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SEE YOU IN COURT, SIR!

What ever has happened to the good old-fashioned litigant? There was a time when, if perplexed by an unsatisfactory area of public land law, we could confidently rely on some injured or aggrieved person coming forward to obtain a judicial clarification.

Think of plaintiffs Brodie and Ghantous, whose accidents inspired the *Road Management Act* 2004 – with all its shortcomings. Think of plaintiffs like Shirt and Ballerini, whose personal tragedies led to the re-definition of public authorities' liability through the 2003 amendments to the *Wrongs Act* 1958. Or even Fenelon and Nugent, who confirmed what we already knew about unused government roads. And let's not forget the hapless Mr Calabro who lost his money in the course of helping us clarify the ownership of freehold roads created before the *Subdivision Act* 1988.

Eddie and Bonita Mabo
By Emma, Warrandyte Primary School

At the top of the list, of course, is the late Eddie Mabo, who led us to admit – albeit 200 years too late – that we had got *Terra Nullius* entirely wrong.

The person we may have to thank for a clarification of the law may not be the plaintiff, but the defendant: think of the trespassers William and Patricia Melville who appropriated a reserve from the City of Monash and in doing so triggered legislation protecting council land from adverse possession.

But now what's happened: we're seven years into the Road Management Act, and still waiting for the litigants. No-one has yet put it to a court that…

- *Council has unreasonably proclaimed (or failed to proclaim) some road as a 'Public Road'…*
- *Council has not met the standards it set for itself in its Management Plan…*
- *The Titles Office has refused to recognize a road abuttal simply because the road has not yet become a public highway…*
- *Council has failed in its duty of care in relation to a road which is not a Public Road, but is nevertheless under its control…*

Have councils been so assiduous that no-one has had cause to complain? Afraid not. The explanation is that councils (and other statutory authorities such as VicRoads) are far more likely to have settled out of court. Whatever views were expressed by the parties, their lawyers and their insurance companies were views expressed in private, and not put onto the public record like a Supreme Court judgement. Pity.

Footnote: *Brodie, Ghantous, Shirt, Ballerini, Nugent, Fenelon, Melville, Mabo…* If you want to know more about these cases, go to www.austlii.edu.au – then to 'advanced search' then to 'this case name'. Have fun. ■

Who put the tank trap in the middle of a suburban park?

Question asked by the lawyers representing a trail-bike rider who's now a quadraplegic.

Remember this story from the Easter 2010 Terra Publica?

We're pleased to report the victim was awarded seven-figure damages.

Law Institute Victoria Member of the LIV

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UP THE CREEK…

Kannanook Creek Frankston:
Where's the property boundary?

Another area of law where we're waiting for public-spirited litigants to come forward is the law relating to riparian boundaries.

In the nineteenth century, many Crown Allotments alienated as freehold were bounded by the centreline of an abutting watercourse.

The *Water Act* 1905 revoked these Crown grants insofar as they applied to the waterway, and re-defined the freehold boundary as being at the edge of the land 'over which water normally flows.' This provision survives as section 385 of the *Land Act* 1958.

Notably, section 385 not merely confirms the revocation of the pre-1905 freehold status, but decrees that such land 'must be taken always to have remained' the property of the Crown.

Residual rights under the Land Act

The *Land Act* 1958 goes on (at section 386) to provide that although abutting owners and occupiers may have been dispossessed of the land in the bed and banks, they retain rights in relation to access and stock grazing. Further, persons entering onto the land may be regarded as trespassers, as if they were trespassing on land remaining in the owner's or occupier's possession.

Section 386 confers these rights on owners and occupiers 'for the time being' – a phrase which indicates that rights survive transfers of ownership and, arguably, subdivision.

The Act is silent on which, if any, subdivided lots carry with them the rights conferred on owners and occupiers of the parent Crown Allotment. Restrictions or conditions on a Crown Allotment certainly flow through to all lots derived from it, and on this basis it could be argued that benefits enjoyed by the parent Crown Allotment also flow through to all subdivided lots – even those remote from the watercourse.

Reservation of 'section 385' watercourses

At various times prior to 1905 (notably in 1881) Crown land forming the bed, banks and frontages to many Victorian waterways had been permanently reserved. Any land which was not Crown land at the time was unaffected.

It is widely held that, upon the 1905 expropriation, the 1881 reservation was not resurrected. This would appear to contradict the 'must be taken always to have remained' provision of section 386, which could be interpreted as deeming the bed and banks to have been Crown land in 1881, and hence to have been reserved at that date.

The *Crown Land (Reserves) Act* 1978 allows Crown land to be reserved for public purposes. As far as we can ascertain, this provision has never been used to reserve land to which section 385 of the Land Act applies – possibly because of concerns that any such reservation would be incompatible with continuation of rights preserved by section 386 of the *Land Act* 1958 and section 8 of the *Water Act* 1989.

Survival of Native title

A further query relates to Native title. Normally, it would be clear that because the bed and banks had once been freehold, Native title has been extinguished. But given the 'must be taken always to have remained' provision, doubts must fall on this assumption.

…AND SWEPT OUT TO SEA

And a further area of law untested in the courts (at least in recent times) is the law relating to cadastral boundaries defined by the sea.

There seems to be no doubt that if a Crown grant shows "Port Philip" as a boundary, or "High Water Mark," then the boundary will move back and forth as the topographic feature moves – provided the movement is gradual and imperceptible. This is known as the doctrine of accretion.

But what about boundaries defined by lengths and bearings? Boundaries originally marked out on the ground with pegs or blazes? One version of the doctrine holds that if the land is inundated by the sea it will be lost to title – but we're not so sure.

This is an area of common law deriving from English practice – and over there we find an agency called "The Crown Estate" which owns a fair bit of the UK foreshore. Their website – one of many touching on the issue of sea level rise and coastal erosion – discusses accretion and diluvion in terms we're familiar with here – but adds an exemption for land alienated by 'fixed boundary sales.'

As the waters rise, perhaps we'll find out. ■

Reference: DCE GUIDELINE NO: 02-20:0734-1

Q & A

Who controls airspace above roads ?

Question arising from a Council Property Officer trying to understand Accounting Standard AASB 1051 "Land Under Roads"

The pedestrian overpass between Myers and Melbourne Central was Melbourne's first use of road air-space, but certainly won't be the last… Urban planners and property developers will increasingly look to make use of airspace above roads – and the rock-space below. Who owns and controls this space?

The Bridge of Aspiration connects London's Royal Opera House with the Royal Ballet School.

Government roads are owned by the Crown, but are controlled at the surface by the 'Coordinating Road Authority' which is usually the municipality. At strata other than the trafficked surface, government roads are controlled by DSE as agent of the Minister responsible for the Land Act 1958, under which leases and licences may be issued.

Freehold roads, normally created in the course of subdivisions, are usually owned by the municipality – even though someone else's name may appear on the title. In these cases, the council owns the surface and the airspace and the rockspace, and may issue leases over those spaces – but not so as to interfere with public passage. Council could even do a discontinuation at stratum and sell a lot above or below a road.

Arterial roads are those where VicRoads is the Coordinating Road Authority – and VicRoads has powers under the *Road Management Act* 2004 to lease parts of the road reserve not likely to be used for road purposes. One place where this has happened is the canal-over-road structure at Martha Cove, Safety Beach. ■

Where there's no fence alongside a government road reserve, DSE must give the landowner an unused road licence – right?

Question asked by a DSE officer at one of our training courses.

No, wrong. We don't know how widespread this misunderstanding is, but we know how it arises. Section 402 of the *Land Act* 1958 is so badly drafted that it invites such misinterpretation:-

> **402 Right to enter and use an unused road**
> (1) Where the land on one side only of an unused road is fenced off from such road the occupier of any unfenced private land on the opposite side of such road shall obtain a licence under Division 8 of Part I or section 138 of this Act to enter and use the whole of such road to the extent to which his land abuts thereon.

The landowner "shall obtain" a licence! Makes it so easy to infer that the Minister "shall grant" a licence – but there's no way in the world the Land Act was ever intended to compel the Minister to do anything as a result of some arbitrary action by a landowner. If this was indeed the effect of section 402, landowners all around the countryside would be tearing down their fences in order to force the Minister's hand.

If DSE ever gets around to fixing the Land Act, we would be happy to provide them with a re-written section 402. Our new wording would clearly state that if an occupier of land abutting an unused road carries stock on that land, then he/she must either (a) obtain a licence or (b) construct a fence. Simple.

A little bird tells us that Department of Justice is having a think about the *Fences Act* 1968. If DSE is unable to fix the Land Act, then perhaps DoJ could sort it out for them through the Fences Act.

Meanwhile, we wouldn't want the misunderstanding appearing in a briefing note from DSE to Minister Ryan Smith, would we? ■

Land Law for Managers of Roads, Streets and Lanes

Presenter: Andrew Walker of the Victorian Bar; LIV accredited specialist in Environmental and planning law

Thanks to the many councils and authorities which have engaged us to run in-house courses for their staff…

Alpine … Corangamite … Bayside … Gannawarra … Horsham … Hume … Macedon Ranges … Maribyrnong … Melbourne … Mildura … Moira … Port Phillip … South Gippsland … Swan Hill … Wangaratta … Warrnambool … VicRoads … Parks Victoria … Melbourne Water … many other water authorities … Most of Victoria's CMAs … DSE, DPCD, and several other government departments …

NEW COURSE *see page 1*

Our Professional Development Program
May to August 2011

	Melbourne	Western Victoria	North-Western Victoria	North-Eastern Victoria	Gippsland
Risk Management *and the Law*	17 June 29 July 31 August				
Land Law and ***Subdivisions***	29 April 9 June 28 July				
Land Information *and its Interpretation*	30 May 27 June 25 July 29 August				
Land Law for ***Service Utilities***	18 May 28 June 16 August				
Public Land and ***Urban Consolidation***	21 June 23 August				
Vegetation *and the Law*	21 June	18 August Ballarat			
Environmental Law *– A Strategic Overview*	16 June		19 May Bendigo		
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Planning Law *– A Strategic Overview*			26 August Bendigo		1 June Traralgon
Land Law for Managers of ***Roads*** *Streets and Lanes*	4 May 30 August	15 June Ballarat			19 July Traralgon
Land Law for Managers of ***Rivers*** *and Lakes*		31 May Geelong		1 August Bendigo	6 June Traralgon
Public Land ***Leases and Licences***	24 June			22 July Wangaratta	5 August Traralgon
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