a council usually consists of a bunch of people sitting round a table; we know them as councillors. But the council as a whole is a legal person – as is any body corporate. So when a council is appointed as a Committee of Management, it’s not the nine or twelve individual councillors who constitute the committee, but the single corporate entity. It’s a one-person committee.

... Continued Page 3

Risk Management the Take-Home Messages

Question arising at the end of our
“Risk Management” course



Having put in a whole day discussing risk exposure, duty of care, statutory protections and the insurance industry, our students turned around and asked – “So what are the take-home messages?” Here’s our attempt at an answer...

Know Your Risk Appetite

Your organisation should clarify its degree of risk-aversion. All too often the polities want to minimize expenditure AND minimize risk. For each class of risk you need to sit down and think whether it is acceptable within your corporate culture, and what price you are prepared to pay to avoid it. This should be a repeated exercise – say every 3 years.

Know Your Land

You should have a pretty clear idea about what land you own, under what arrangement you manage it,

and where its boundaries lie. On a road reserve, you need to know whether you’re looking at a ‘road’ or a ‘pathway’ or a ‘roadside’ – and whether its on your register, VicRoads’ register, or nobody’s register. If you don’t know this for every road and reserve in your territory, then at least you must have the ability to find out...

Document Your Systems

Given the importance of the ‘policy defence’ you need to have well-documented management plans, maintenance programs and response systems. They don’t have to be unduly onerous (maybe your policy is to leave the potholes unfilled) – but you must be able to establish that you have complied with your own standards.

Learn from Your Mistakes!

No-one wants disasters – but when inevitably they occur you should see them as learning opportunities. In fact, overcome your embarrassment and share your mistakes with your constituency and your neighbors. There’s no shame in making a mistake once – but to make it twice would be reprehensible.

Don’t Forget Ethics

Built into your corporate culture must be a view on whether you really want to hide behind statutory defences; whether you do only what you must and no more. Our own view at Terra Publica is that municipalities and other public-sector land managers should go the extra yards to assist their constituencies – but they need a documented policy explaining the circumstances in which they do so. ♦

Continued from Page 2...

... why is there no actual committee?

We’ve heard of councils which attempt to distinguish between their business as municipal council and their business as Crown land Committee of Management. *‘This Council meeting is now adjourned and we immediately reconvene as the Committee of Management...’*

Well, it’s good that they recognise the distinction between land they actually own and land which they merely manage under delegation – but this procedure reflects a misunderstanding of the true governance arrangements. The nine or twelve people around the table are not members of the

Committee of Management, which only has one member.

Votes taken by these people in their capacity as councillors determine the position adopted by Council in its capacity as the single-corporate-person Committee of Management.

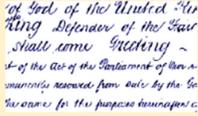
Under sections 63 and 65 of the *Local Government Act 2020* it is possible for the single-corporate-person Council to delegate its powers to a multiple-natural-person committee of councillors, council officers or citizens. Such a committee could, in effect, become the manager of some Crown reserve – but remember: formal responsibilities remain with the council itself. If a section 63 or 65 committee blunders, then council itself has blundered. ♦

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.

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.

Training Courses, February-March 2022

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

	<p>Risk Management and the Law <i>Presenter: Michael Beasley</i></p>	<p>Tues 8 Feb, 2pm – 4pm Wed 9 Feb, 2pm – 4pm Thurs 10 Feb, 2pm – 4pm</p>
	<p>Crown Land Governance <i>Presenter: David Gabriel-Jones</i></p>	<p>Tues 8 Feb, 10am – 12pm Wed 9 Feb, 10am – 12pm Thurs 10 Feb, 10am – 12pm</p>
	<p>Coastal Land Management <i>Presenter: Richard O'Byrne</i></p>	<p>Tues 15 Feb, 10am – 12pm Wed 16 Feb, 10am – 12pm Thurs 17 Feb 10am – 12pm</p>
	<p>Land Law and Subdivisions <i>Presenter: Mark Bartley</i></p>	<p>Tues 22 Feb, 10am – 1pm Wed 23 Feb, 10am – 1pm</p>
	<p>Roads Governance <i>Presenter: David Gabriel-Jones</i></p>	<p>Tues 1 Mar, 10am – 12pm Wed 2 Mar, 10am – 12pm Thurs 3 Mar, 10am – 12pm</p>
	<p>Native Title and Aboriginal Heritage <i>Presenter: Anoushka Lenffer</i></p>	<p>Wed 2 Mar, 10am – 1pm Wed 9 Mar, 10am – 1pm</p>
	<p>Leases and Licences of Public Land <i>Presenter: Richard O'Byrne</i></p>	<p>Tues 8 Mar, 10am – 12pm Wed 9 Mar, 10am – 12pm Thurs 10 Mar, 10am – 12pm</p>
	<p>Restriction on Title <i>Presenter: Nick Sissons</i></p>	<p>Tues 15 Mar, 10am – 1pm Wed 16 Mar, 10am – 1pm</p>
	<p>Land Law for Managers of Rivers and Riparian Land <i>Presenter: Jo Slijkerman</i></p>	<p>Mon 21 Mar, 10.30am – 12.30pm Tues 22 Mar, 10.30am – 12.30pm Fri 25 Mar, 10.30am – 12.30pm</p>

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

Accreditation:
These courses are eligible for CPD points for lawyers and FPET points for surveyors

Enquiries and Registrations:
Fiona Sellars
(03) 9534 5128
fiona@publicland.com.au

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