New submission for investigation "Statewide Assessment of Public Land"
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Submission for the investigation "Statewide Assessment of Public Land"

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Description:

Statewide Assessment of Public Land This VEAC investigation presents a welcome opportunity to consider the statewide framework for public land governance. We have long been of the view that the legislative framework under which Crown land is governed should be totally reviewed, in order to bring it from the Nineteenth Century into the Twenty-first. The attached paper (dated 2003) presents our case, as it stood twelve years ago. Since then little has changed, and many of the paper's arguments remain valid. Above all, we strongly believe that this investigation provides a rare opportunity to examine the possibility of re-framing the legislation to match modern concepts and philosophies, to match the Victorian landscape as it is, rather than as it was in the gold rush. Accordingly, we propose that VEAC includes the attached paper in the materials it circulates, with a view to promoting public consideration not only of the public land itself, but also the statutory apparatus which governs it. Please not that we will be making further submissions to this investigation over the coming days. We look forward to reading VEAC's responses, as they evolve. David Gabriel-Jones Principal, The Public Land Consultancy

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Sustainability and Public Land Planning

Towards a New Public Land Sustainability Act

David Gabriel-Jones

PLANNING IN A RURAL ENVIRONMENT

Tuesday 24 June 2003

Blythewood Grange, Sebastopol

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The views expressed in the paper are the author's own and do not necessarily reflect the views of the Department.

Sustainability and Public Land Planning

Towards a New Public Land Sustainability Act

In contemporary Australia, the concept of sustainability provides a useful focus for many issues of public policy, not least amongst them the planning and management of public land.

This paper seeks to place sustainability into the context of a series of cultures and philosophies which have shaped Victoria's land portfolio over 170 years. Some we accept as self-evident – such as freehold being held in fee-simple rather than at the behest of a landed aristocracy. Others we now abhor – such as the doctrine of terra nullius and the phenomenon called here the cornucopia culture.

Inseparable from the public land portfolio itself are the administrative instruments which govern it, which are also the legacy of those past cultures and philosophies.

The paper goes on to ask how the portfolio and its governing instruments would be different if they were being fashioned today. We can't undo history, but a review of past triumphs and disasters will help us to propose an agenda for the creation of a sustainable public land portfolio and systems of governance which ensure its sustainability.

We will start with a look at the two main Acts of Parliament dealing with public land in Victoria – the Land Act 1958 and the Crown Land (Reserves) Act 1978. We'll look at the political landscape of the nineteenth century, when this body of legislation was born; we'll look at those major developments of the twentieth century which had a profound effect on public land – developments to which this legislation failed to respond; we'll examine the anachronistic and dysfunctional system we are left with today; and we'll conclude by speculating on new legislation to take public land into the twenty-first century: a proposal for a Public Lands Sustainability Act.

Firstly, let me propose the characteristics of a sustainable public land regime. In a few brief words, it must be a regime -

- With sustainability as a clearly articulated objective
- Which fosters the assembly of a sustainable public land portfolio
- Which ensures that land in that portfolio is used and developed sustainably
- Which operates through a sustainability-driven system of planning and management

The Mother of all Acts

The Land Act 1958

The Land Act is the mother of all land legislation in Victoria. The current version is dated 1958, but is the successor of a series of Land Acts dating back to 1860.

It is important not only because some significant areas of public land still fall under it (like the bed of Port Phillip Bay), but because it defines Victoria's 'default' land regime. If land ceases to be State Forest, or freehold land, or a government road, or a Crown Reserve – then in the absence of some other decision it reverts to "unalienated and unreserved land of the Crown" (I call it 'default status land') and is dealt with under the Land Act.

Although it's had large slabs chopped out of it over recent decades, the Act is still a legislative embarrassment. In it you'll find specifications for post and rail fences; legal restrictions on the distance bees may range from their hives; and provision for the appointment of managers for village commons.

The Governor in Council may order that swamps be drained by prison labour; public servants may graze their cattle on Crown land provided it's done in pursuance of their official duties; lessees of Lake Buloke may be exempted by the Minister from the obligation to spend $2.50 per hectare per annum.

It's easy to lampoon the Land Act, but it also represents far more serious political problems, which we shall come to later.

The Crown Land (Reserves) Act 1978

Although the Crown Land (Reserves) Act is a mere 25 years old, it continues provisions which are much older. When it was separated from the Land Act in 1978, the Lands Department did not use the opportunity to review the legacy of reserves and Committees of Management which had already accumulated over the previous hundred and forty years.

The reserves system was a precursor to Planning Schemes as we now know them. It ensured that every parcel of reserved Crown land would be untarnished by commercialisation, and would be retained for some clearly specified public purpose.

Thirty-two such purposes are explicitly listed in the Act, but it is an open-ended list. There are hundreds of different reserve purposes in current use across the State. Often these are 'permanent' and can be removed only by the passage of a site-specific Act of Parliament.

Some reserve purposes were ludicrously Dickensian. In Northcote there was a reserve for the purpose of a Home for Rehabilitation of Inebriates and Dipsomaniacs. The site of Fairlea Women's Prison was set aside for the Accommodation of Diseased Women and Fallen Girls. In St Kilda, land is still officially reserved for the Recreation of Elderly People and Underground Drainage.

This Act was intended to control the private use of public land. There have been seven amending Acts since 1978 in a succession of attempts to reflect social attitudes and public policy on this question. These legislative patches – and patches upon patches – have resulted in the Act now containing no fewer than ten separate provisions for leases and licences – provisions full of duplications and internal inconsistencies.

The Reserve system perpetuates a regulatory regime which pre-dates local laws made under the Local Government Act. Not only is the head of power still there, but also the regulations themselves. In Lincoln Square Carlton one may not sing obscene ballads on the Sabbath; the Alexandra Gardens may not be used for breaking-in horses; and on some beaches it is still an offence to expose oneself between the neck and the knees.

Again, this Act is not merely a benign curiosity. As we shall see later, the Act and the Reserves system it governs have become a serious impediment to sound, sustainable, public land management.

The Nineteenth Century – the Age of the Cornucopia

In its present form, most public land in rural Victoria dates back to the Nineteenth Century. It was either deliberately set aside as part of the system of Crown land reserves, or it was simply left over because it was too remote, too rugged, or too inhospitable to be brought under the plough and the axe.

The profession of Town Planning had not yet been invented. The planners of their day were the Surveyors-General – officers of the Crown of such importance that they sat with the Governor himself on the State's Executive Council.

Parish Plans, drawn up by these surveyors, shaped the pattern of land use and development in Victoria. They not only specified the size, shape and location of Crown Allotments to be granted in freehold, but also the official designated purpose of those Reserves to be retained as public land.

In a typical country town the location of the state school, the law courts, showgrounds, ornamental gardens, cemetery, recreation reserve and even churches were not determined by planners as we know them today, nor by market forces, but by surveyors.

Nineteenth century society would have found sustainability as foreign as cyberspace. Resource policy was dominated by the cornucopia culture: nature's bounty was there for the

taking – whether it took the form of gold, timber, water or land. When Major Mitchell coined the phrase 'Australia Felix' he was signposting Western Victoria as land ripe for exploitation.

The ethical foundation for this appropriation and pillage was provided by the convenient doctrine of *terra nullius*: this was land belonging to nobody. Terra nullius was to Australia as the doctrine of Manifest Destiny was to America.

We should not lightly dismiss the social values of the Nineteenth Century. This was an age of vigorous debate on questions of public policy. The American and French revolutions were relatively recent events; the Eureka Stockade led directly to a bicameral parliament and universal franchise (albeit male-only); an emerging organised working class won the eight-hour day, visionaries like J. D. Lang forced through compulsory secular education, and the disestablishment controversy ushered in the separation of church and state. When William Charles Wentworth proposed a colonial hereditary peerage, it was famously ridiculed as a 'bunyip aristocracy.'

In short, the Nineteenth Century, riddled though it was with racism, sexism and a nostalgia for rustic pastoral feudalism, nevertheless laid the foundations of liberal democracy as we know it today.

Through this period, land was also being shaped by the forces of democracy. The squatters were compelled, acre by acre to relinquish their runs to selectors.

Public land was to be provided as-of-right by the State, not at the whim of the landed gentry. (We should not forget that the Royal Parks of London originated as the hunting chases of nobility: their high iron fences serving both to keep the deer in and the peasants out.)

Roads were laid out as public property, rather than as freehold which took on the status of public highway through the curious workings of the common law.

In Victoria, perhaps the single most important decision about public land was the 1881 reservation of those river frontages which had not already been alienated. This decision was not driven by conservation policy as we know it today, but by precepts of democracy and justice: it guaranteed the small land-holder the same rights as the wealthy grazier when it came to watering his sheep and cattle.

It's worth noting that the provision of public land by the State was not funded by budget appropriations. The economics of terra nullius meant that this land was made available at no cash cost to the government. At the most, it may have represented some revenue foregone – but this was repaid manyfold by the sale into private ownership of land which the public infrastructure made more attractive.

It's also worth noting that at the end of the Nineteenth Century, there was a clear legal distinction between public land and private land. Public land was synonymous with Crown land; and private land was synonymous with freehold. This nice neat dichotomy was one of many certainties which were about to change.

The Twentieth Century – the Age of Denial

The Twentieth Century saw a new set of imperatives, and a newly-emerging twentieth-century body of public policy, value-sets and governance systems.

I want to touch on four of these Twentieth-Century developments – developments to which the administration and management of public land did not always respond.

Indeed the main instruments for the planning of Public Land – namely the core provisions of Acts of Parliament relating to Crown Land – passed through the entire Twentieth Century virtually unscathed.

As the world changed around them, the custodians of this body of legislation were in denial.

Populate or Perish

The first development was, simply, growth. The patterns of land use altered in response to the expansion of agriculture, the pressures of urbanisation, transport technology and above all, to the sheer increase in population.

At the turn of the twentieth century, Victoria's population had already reached 1.2 million, exceeding the most optimistic expectations of the early administrators. It was to double again in the next 50 years.

The original Crown Allotments laid out by Surveyors-General were no longer adequate to the task. In near-urban areas, lots which has been configured as agricultural small-holdings now became residential. Melbourne 2030, with its focus on increased densities, is new in magnitude only: urban consolidation has been a feature of settlement for at least a hundred years.

In rural areas the forces of restructure were also at work: technological change drove the consolidation of farm units into bigger landholdings; irrigation ushered in intensive horticulture on smaller landholdings. Closer settlement schemes aimed to squeeze many new settlers – notably returned servicemen – into the rural landscape.

One consequence of this was that the supply and demand for land was increasingly being driven by the private market. Settlement was occurring where market forces directed it, not where surveyors thought it should go.

In this new environment, who would protect the public interest? How were patterns of settlement to be guided, if not through a benevolent Department of Crown Lands and Survey? And, of particular interest to the subject matter of this paper – how was land to be provided for public purposes?

We know the answers to these questions: new public land was created on freehold – either as land set aside in the course of subdivisions, or as land purchased by authorities. The most notable acquisitions were probably the Metropolitan Parks, purchased by the Melbourne Metropolitan Board of Works and its successor Melbourne Water.

On a smaller scale, utilities and municipalities also purchased land to augment their original Crown land reserves. The typical hospital, the typical recreation reserve and the typical council offices all consist of a core parcel of Crown land surrounded by freehold parcels added to it over the years.

This leaves us with public land falling into at least four different baskets, each with quite different objectives - not necessarily related to the actual values of the land in question; objectives which often have little or no bearing on sustainability:

- Reserved Crown land (like river frontages) for which the legislated objective is tied to some *ad hoc* and often vague or inappropriate gazetted purpose
- Unreserved Crown land (like the bed of Port Phillip Bay) which is controlled under an Act whose objective is the alienation of *terra nullius*
- Freehold land (like Safety Beach, Dromana) controlled by legislation which treats land as a commodity to be bought and sold
- National and other Parks, which are the only category with clearly stated statutory objectives related to conservation and sustainability

This legacy of inconsistent objectives and can never be overcome by superimposing layers of zones and overlays under planning schemes.

From Cornucopia to Conservation

The second twentieth-century development was the emergence of the conservation ethic. For pubic land this was epitomised in Victoria as elsewhere by the National Parks movement.

Wilsons Promontory was reserved 1898, and declared as a National Park 1905. It was followed by a series of other parks, guided in part by the precepts of the IUCN, but also facilitated through the convenient economics of *terra nullius*.

One of the many Parks which was to be created subsequently was the Little Desert National Park in the Wimmera. It was here that this second cultural shift was most clearly demonstrated.

As well as being placable in a specific park, this cultural shift can be dated quite precisely to 1970. That is the year in which Sir William McDonald, Minister for Lands in the Bolte Government, handed over to Bill Borthwick, Minister for Lands under the Hamer Government.

Each gentleman wore a second hat: in those days the title Minister for Lands invariably went hand in hand with the title Minister for Soldier Settlement.

The fight to save the Little Desert is legendary. McDonald's proposed subdivision was vigorously opposed by conservationists – indeed it served in a perverse way to coalesce the disparate groups which became the Conservation Council of Victoria. Eventually the scheme was abandoned, and McDonald lost his seat at the next election. His successor was Bill Borthwick, who proceeded to establish the Land Conservation Council.

Borthwick declared: "The important task of land use should become less of a political and parochial wrangle, and more of a scientific assessment and decision."

He was wrong: the politics has never been eliminated from decision-making about public land - although it is now, we hope, better informed by the science.

The LCC subsequently became the Environment Conservation Council, and is now called the Victorian Environment Assessment Council. It has rightly been acclaimed as one of the State's success stories – but let's not overstate its role. It was hamstrung from the start by two major deficiencies in its charter – and they were politically-imposed deficiencies.

The first was the inability to consider urban Crown land. This restriction was removed in 1990, but the body (by whatever name we call it) has not yet been given a reference to look at urban land.

The second deficiency is the inability to look at any freehold land, either urban or rural. It is forbidden by law from looking at anything other than Crown land – and cannot, for instance, recommend that some National Park boundary be rationalised through the inclusion of neighbouring freehold – no matter how compelling the case may be for doing so.

Since the Little Desert, National Parks have remained the flagship of the conservation movement. It is increasingly recognised, however, that a flagship is no substitute for a whole navy.

National Parks will not solve our massive ecological problems – water, extinctions, salinity, and air pollution. National Parks will not protect the Basalt Plains grasslands – because what little is left of them is too fragmented to qualify as a Park. National Parks as we know them in this country will not protect Melbourne's Green Belt.

In the 1970s, even though the Country Party had prevented the LCC from considering freehold land, premier Hamer nevertheless inaugurated a program to buy back certain tracts of freehold which the emerging planning system had failed to protect.

These were known as 'old and inappropriate subdivisions' and included estates in the Dandenongs and the Summerlands Estate next to the Phillip Island Penguin Reserve. This program is only now reaching its conclusion.

Elsewhere, land has certainly been purchased for addition to the public estate, or bequeathed in the wills of public-spirited citizens. There has, however, been no systematic attempt to identify and purchase land.

Planning controls are no substitute for acquisition. In the interests of sustainability, we may deem it necessary to exercise control over some tract of freehold land, but zonings and overlays may prove ineffective tools. The better strategy may be acquisition, either of the full freehold title or of an interest in the title – as already occurs under the Victoria Conservation Trust.

Governments have been reluctant to take this path. Treasury resiles from any program which costs cash money – as against programs which deliver off-budget hidden subsidies. Compulsory acquisition has been avoided by most authorities, with some notable exceptions. At a parliamentary level, intrusions into the freehold property rights have been abhorred by the National/Country Party, which until recently held some political sway.

In short, the Governments of the Twentieth Century failed to develop coherent mechanisms for buying back the farm – for reclaiming those jewels of the public estate which must be added into the public land portfolio if they are to contribute to a sustainability objective.

What's Public; What's Private

The third difference between the Nineteenth and the Twentieth Centuries was a repositioning of the boundary between the public and the private domains.

Part of this phenomenon was deregulation. Here I'm not simply referring to the economic rationalists' mantra so eagerly espoused by neo-conservatives from Maggie Thatcher to Jeff Kennett.

I'm also referring to the philosophy of personal freedom which some would derogate as the permissive society. We saw the virtual abolition of censorship, the introduction of Sunday trading, the liberalisation of liquor laws, the decriminalisation of gay sex and even the introduction of footpath cafes. The rot has truly set in: perhaps it could be sourced right back to the disestablishment of the church.

At the same time the public domain was extending itself forcefully into areas which had hitherto been private.

Taxation laws intruded deep into people's private affairs. Income tax had been invented to fund the Napoleonic wars, but only in 1942 did it become the principal source of Commonwealth revenue. Compulsory education had been introduced in 1880, and the Twentieth Century saw welfare systems intrude even further into the relationship between parents and their children. Labour laws intruded into the employer-employee relationship; Medicare and pharmaceutical benefits into the doctor-patient relationship.

Only die-hard ultra-conservatives would still argue that these incursions lie outside the proper realm of governments.

As we observed earlier - until federation public land had been synonymous with Crown land; and private land had been synonymous with freehold. This neat dichotomy was about to change, as the public domain intruded into property rights, and conversely we came to be more tolerant of private use of public land.

By the centenary of federation, the old catch-cry 'A man's home is his Castle' was looking very tattered.

Most notable amongst the instruments of this intervention are, of course, planning schemes – but we must also include here property taxes, rating systems, local laws, controls over emissions, and conditions attached to the connection of reticulated services.

Landowners no longer own the fauna on their properties (remember that fauna used to be called 'game'); they may not own the trees; and soon may not own the very water in their dams.

This trend has implications for public land – it demonstrates that retention of land in public ownership is no longer the only way of protecting public values. The converse of this phenomenon has been the increasing acceptance of the private use of public land.

Until very recently public land was seen as sacred: it must be kept totally free from blight of commercialisation.

Notable amongst advocates of this view was the Port Phillip Conservation Council. In a vigorous 1972 campaign which rocked the Hamer Government, the Association defeated a proposal for a restaurant on Point Ormond.

Take a look at St Kilda foreshore now. There are a dozen restaurants, coffee shops and kiosks. This is no longer seen as unacceptable commercialisation: on the contrary, the products and services offered by these vendors are now seen as an integral part of a visit to St Kilda beach.

Yet the Port Phillip Conservation Council does not resile from its policy: "The foreshore should never be degraded…for private gain," says its website.

"No new leases, or extension of existing leases, on foreshore reserves, for commercial purposes, should be allowed."

This remains a complex and controversial topic, one on which I do not at this time pretend to have a clear policy position to offer. Which of the following four examples (all Crown land) contribute to sustainability, which do not, and why?

- The Kiosk at the Royal Botanic Gardens – a commercial enterprise which provides services for people who use the gardens.

- The National Tennis Centre – which provides benefits to the state, without providing any service to the users of the parkland which surrounds it: indeed the Yarra Park precinct has become a mere curtilage for the sporting enclaves within it.
- The Commonwealth Games Village – to occupy land which is not part of Royal Park, but which certainly had the potential to be added to it.
- The Royal Mint in William Street – which has been leased to TEAC at a rental which allows the Committee of Management to restore the historic building, but which otherwise provides no public benefit.

The land Acts struggled to respond to this issue. The Land Act 1958 provides no restriction whatsoever on the commercialisation of the Crown land it controls – other than an *ad hoc* assortment of terms for leases. On the other hand the Crown Land (Reserves) Act 1978 struggles to protect reserved Crown land from inappropriate private use through a set of restrictions which are inconsistent, illogical and often quite unintelligible.

From Governor to Governance

In the earliest days of the Port Phillip Colony, we were governed from Government House, by the representative of the Crown. Surveyors-General answered not to Minsters, not to Parliament, but to the person entitled the Superintendent, the Lieutenant-Governor, and after separation, the Governor. It was Charles La Trobe who personally directed the Surveyor General on the locations of the Eastern and Western markets, the police paddocks, the botanic gardens, and the Melbourne cemetery.

As the apparatus of government built up, Governors were advised by an Executive Council, the Legislative Council and later a bicameral Parliament. Through this period we saw the creation of a public service and an independent judiciary, and bodies we now call statutory authorities.

The first such statutory authority (it predated Melbourne City Council by a few months) was the board of commissioners for the Western Market. Candidate John Pascoe Fawkner plied voters with free grog from his various hostelries. As the subsequent inquiry found, his election allowed him to influence the price of vegetables which he supplied from his market gardens on the Moonee Ponds Creek.

The machinery of government has been the subject of much debate ever since. Let me run through a few characteristics of a sound, competent land management authority – one which promotes and achieves sustainability.

- Asset Management

Our authority will know what assets it is responsible for, and the terms of the grant, lease, delegation or bequest under which those assets came under its stewardship

It will know whether or not its assets contribute towards its corporate goals, and how assets may be acquired, improved or disposed of in pursuance of those goals

- Functional Performance

It will clearly understand and articulate its performance objectives, and develop meaningful indicators by which its performance may be judged

It will monitor its corporate environment, and know what constitutes 'best practice'

It will have a forward vision of how its performance will improve. We might call this a Management Plan

- Financial Performance

Our authority will understand the degree to which it can expect to be subsidised (including implied subsidisation), and the degree to which it must be self-sufficient

It will understand the economics of its operations, including the distributional effects on its clients and tenants. It will know what explicit and implied subsidies it hands out.

It will maintain a meaningful balance sheet, which clearly differentiates between those assets which are owned by the authority and those held in trust on behalf of the community

- Accountability

It will provide annual reports to its superior body and to the public. These will be both financial and performance reports

It will understand its own contractual obligations, and its responsibility for subordinate entities

Finally, it will find meaningful ways to relate to its constituency

Another highly relevant feature of public sector governance is something called *subsidiarity*. This is a word not used much in Australia, although the concept itself is quite familiar to us. It is the principle that, in a hierarchical system, authority should be devolved from higher levels to those lower down the chain: the action should be as close to the citizen as practicable.

In Europe where the word in vogue, subsidiarity means that matters which affect the whole EU, like the currency, tariffs and climate change should be governed from Brussels; matters of national importance should be governed by individual member states, and matters of local significance should be left in the hands of regional or local authorities.

All this is relatively new to Europe, but has been familiar to us for a hundred years: we wrote a version of subsidiarity into the Australian constitution at federation.

The Crown Land (Reserves) Act provides for management of reserves to be delegated to Councils and 'local' Committees of Management. Often this arrangement will be consistent with the principle of subsidiarity, but this is an assumption which should come under critical

scrutiny. A study would still find local committees managing land of state significance – and in some cases managing it quite well.

At the same time, we could point to Committees whose mismanagement of land abutting waterways (of State importance) has adverse downstream impacts on Ramsar wetlands (of international importance).

The Twenty-First Century – From Here to Sustainability

When you analyse the various Acts of Parliament relating to public land in Victoria, and look for the ways in which those Acts contribute to (or detract from) the goal of sustainability, you end up with a very sorry picture indeed.

The Land Act

It's easy to lampoon the Land Act. Its principle fault, however, runs deeper than the ludicrous but essential benign anachronisms we mentioned earlier.

The Act is a legislative bastion of the discredited doctrine of *terra nullius*, and is therefore a standing insult to aboriginal Australians.

It's a decade since the High Court's Mabo decision and the Commonwealth Native Title Act overturned *terra nullius*. The Land Act still keeps alive on the statute book the apparatus under which the Koorie people were dispossessed, and vast tracts of their land were granted to white settlers by representatives of a foreign Crown.

The Land Act is rooted in the age of the cornucopia. It is designed primarily to support and facilitate the business of alienating Crown land by leasehold or freehold. Even though Commonwealth legislation may bind the Act's administrators to recognise native title, and even though those administrators may recognise sustainability as a policy issue, the Act itself fails to acknowledge these central themes of modern public land management, and makes no contribution whatsoever to their furtherance.

We can't undo history, but surely we can wipe this anachronistic relic of colonialism from the statute book.

The Crown Land (Reserves) Act

The Crown Land (Reserves) Act contains two different types of fault. The first group could be remedied by tinkering around with amendments, the second group could not.

The Parliament could continue to sew patches on to the holes in the Act – or even patches on the patches. This approach may, for instance -

- rationalise the list of purposes available for reserves

- remove the curious distinction between temporary and permanent reserves

- abolish the provision for reserve-specific regulations, long since superseded by local laws made under the Local Government Act

- abolish the anachronistic provisions for trustees

- rationalise the ten inconsistent tenure provisions into two: one for leases and one for licences

- rationalise the circumstances in which decisions can be taken by the Minister, by the Governor in Council, and by the Parliament.

I would argue that the faults in this system lie deeper, and that a far more fundamental review is required.

Sustainability should be recognised as relevant to all reserves of National or State significance, not merely those falling within the half-dozen purposes where a tenure proposal now triggers Parliamentary scrutiny.

The resourcing of reserves of State or Regional significance should be accepted as a responsibility of the State government. Reserve managers should not have to exploit their own land in order to generate revenue, nor should they be forced to rely on an uncertain income from tied grants.

There should be no 'local' committees of management directly responsible to the Minister. If a reserve or some part of it is best managed by a local community group, that group, however constituted, should be accountable to the relevant municipality or statutory authority.

The system should be supported by a vigorous partnership dialogue, involving meaningful performance reports from delegated managers, compliance reports by tenants, and active monitoring by government of that performance and compliance.

Many Crown Reserves need not, and should not, be Crown land at all. They should be handed free of charge to Councils to hold in freehold title, subject only to the controls available under the Planning and Environment Act.

The Planning and Environment Act

The Planning System as we know it is an essential instrument to guide the use and development of private land.

Its *raison d'etre* is to protect the public interest when it comes into conflict with the private interests of private landowners.

It is an adversarial system. It assumes, correctly, that landowners will be motivated by their own private interests – whether these be couched in terms of commercial profit or personal amenity. It assumes, again correctly, that there is something called 'the public interest' which is often at odds with private interests, and which must be protected through instruments of public policy. The 'public interest' includes the pursuit of sustainability.

Planning Schemes were never intended to apply to public land, and their recent extension to cover Crown land was not, in my opinion, well thought through.

Public Land of State significance, if properly controlled, should be under the management of an agency of government whose key purpose is to protect the public interest. In this case the adversarial milieu should not exist.

In the case of National Parks, I doubt that adding a PCRZ zone and a series of overlays adds anything useful to the regime already in place under the National Parks Act. We may or may not be satisfied with the manner in which DSE and Parks Victoria manage National Parks, but I can't see their performance being improved in any way by a Planning Scheme.

In the case of Coastal Crown land, I doubt that slapping on a PPRZ zone and assorted overlays adds any further protection of the public interest than is already provided under the Coastal Management Act. Indeed, the second layer of control simply adds unnecessary bureaucracy and confuses applicants and on-the-ground managers.

By purporting to give councils (as responsible authorities) power over coastal use and development, the extension of Planning Schemes to coastal Crown land runs contrary to the principles of responsible government. It takes subsidiarity too far, and puts state issues in the hands of local authorities.

In general, State governments are most reluctant to allow themselves to be beholden to municipalities – hence the notorious section 16 exemptions put in place twenty years ago by Minister 'Snappy' Tom Roper, under which certain of his successors continue to bypass the system which applies to everyone else.

Despite the rancour which this exemption generates, there is a valid point here: land of state significance, like projects of state significance, must be managed in the interests of the state, not necessarily in the interests of the local community. This is not the case for public land of local significance, including land controlled by public agencies for essentially local purposes – such as schools, police stations, bus depots and offices.

In general, Planning Schemes are reactive instruments, not pro-active. They cannot require a landowner to build a hotel, or convert an office into a factory, or paint a fence yellow: they only respond to such proposals as and when they are initiated by the private landowners.

On public land, controlled and managed by some public agency, it is possible (indeed highly desirable) to set in place a pro-active system to protect the public interest and to promote sustainability: in other words, to adopt a Management Plan.

The National Parks Act provides for Management Plans; the Coastal Management Act provides for Coastal Action Plans. The processes for framing and approving these plans should look very like the exhibition of a Planning Scheme Amendment – with one significant exception: there can be no appeal against the decision of the government. It is reasonable to assume that any proposed use or development which conforms to an approved Plan should be itself be approved.

Having levelled this series of criticisms against the main statutory instruments of public land control in Victoria, it is incumbent on me to suggest how this legislative regime should be reformed.

Reduce the Two Layers of Control to One

Public land of National, State or regional significance such as National Parks, Coasts and the Royal Botanic Gardens should be controlled by the State under State jurisdiction. The permitted uses of these lands, and the management objectives of their controlling agencies, should be enunciated in the National Parks Act, the Coastal Management Act, the RBG Act, or the proposed Public Land Sustainability Act as the case may be.

Land which falls into these categories should have Management Plans developed for it, and all use and development should be in accordance with such plans. Where there is an approved Management Plan, these areas should be removed altogether from Planning Schemes.

On the other hand, public land of local or neighbourhood significance should be managed by Local Councils. This land should be used and developed in accordance with the relevant Planning Scheme, not the Crown Land (Reserves) Act. Indeed, it need not be Crown land at all, but should be granted in freehold to the municipality.

Abolish the Crown Land Reserves System

The Crown Land (Reserves) Act should be repealed and the entire Crown land reserves system abolished.

Reserves of high significance should be adequately protected under the National Parks Act, the Coastal Management Act or the proposed Public Land Sustainability Act.

Reserves of Local significance should be granted in fee simple to the relevant municipality, or in the case of land used by government agencies, to that agency.

The proposed Public Land Sustainability Act would allow the Minister to appoint Parks Victoria, Councils and other statutory authorities as Committees of Management, but there would be no ‘local’ Committees for land of National or State significance.

Committees of Management for land of local significance could be reconstituted, if the relevant Council so desired, as committees under the Local Government Act.

Reserve-specific regulations for Crown reserves would be repealed *en masse*, and replaced by state-wide regulations made under the new Public Land Sustainability Act. Matters of local concern could be dealt with through local laws under the Local Government Act.

Systematically Acquire High-Value Freehold Land

Freehold with significant public values (conservation, heritage, landscape etc) should be purchased for inclusion in the Public Land portfolio.

This could take the form either of the purchase of the full freehold title or purchase of covenants restricting the freehold owner's development rights.

The Victorian Environment Assessment Council should be reconstituted as the Public Land Sustainability Council. The arbitrary restriction preventing it from considering freehold land should be lifted.

The new PLSC should commence a prioritised study of land suitable for acquisition – such as freehold intrusions into the Crown frontages along rivers, and the infamous subdivisions along the Ninety-Mile beach.

In adopting this program, Governments must be prepared to commit budget appropriations and use their powers of compulsory acquisition.

There are few causes more laudable than the conservation of public land. A fortunate conjunction of circumstances means that Victoria now has an opportunity to throw off the burden of the past two centuries, a burden carried forward by institutions and instruments long overdue for reform.

It is proper, I believe, for the planning profession to encourage Government in this task. The outcome will be worthwhile: the knowledge that our bequest of public land to future generations will be, in addition to its other qualities, sustainable.

* * * * *

THE PUBLIC LAND SUSTAINABILITY ACT (2005?)

Native Title

Salutation to the traditional owners of land in Victoria
Acknowledgement of the Commonwealth Native Title Act

Objects of this Act

The Principle of Sustainability
The Principle of Subsidiarily
The Objective of Net Gain

Application of this Act

Public Land means –
- all unreserved Crown Land previously subject to the Land Act
- all reserved Crown Land previously subject to the Crown Land (Reserves) Act
- all reserved Forest previously subject to the Forests Act
- all freehold land owned by Ministers or government agencies
- any freehold land brought into the public estate through acquisition

This Act does not apply to land under the National Parks Act

The Public Land Sustainability Council

The Victorian Environment Assessment Council shall be reconstituted as the Public Land Sustainability Council
The Council will have the same powers as the VEAC, with the additional power to assess freehold land and recommend on its acquisition for inclusion as Public Land

The Public Land Register

There shall be a register of all Public Land
At three-yearly intervals the Minister shall report on the extent of the Public Land portfolio, its relevant characteristics, changes to the portfolio, and progress towards the achieving the objects of this Act

Land Assessment

All Public Land shall be assessed by the Public Land Sustainability Council
The Governor-in-Council may prescribe procedures and criteria for assessments
Assessments may be conducted on a geographic basis or a functional basis
Priority shall be given to land not already assessed by the LCC or its successors

Control of Public Land

Public Land assessed as being of National, State or Regional significance shall be under the control of the Minister, except that -

If it is used by another Minister or government agency, it shall be under the control of the relevant Minister, who may not dispose of it.

Divesting of Public Land

Public Land assessed as being of Local Significance shall be –
protected under the relevant Planning Scheme, and
transferred into freehold title with appropriate covenants and easements.
If it is used by another Minister, Department or government authority, it shall be granted in fee simple to that user
Otherwise, it shall be granted in fee simple to the relevant Municipality.

Disposal of Surplus Land

Public Land assessed as having no public values, or values which can readily be protected under the Planning and Environment Act, shall be converted to freehold and sold.

Acquisition of High-Significance Land

Freehold land may be acquired for addition to the Public Land Register if -
- it is assessed as being of national, state or regional significance, and
- its values cannot be adequately protected if it remains in private ownership

Planning of Public Land

The Minister may approve Public Land Management Plans
The Planning and Environment Act shall not apply to land for which there is
- a Public Land Management Plan or
- a Coastal Action Plan or
- a Plan of Management under the National Parks Act
The Planning and Environment Act shall apply to all other Public Land

Management of Public Land

The controlling Minister -
- may manage Public Land directly
- may engage Parks Victoria, a Council, or another Statutory Authority as delegated manager
- all delegated managers must submit performance reports to the Minister

Private Use of Public Land

If there is a Public Land Management Plan -
The controlling Minister may issue leases for up to 21 years
The delegated manager may issue licences for up to 3 years
Leases and licences must not compromise the public values of the land
Leases and licenses must provide a clear public benefit

* * * * *

New submission for investigation "Statewide Assessment of Public Land"
veac
to:
veac
22/06/2015 09:19 AM
Hide Details
From: veac@veac.vic.gov.au
To: veac@dse.vic.gov.au,

Submission for the investigation "Statewide Assessment of Public Land"

Submitted on **22-06-2015**

Information provided by the author:

Title: **Mr**

First Name: **David**

Last Name: **Gabriel-Jones**

Organisation: **The Public Land Consultancy**

Description:

This is a second submission, in addition to the submission made last week.

Click here to review and validate the submission

Victorian Environment Assessment Council
PO Box 500
East Melbourne
Victoria, 3002

22 June 2015

Statewide Assessment of Public Land

A Submission from The Public Land Consultancy

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

VEAC's terms of reference require development of options for land categorisation which will 'support effective and efficient public land management.' Accordingly, this submission offers a set of propositions which we believe serve that end, and which VEAC should now explore.

In short, 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*.

We note that this is the first of three periods during which submissions may be made. Further rounds of submissions will occur following your interim report (Sept 2015) and then again following publication of a discussion paper (early 2016). Clearly, this timetable facilitates a process of iterative refinement of ideas which, if advanced precipitously, might be seen as unduly radical.

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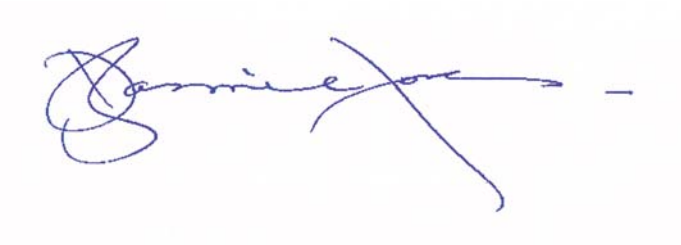
On the basis of our extensive experience in this field we firmly believe that these propositions have merit. This experience includes a series of 8 workshops we held at various venues around the State during 2014, attended by 97 officers from 36 municipalities.

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

The Public Land Consultancy takes full responsibility for the views expressed in this submission, which has been made possible by the City of Wyndham and the Shire of Mornington Peninsula, whose support we gratefully acknowledge.

* * * * *

FIVE PROPOSITIONS

1 There should be no unreserved Crown land in Victoria

The notion of 'unallocated' or 'unalienated and unreserved' Crown land has no place in the Twenty-first Century. It is a throwback to the days of *terra nullius*, when Crown land was regarded as a commodity to be disposed of in the course of white settlement.

In the Nineteenth Century the default policy in relation to Crown land was that it was available for alienation; the alternative being that it could be reserved for public use. The time is long overdue for this paradigm to be reversed.

In other states, there may well be significant tracts of Crown land awaiting some decision as to their future, but not in Victoria. Here, very little terrestrial Crown land is unreserved, the largest single tract being Port Phillip Bay.

Crown land legislation has always been focussed on the alienation of land, principally through Crown grants in fee simple. The reservation of Crown land for public purposes has been a recognised, but secondary, function of the legislation ever since the Land Act of 1860, and even earlier NSW legislation. In 1978 the Government of the day recognised that reserved Crown land was sufficiently important to warrant its own legislation. In parallel with setting up the Land Conservation Council, it re-badged the relevant provisions of the *Land Act 1958* as the *Crown Land (Reserves) Act 1978*.

The time has now come for the next substantial advance. We should acknowledge that, in Victoria at least, the business of carving up the landscape for the purpose of alienation has come to a conclusion. The Nineteenth Century paradigm should now be reversed: the default position in relation to all remaining Crown land should be that it is reserved for public purposes, with alienation being the exception.

Recommendation

Accordingly, VEAC should now float the concept of a new Act to replace both the *Land Act 1958* and the *Crown Land (Reserves) Act 1978*. One model for such an Act is the 2003 paper we submitted to you separately (15 June 2015) entitled 'Towards a New Public Land Sustainability Act.'

2 We need to reassign Crown land reserves within a new conceptual framework

Over recent years government has had some difficulty in matching VEAC's various recommendations to the available legislative instruments. This difficulty is reflected in the inordinate complexity which has come to pervade the *Crown Land (Reserves) Act 1978*. When it was first enacted, this Act consisted of 32 sections and only one site-specific schedule; by 2015 it had expanded to 137 sections plus 17 pages of schedules – this in an era when governments espouse deregulation and simplification of the statute books.

Even on day one, the 1978 Act carried forward several historic incongruities which were already obsolete: these included the 1860s list of acceptable reserve purposes, and the legacy of the inappropriately-designated 'permanent' reserve. These two matters are discussed under proposition 4 below.

We are of the opinion that a new conceptual framework should, and can, be developed into which every Crown land reserve would be transferred, without adversely affecting the status, control, or protections afforded that parcel by the current system.

The parameters of this framework would be (a) the parcel's generic type or purpose, (b) its level of significance (national, state, regional or local), and (c) its degree of protection from change. These are well-established concepts,

clearly understood and amenable to codification – but reflected only marginally, if at all, in the corresponding legislation.

We hypothesise that:-

- a new, rational, conceptual framework could readily be developed for Crown land reserves
- a process could be devised for the orderly transfer of Crown land reserves into such a framework
- in parallel, the legislation relating to the governance of Crown land reserves could be vastly simplified
- within a relatively short timeframe Victoria could have a Crown land governance regime which is cogent, relevant to the twenty-first century, and would serve as a model for other Australian states to emulate.

Recommendation

VEAC should float this idea in its interim report, to be followed up with a structured program of workshops in which the concept of a new Act would be explored and refined.

3 Each Crown land reserve should be categorised according to its level of significance

We are familiar with the notion of some land being of national significance, some of state or regional significance, and some of local or neighbourhood significance. This logical taxonomy is, however, only partially reflected in systems of land governance.

A theme running through modern systems of governance is *subsidiarity*: the principle that issues should be dealt with at the most immediate (or local) level consistent with their solution. Subsidiarity has become central to the rhetoric

of the European Union, but is equally relevant to the Australian federal system.

Australia has a well-settled three-tier system of government: national, state and local – but it is a system not reflected in public land governance. Under the federal constitution the law relating to land resides with the states. Thus the State of Victoria, in additional to being responsible for public land of state significance, is also responsible for public land of national and local significance. Living within this constitutional framework, as we must, it is nevertheless possible to better align land characteristics with land governance.

State-based legislation is, of course, quite capable of recognising other levels of significance. The *National Parks Act 1975* and the *Local Government Act 1989* reflect the higher and lower levels of the federal hierarchy, respectively. The Victorian *Traditional Owner Settlement Act 2010* compliments the federal *Native Title Act 1993*. The capacity for this recognition of the hierarchical Australian structure does not, but should, extend to most Crown land reserves.

Recommendation

VEAC should explore the idea that 'effective and efficient public land management' would be facilitated by codifying the notion of *significance*. For any given parcel of public land, government and community should be able to apply an objective methodology to ascertain its level of significance: national, state, regional, or local. VEAC should develop and float a tentative set of criteria to support this methodology.

4 Historic designation systems for Crown reserves should be re-engineered

Any new conceptual framework for Crown reserves must address two of the less purposeful features of the system we have inherited from the century-

before-last. These are the gazetted purposes of Crown reserves, and their designation as either temporary or permanent.

The Crown Land (Reserves) Act lists thirty-three public purposes for which Crown land may be reserved – but it is an open-ended list. We understand that in fact there are well over a thousand individual gazetted purposes – some so archaic and specific as to be not merely pointless, but absurd.

This list of acceptable reserve purposes first appeared in the Land Act of 1860. For a hundred years it served as the framework for designating the purposes for which Crown land was to be used and developed. When planning schemes were first introduced, in the mid-twentieth century, they did not apply to Crown land – perhaps because Crown land was seen to already have an adequate system governing land-use. In the ensuing decades the planning system has become a core pillar of all land-use decision-making, for Crown land as well as for freehold. The planning system has evolved and adapted, the Crown land reserves system has not – and yet, if there is an inconsistency, the latter prevails. One must ask whether the 150 year-old system of Crown land reserve purposes has continuing relevance.

The categorisation of Crown reserves as either 'temporary' or 'permanent' needs to be realigned with Twenty-first century value systems. Quite properly, the designation 'permanent' applies to reserves which have the protection of the parliament: their alteration requires a new Act. Across the state, however, we find a plethora of Crown reserves whose 'permanent' designation serves only to impede orderly change and to clutter up the parliament.

One of the most telling examples is the permanent Crown reserve along many of the State's rivers. If the river changes course, the reserve does not. The resulting situation is a river along which there is no public reserve, and a public reserve remote from the river. Such situations could be addressed through normal processes of re-zoning, re-subdivision, acquisition, and disposal – but for the fact that the reserve is permanent. Somewhat ironically, the permanent designation impedes rather than assures the desired outcome.

Recommendations

VEAC should document the 1000+ purposes for which Crown land has been reserved, analyse the relevance of those purposes, compare the Crown reserve system to the corresponding apparatus of the planning system, and open a discourse on their continued relevance.

VEAC should critically examine the permanent / temporary designation of Crown reserves, analyse the cases which it has caused to come before parliament, and postulate new non-parliamentary processes for allowing changes of status to occur in an orderly and safe manner.

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

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.

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 has commented on the resulting dilemma. In his 2014 report *Asset Management and Maintenance by Councils* he notes that:-

"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.

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