

## Landlocked!

*'Our property is worthless, because its only access is across Crown land.'* That's the complaint made to a rural council. *'What should we do?'*

Is it one for the council to solve? Perhaps not: if council didn't cause the problem, the response could be *caveat emptor*. But the officers concerned take the view that they should at least inform the landholders of their options for getting un-landlocked. We agree.

Landlocked blocks really should not happen. The original surveyors went to some lengths to ensure that every allotment created by the Crown had legal access. Whether that constituted practical access is another matter: we have seen government road reserves laid out up cliffs and through lakes. But here and there we do find Crown Allotments with no road frontage at all.

### The Battleaxe Block

Turning to freehold subdivisions, no Responsible Authority would these days approve a development with landlocked blocks, and surely no developer would attempt to create them. We are familiar with the battleaxe block, where a residential lot may take an odd shape in order for its driveway to reach a nearby road reserve, or perhaps a common property roadway – but not to reach some tract of Crown land.



So what are the options for our landlocked property owner? There are half a dozen.

If the Crown land happens to be unreserved, then DEECA could arrange to have it proclaimed as a government road, or for it to be declared as surplus and sold to our landholder. Both processes are fraught with complications, uncertainties and costs, probably involving the extinguishment of Native title through an ILUA or equivalent.

If the Crown land happens to be reserved 'for public purposes,' then DEECA could arrange for it to be given an additional purpose, namely 'government road' – this without any revocation of the original purpose. That's how we come to have road reserves within many Crown river frontages, such as the Murray River 'three chain reserve.'

If, however, the Crown land reserve status is incompatible with its use as road, then it would require revocation of that status, which may well involve an Act of Parliament. Now we are getting into difficult territory: it's hard to imagine a Minister condoning excision from the foreshore reserve, or from a National Park.



However, there are circumstances where Crown land can be used as legal access to a freehold property. It's a power applied in irrigation areas, where the landscape is criss-crossed with water channels. There is simply no way in and out of many blocks except by crossing the Crown land channel. The Subdivision Act (sec 6) implicitly empowers the Minister for DEECA to authorise such arrangements. It's a curious provision: we assume that such authorisation is permanent, and runs with title, but it is not registered and does not appear on the title document.

### Easement of Necessity

Legal authorities tell us that making a subdivision that includes allotments without access to public roads will result in the creation of 'easements of necessity' at common law<sup>1&2</sup>.

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Sign up for our free Lunchtime  
Conversation on 'Landlocked'

Tuesday 11 July, 12 pm-12.45 pm  
[fiona@publicland.com.au](mailto:fiona@publicland.com.au)

*Landlocked – continued*

In the case of the irrigation areas, it was the Crown itself that created the landlocked freehold. The Mildura-Robinvale area and Werribee South were laid out by government surveyors – so it's reasonable for the Minister to give the necessary consent. DEECA is implicitly acknowledging an obligation imposed under common law.



Elsewhere the landlocked configuration may have been the work some developer who imagined (perhaps a century ago) that Crown land could be used as legal access to a subdivision. Along parts of Port Phillip foreshore, current landowners must pursue carriageway easements over neighbouring freehold – perhaps citing 'easement of necessity' in support of their case.

### **Compulsory Acquisition**

Indeed, the problems associated with legalising access across Crown land are such that it may well be simpler to look at acquiring an appurtenant easement over some neighbour's freehold.

By whatever means they were created, poorly configured parcels may require access over abutting freehold. In these cases, easements may be created either through negotiation or compulsion. It's a curiosity of the Subdivision Act (sec 36), but in some circumstances a private landowner can exercise powers of compulsory acquisition normally available only to public sector authorities.

It's a mechanism which requires the consent of VCAT, which may or may not be granted<sup>3&4</sup>. And it can't be used for the acquisition of rights over Crown land.

### **What about Emergency Access?**

Legal access and practical access usually go hand-in-hand: the cadastral road reserve contains a physical roadway. But that's not

always the case. In topographically difficult terrain we often find freehold which has a road access on paper, but the physical access roadway is on nearby Crown land.

Here's a rural property adjacent to a National Park. The legal access is a heavily vegetated government road reserve, but the actual roadway is in the National Park itself. The landowner and the municipality are acutely conscious of the provisions of the planning scheme: *Access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles.* The access roadway did not meet this standard.

The case ended up in VCAT<sup>5</sup>, where Deputy President Helen Gibson summed up the situation as follows:

*I consider that from a practical perspective, it is unlikely that Parks Victoria would deny the applicants continued access to their property on a day-to-day basis. However, the legal status of this access (or rather the lack of legal status) means that the applicants have no legal right to upgrade the access or to insist on its upgrade by either the council or Parks Victoria... A permit should not be granted for construction of a new dwelling on the subject land.*

### **The Crown Landlocks Itself**

Perhaps the most unusual case of landlocking we have seen is in Eastern Maar country just west of Port Fairy, where the Crown landlocked itself<sup>6</sup>. Here we find an inaccessible foreshore, including a government road which leads from nowhere to nowhere – from one dead-end to another dead-end. Good surfing beach we are told. If you can get there. ■

- 1 WA Planning v Temwood, High Court, 2004, at 147
- 2 Easements and Covenants Consultation Paper, Law Reform Commission, 2010, at 6.6
- 3 Snipe v Hume CC, VCAT, 2007
- 4 Gale v Frankston CC, VCAT, 2017
- 5 Hosking v Northern Grampians, VCAT, 2009
6. *Lex Loci's Travels*, The Public Land Consultancy, Dec 2020

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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, we can obtain formal legal advice from one of our legal associates.

## Crown Land Governance

A 6-hour On-line Course  
in 3 sessions

### Session 1

- Land Status in Victoria: Crown land and Freehold land

*How Crown land in Victoria is owned, legally categorised and designated; Which laws apply to the different types of Crown land; How land status may be changed*

- Ownership, Control, Management and Occupation

*The chain of responsibility for Crown land; How power over Crown land is assigned and exercised; the roles of DELWP and Parks Victoria; How governance may be altered...*

### Session 2

- Unlike Freehold Land

*Crown land cannot be encumbered, subdivided or acquired through adverse possession.*

- Delegated Management

*The composition, powers and duties of Trustees and Committees of Management; the roles and powers of authorities with vested land; models of sub-delegation...*

- Roads, Rivers, Railways, Coasts

*An introduction to the complex body of statutory and common law relating to the ownership and management of roads and lanes, railway land, rivers and frontages.*

### Session 3

- Crown land Tenures

*How Crown land may be used for private, commercial and community purposes under Leases, Licences and Permits*

- Use and Development

*How controls over Crown land contrast with controls over freehold land; An introduction to environmental controls and the Coastal Management Act*

### And throughout the course...

- Native Title and Aboriginal Heritage

Next Presentation  
Tues 11 July, Wed 12 July and  
Thurs 13 July 2023  
10am - 12 noon each day

Such is the demand for our one-day training course on

## Native Title and Aboriginal Heritage

that we now engage two specialist presenters...

### Bridgid Cowling

BSc (Hons), LLB (Hons)



*Bridgid is Special Counsel at the law-firm Arnold Bloch Lieber.*

*She has many years of experience working with remote and urban Indigenous communities across Australia.*

### Mary Scalzo

BA (Aboriginal Linguistics)  
LLB (Hons)



*Mary has been Managing Principal Solicitor in the Victorian Govt Solicitor's Office.*

*She has over 20 years of experience advising on native title claims resolution and agreement making.*

*Thanks to the Councils and Authorities which have engaged us to present this course...*

*Warrnambool, Mitchell, Northern Grampians, Macedon Ranges, Indigo, Buloke, DEECA, GHD Engineering, Corangamite CMA...*

Next Presentation  
Wednesday 19 July and  
Thursday 20 July 2023  
9:30 am - 12:30 pm each day

*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. And we support The Voice*

## Professional Development, July-August 2023

NOTE: some presentations are 3 sessions, each of 2 hours duration;  
others are 2 sessions, each of 3 hours duration

	<b>Crown Land Governance</b> <i>Presenter: David Gabriel-Jones</i>	Tues 11 July, 10am – 12pm Wed 12 July, 10am – 12pm Thurs 13 July, 10am – 12pm
	<b>Native Title and Aboriginal Heritage</b> <i>Presenters: Bridgid Cowling, Mary Scalzo</i>	July presentation (full!): Wed 19 July, 9:30am 12:30pm Thurs 20 July, 9:30am 12:30pm  September presentation 6 Sept 9:30am 12:30pm 7 Sept 9:30am 12:30pm
	<b>Referral Authorities and the Victorian Planning System</b> <i>Presenter: Mark Bartley</i>	Wed 19 July, 10am – 1pm Thurs 20 July, 10am – 1pm
	<b>Coastal Land Management</b> <i>Presenter: Richard O'Byrne</i>	Tues 25 July, 10am – 12pm Wed 26 July, 10am – 12pm Thurs 27 July, 10am – 12pm
	<b>Roads Governance</b> <i>Presenter: David Gabriel-Jones</i>	Tues 1 Aug, 10am – 12pm Wed 2 Aug, 10am – 12pm Thurs 3 Aug, 10am – 12pm
	<b>Risk Management and the Law</b> <i>Presenter: Michael Beasley</i>	Thurs 3 Aug, 1pm - 4pm Fri 4 Aug, 1pm - 4pm
	<b>Leases and Licences Of Public Land</b> <i>Presenter: Richard O'Byrne</i>	Tues 8 Aug, 10am – 12pm Wed 9 Aug, 10am – 12pm Thurs 10 Aug, 10am – 12pm
	<b>Land Law and Subdivisions</b> <i>Presenter: Mark Bartley</i>	Tues 15 Aug, 10am – 1pm Wed 16 Aug, 10am – 1pm
	<b>Land Information and its Interpretation</b> <i>Presenter: Robert Steel</i>	Tues 22 Aug, 10am – 1pm Wed 23 Aug, 10am – 1pm

**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:**  
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