

LEX LOCI'S TRAVELS

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Lex Resolves a Contradiction At Safety Beach, Dromana



Lex is well below sea level. He's in the Lexmobile, driving along Marine Parade, Dromana. It's a road which goes down, down, down... under the Martha Cove canal, then up, up, up the other side... and back to normal ground level.

As Lex knows, land is three-dimensional. Each parcel has some vertical extent – possibly reaching as far as heaven and hell¹. So the canal is part of the road. And what's more, roads are public highways.

The word *highway* is older than you might think². A public highway (or just 'highway') is land over which you or I or anyone else is entitled to come and go. That's the common law. Older than motor vehicles; older than Australia.

Here at Martha Cove the canal occupies part of the road reserve. That part of the road reserve which is right above Lex's head. This causes him two concerns: firstly, he hopes the structural engineers did their calculations right, back in 2005 when the thing was built. And secondly, he sees the canal as a legal contradiction.

That land occupied by the canal is the subject of a *lease* – from VicRoads as landlord to the Martha Cove Owners Corporation as tenant.

That's right, a lease. Not a licence. And what's the essential characteristic of a lease? Exclusive possession!

Yes, here is the contradiction. A public highway is available for anybody to enter; whereas a lease allows the tenant to lock anybody out. That's why most occupations of road reserves take the form of licences, permits, or gazetted authorities to occupy as if under a licence. But not this one!

The contradiction is overcome by clause 9 of schedule 5 of the *Road Management Act 2004*. This allows VicRoads to issue leases for portions of arterial roads not required for traffic. VicRoads, but not other road authorities. And Marine Parade, Safety Beach is a VicRoads (arterial) road.

The 'public highway' status of the leased stratum has gone into abeyance.

Whew! The contradiction is resolved. Lex can emerge from the underpass and get on with his journey. But he's still wondering whether the structural engineers did their sums right.

See you there!

Lex Loci

1. *'ad coelum et ad inferos'* as Lex's Latin master taught him.
2. If Ned Kelly had been in England, he would have been a *highwayman*.