

Making a Federal Case of It

The Commonwealth government deals with federal issues – or does it?

Recently, we find the Prime Minister himself [campaigning on matters](#) within the jurisdiction of the State government and municipal councils. Yes, Scott Morrison has promised more car parking spaces at specific Melbourne suburban railway stations in (surprise, surprise) marginal electorates.



The Commonwealth government has no direct power to build station carparks. It does have power to offer Specific Purpose Payments (SPPs) to state governments, which those governments may accept and utilise at their discretion. But station carparks?

Back in 1901, the Commonwealth was granted a swag of powers – defence, immigration, the currency and so forth. Over the years the list has been augmented, principally through multilateral agreements with the states. The Commonwealth now controls income tax, and dominates health and education through SPPs – but the distribution of Commonwealth funds to individual schools and hospitals remains a matter for the States.

Attempts to bypass state controls are fraught with controversy – consider the East-West link, or John Howard’s take-over of one specific hospital in Tasmania. And yet we see ScoMo moving in on station carparks.

So – what are appropriate avenues of federal involvement in public land?

‘National’ Parks

Those National Parks in States (as against those in Territories and off-shore) are, of course, creatures of State law. Their creation, management and regulation all fall within the jurisdiction of the relevant state.

However, Australia has now signed up to the international Convention on Biological Diversity which, as pointed out by [the VNPA](#), opens up a constitutionally legitimate avenue whereby the Australian Government could take a greater involvement in the management (and funding) of National parks.

The vehicle for such involvement could well be an expansion of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). At the same time the Feds could consider a more rational basis for the protection of wetlands – looking beyond the relatively arbitrary distinction between ‘Ramsar’ wetlands and others.

Native Title

The *Native Title Act 1993* is, of course, federal legislation – stemming from the ‘Mabo’ decision of the High Court which pertained to the whole of Australia, and authorised by the 1967 amendment to the constitution. Here in Victoria, we’ve streamlined and augmented the workings of the NT Act through our own *Traditional Owner Settlement Act 2010* (the TOSA).



Consensus seems to be that this legislation is still bedding down, that Indigenous people in Victoria are still testing the workings of its various provisions. Nevertheless, it might be worthwhile floating the idea that the TOSA should be extended nationally – through a review of the NT Act, now 25 years old.

Coastal Erosion

We think of the coastline as being part of the adjoining State – but this is only partly correct. In 1975 the High Court ruled that the States end at low-water mark; that below low water mark it’s federal domain. Two 1980 Acts of the Commonwealth responded, by deeming the States to extend to 3 nautical miles from the Territorial Base Line. So, if the States extend seaward only by virtue of a

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A Federal Case – Continued...

Commonwealth Act, it follows that it's open to the Commonwealth to resume some measure of control and responsibility. We've little doubt that the States (and coastal municipalities) would be amenable to a high-level discussion of the division of responsibility for coastal erosion associated with storm surges and sea level rise.

Telecommunication Infrastructure

One item in the constitutional basket of Commonwealth powers is 'Posts and Telegraphs.' The operation of telecommunications has moved on somewhat since 1901 – but to this day we find that telecom companies (private sector entities, nothing to do with government) operate under a different regulatory regime from that applying to other services. When it comes to the use of road reserves, we can't see why communications differ from electricity, gas, water and sewerage. A review of this anomaly is long overdue.

And Station Carparks?

Not only station carparks: ScoMo has promised cash for such localised, site-specific beneficiaries as the Ringwood Tennis Club and Torquay Bowls Club. They will no doubt be delighted – but not so all those other clubs which have the misfortune to be in non-marginal electorates.



So – if federal money is to be committed to such projects, by what criteria should it be allocated?

The *Building Better Cities* program of the Hawke-Keating years was introduced 'to promote improvements in the efficiency, equity and sustainability of Australian cities and to facilitate economic growth and micro-economic reform; improved social justice; institutional reform; ecologically sustainable development; improved urban environments and more liveable cities'.

It was a program initiated through in-principle agreements with State governments (the 1991 Premiers' Conference) and delivered through via the States' allocative processes.

It was the sort of program that could well have delivered benefits to sporting clubs in Ringwood and Torquay – but through a transparent allocative system based on objective criteria other than on-the-run electoral expediency. ■

Q & A

Is Commonwealth land Crown land?

Question asked by a Council property officer dealing with a very ordinary back lane.

Ordinary back lanes... Every council in the State has to deal with them: should they be discontinued and sold? Should encroachments be permitted, tolerated or removed? For your average property officer, these are bread and butter issues. But what has the Commonwealth to do with it?

The tool kit for dealing with back lane issues includes an understanding of 'adverse possession' – the common law that condones land theft. And an understanding of the statutory defences against adverse possession – including the protection of public highways (found in the *Road Management Act 2004* (RM Act)) and the protection for 'the Crown' (found in the *Limitation of Actions Act 1958* (LoFA Act)).

The back lane in question here is freehold land. It has a title, derived from some grandparent Crown grant. And the title shows that the registered proprietor is 'The Commonwealth of Australia.' It seems some Commonwealth agency bought a tract of freehold many decades ago, subdivided, sold off the lots, and retained proprietorship of the lane. Nothing unusual here: there are thousands of freehold roads for which the registered proprietor is some long-dead subdivider.

So can it be adversely possessed? One line of argument goes: no, the Commonwealth is the Crown, and the LoFA Act protects the Crown from adverse possession. Note: this protection is not for Crown land, but for 'the Crown' – so it extends to freehold land owned by agencies operating under the auspices of the Crown (see the [Pearce case](#)).

But here comes the problem: there's more than one Crown! In Victoria there are two: the Crown in the right of the State of Victoria, and the Crown in the right of the Commonwealth of Australia (see [TP, March-April 2018](#)). They are different entities. Each is headed up by Her Majesty QE2, represented in the former case by the Governor, and in the latter by the Governor-General.

If here are two Crowns, which Crown enjoys the protection offered by the LoFA Act? Answer: only the first – the Crown in the right of the State of Victoria. How do we know? Because another Act of parliament tells us so: the *Interpretation of Legislation Act 1984*.

At the end of this little exercise, we're not going to assert that our back lane is vulnerable to adverse possession, but merely that the statutory protection for the Crown does not apply. Maybe it could be argued that the Commonwealth Crown is protected under common law – but that's the sort of argument that could see our Council in the High Court. ■

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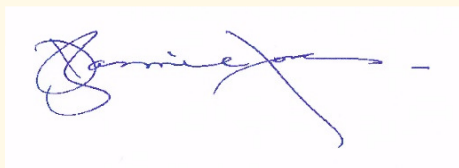
If required, The Public Land Consultancy can obtain formal legal advice from one of its legal associates.

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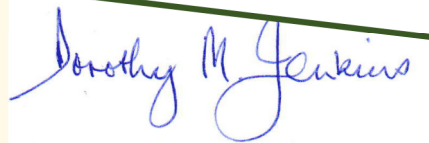
Certificate in Public Land Governance

We are pleased to see more students signing up for our [Certificate in Public Land Governance](#). One requirement for this certificate is a 3000 word essay on a mutually agreed subject. We are seeing some great essays coming in!

- Christine Glassford of Goulburn Broken Catchment Management Authority (GBCMA) wrote about the Victorian Regional Riparian Action Plan and how it affects water frontage licences.
- Zac Elliman from Wellington Shire encounters roads that wander out of their road reserves. His essay set out how Wellington dealt with a couple of difficult cases.
- Melody Stone from Bass Coast Shire wrote about dealing with community requests to purchase road reserves, and the various options Council has for responding.
- Jock Wilson from DELWP is looking into the various ways in which Indigenous groups across Victoria approach Native Title claims.
- Kade Hancock from Moyne Shire is writing about his Council's procedures for determining which roads should be placed on the Road Register
- Tendai Mhasho from Southern Grampians Shire is starting to examine the various statutory protections for the 'Grange Burn' waterway, which runs through Hamilton.
- Ron Bauer from Wyndham City Council discussed an encroachment onto a Council Reserve and analysed its implications for Council's divestment policy.
- Sophie Stickland from Surf Coast Council is writing about the Great Ocean Road Committee of Management (GORCC) and how it grew out of a string of smaller Committees of Management.



David Gabriel-Jones
Principal



Dr Dorothy Jenkins
Course Supervisor

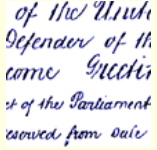
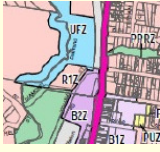


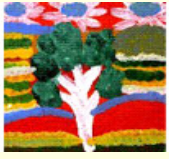


The Public Land Consultancy
27 / 539 St Kilda Road
Melbourne VIC 3004
www.publicland.com.au

Our Melbourne presentations are moving to Collins Street !

From 1 June 2019 our Melbourne courses will be presented at Cliftons specialist conference venue, 440 Collins Street, Melbourne.

Thanks to the Law Institute of Victoria (particularly Rohan Gladman, Member Services Officer) for having hosted our presentations for many years.

Our Training Courses – May to August 2019

	<p>Encroachments on Public Land (half-day) <i>Fri 10 May – Wangaratta Fri 31 May – Bendigo Fri 28 June – Traralgon</i></p>		<p>Restrictions on Title <i>Mon 3 June – Melbourne (Venue: Russell Kennedy)</i></p>
	<p>Statutory Approvals for Public Land Development <i>Tues 14 May – Melbourne</i></p>		<p>Land Law for Managers of Rivers and Lakes <i>Thurs 6 June – Melbourne</i></p>
	<p>Referral Authorities and the Victorian Planning System <i>Wed 8 May – Traralgon</i></p>		<p>Crown Land Law, Policy and Practice <i>Tues 18 June – Benalla Tues 25 June – Melbourne</i></p>
	<p>Coastal Land Management <i>Wed 24 July – Melbourne</i></p>		<p>Roads Governance <i>Wed 22 May – Shepparton Thurs 25 July – Melbourne</i></p>
	<p>Native Title and Aboriginal Heritage <i>Thurs 20 June – Melbourne</i></p>		<p>The Law relating to Works on Roads <i>Mon 22 July – Melbourne (Venue: Russell Kennedy)</i></p>
	<p>Leases and Licences of Public Land <i>Wed 26 June – Melbourne Wed 14 August - Warrnambool</i></p>		<p>Land Information and its interpretation <i>Date TBA</i></p>

Cost \$550 per person including GST, Course notes and working lunch. Discounts for host organisations

All courses are of one-day duration; starting time 9:00 am, finish 4:30 pm

Enrolments and Enquiries – Jacqui Talbot – jacqui@publicland.com.au

For details of all these courses go to www.publicland.com.au/professional-development