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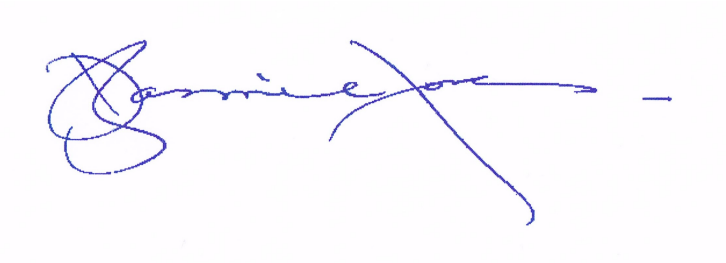
On the basis of our extensive experience in this field we firmly believe that these propositions have merit. This experience includes a series of 8 workshops we held at various venues around the State during 2014, attended by 97 officers from 36 municipalities.

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.

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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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