



Hey, Watch Where You're Walking, Dude

A new [Austroads report](#) tells us that one in three 18-30 year olds are text-walkers. They use their smart phones while crossing the road. And, the report concludes, pedestrians distracted by mobile phones are at increased risk of serious accident. So what's news?

Well, the report goes on to discuss countermeasures: things a road authority might do to protect people too irresponsible to protect themselves. Signs on the pavement, revised traffic signal sequences, lower speed limits – even electronic interventions which blank out the screen of the offending device. Good thinking, Austroads.

But there's the rub (as Hamlet might have texted): if road managers have preventative measures available, are they obliged to deploy them?

'Your Honour, Council should have protected me from walking into the traffic while I was texting...'

The prospect of such legal action would seem absurd were it not for the continuing stream of claims from injured footpath-trippers.

....Continued Page 2

27 April 2016

Best Value from Community-Use Land

In an era of rate capping, local government needs to constantly monitor the governance arrangements for community facilities, whether they are on freehold land or Crown land.

Details – Page 3

The Aboriginal Heritage Act will celebrate its tenth birthday in May. And, politics permitting, it will get a very substantial birthday present: **enforceability**.

The Aboriginal Heritage Act gets some teeth

As we noted in [Terra Publica of July 2013](#) the Act sets up major penalties for destruction of Aboriginal heritage, but there have been no prosecutions. The impediment has been due to one word in the Act – 'knowingly.'

All that is about to change. Amendments will re-categorise the destruction of Aboriginal Heritage from a 'state of mind' offence to a 'strict liability' offence. It seems almost certain that prosecutions will follow.



Spring Street, 2016 – the Aboriginal flag flies over Parliament House.

In the coming months we'll be getting around the State running half-day training courses on how the reinvigorated Act will affect Councils, CMAs and Government agencies. Wherever possible, we'll be joined by the RAP concerned.

Half-Day Training Courses

- In **Wurundjeri country** (Melbourne) Thursday 5 May, at the Koorie Heritage Trust, Federation Square

And on dates to be fixed...

- In **Gunditj Mirring country** (Port Fairy)
- In **Barengi Gadjin country** (Horsham)
- In **Gunaikurnai country** (Warragul)
- In **Watherung country** (Ballarat)
- In **Dja Dja Wurrung country** (Bendigo)

Enquiries and Registrations

Jacqui Talbot – (03)95345128
jacqui@publicland.com.au

Continued: Watch Where You're Walking...

Watch Out in South Perth

People stumble on irregularities in footpaths. Countermeasures are available. Do councils have a duty of care to smooth out such hazards? A [recent case in Western Australia](#) provides us with an extensive review of the relevant common law.

In March 2012 a pedestrian tripped on a 25mm lip in a South Perth pavement. The case ended up in the Supreme Court of WA Court of Appeal. In rejecting the claim the court quoted a series of precedent cases, all involving trip hazards which the injured parties believed should have been ameliorated by the relevant council. The best known is the 2001 [Ghantous](#) case in the High Court.

Watch Out in Newcastle

Quoting from the Ghantous judgement:

- *The plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces.*
- *Persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes.*
- *There was no concealment of the difference in height. It was plain to be seen. The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this.*
- *It was reasonable to expect the plaintiff to have seen what lay ahead of her as she walked along in broad daylight: what was there was obvious and called for no special vigilance.*

But there certainly exist more serious and less obvious trip-hazards which a pedestrian could not reasonably be expected to see and avoid. Two Victorian cases ([Perovic](#) and [Haley](#)) illuminate the common law in such circumstances, but they arise from pre-2004 accidents, and tell us nothing about the defences under the *Road Management Act 2004*.

Watch Out in Echuca

In fact, when we try to find legal interpretations of the *Road Management Act* we find a deafening

silence. In Victoria, such claims are settled out of court – or have been up until [Kennedy v Campaspe Shire Council](#). This case revolves around the defences provided to road authorities by the *Road Management Act 2004* – a Victorian Act which has no equivalent in Western Australia.

The RM Act requires a road authority to inspect, maintain and repair a public road in accordance with a standard. If the authority has a plan, then that plan becomes the standard; if there is no plan, then it may have a policy – which then becomes the standard; if it has neither a plan nor a policy then it must inspect, maintain and repair to a 'reasonable level.'

In the Kennedy case, the County Court found in favour of Campaspe. Council had, in effect, complied with its Road Management Plan despite an 18-month inspection period having been exceeded by two days. On this basis, there was no need to consider whether Council's actions met the common law 'reasonable' test.

On appeal to the Supreme Court, this was overturned: the two-day breach rendered the RM Act defences unavailable, and the case was remitted to the County Court for re-consideration against the common law. But before it had a chance to descend the judicial ladder, Campaspe's legal advisers pushed it further up that ladder – by seeking leave to take it to the High Court in Canberra. We await the outcome.

Watch Out: Roads are Workplaces!

Meanwhile, another road-related case has been bouncing back and forth along William Street. In [DPP v Downer and VicRoads](#) the County Court has been considering roads as workplaces. The defendants had argued that the *Road Management Act 2004* somehow over-rode their obligations under the *Occupational Health and Safety Act 2004*, and that therefore the penalty they faced was \$7000 rather than \$1.1 million.

Her Honour Judge Davis pre-empted a possible appeal by referring certain matters of law up to the Supreme Court of Victoria Court of Appeal. The higher court conducted an extensive review of Victorian legislation and its policy basis, and dismissed as 'wholly misconceived' the notion that the RM Act somehow renders void the OH&S Act.

The case, thus illuminated from above, is now back in the County Court. Once again, we await the outcome.

As the text-walkers might put it:
OMG 4COL LOL B4N. ■

Coming soon... *A new one-day professional development course*

The Law Relating to Road Works

- *Who is responsible for which roads*
- *The powers and obligations of service utilities*
- *The Road Management Act and the OH&S Act*
- *Lessons from [Kennedy v Campaspe](#)*
- *'Works on Roads' permits*
- *What other permits may be required*

Expressions of interest ... David Gabriel-Jones ... david@publicland.com.au

Q and A

If Crown land is subject to a lease, can that land be sold off as freehold?

Question asked by a prospective tenant fearful that his club's lease could be prematurely terminated.

The answer is yes, but the scenario is not as disastrous as our questioner might have feared.

Any lease is a binding contract between a landlord and a tenant, which cannot be unilaterally terminated by either party. However, both parties are entitled to transfer (or 'assign') their interest to someone else.

Tenant number one might sell out to tenant number two. Such deals normally require the landlord's consent, which in the terms of many leases 'must not unreasonably be withheld.'

Likewise it is possible for landlord number one to sell out to landlord number two – a deal which would not require the tenant's consent. Landlord two is obliged to honour the lease-contract, so the tenant should see no change whatsoever in their legal rights or obligations.

It's the same with Crown leases. In fact the *Land Act 1958* (at section 100) provides for exactly that contingency, in relation to certain types of lease over unreserved Crown land. The sale of reserved Crown land is unlikely, but ultimately possible – and we would expect the same rule to apply: it would be a sale subject to the continuing lease.

Warning – the same assurance can't be given in relation to licences, as against leases. A licence does not convey an interest, and is more readily terminated.

Meanwhile – here's [an interesting case](#): the tenant actually wanted to see his lease extinguished when the land ownership changed through compulsory acquisition. He didn't succeed – the Supreme Court of Victoria Court of Appeal ruled that the lease continued, whether the tenant liked it or not. ■

SEMINAR

Wednesday 27 April 2016 1:00 pm-4:30 pm
Venue: Law Institute of Victoria

Best Value from Community-Use Land

In an era of rate capping, local government needs to re-examine the governance arrangements for community facilities, whether they are on freehold land or Crown land.



For more about the rate cap and public land, see [Terra Publica Easter 2015](#)

This half-day seminar will explore community-based governance systems on council owned freehold and managed Crown land.

- *Getting best value from voluntary community involvement in land management*
- *Getting best value from sound and effective management of leases and licences*

We'll have TPLC experts who understand the legal framework applicable to community land governance, and have applied that expertise at both strategic and specific level across the state.

We'll have speakers drawn from within local government who are engaged in the practical application of this body of law within the context of community expectations and tightening budgets.

Wednesday 27 April 2016 1:00 pm-4:30 pm

Venue... Law Institute of Victoria

Cost... \$330 inclusive of GST

Convenor... Grant Arnold (03)9534 5128
grant@publicland.com.au

Enrolments... Jacqui Talbot, (03)95345128
jacqui@publicland.com.au

More questions?

Our retainer-based advisory service may be the answer.

We can provide:

- a ten minute phone discussion
- a brief exchange of emails,
- a more formal written opinion,
- or even a 'QandA' article in *Terra Publica*...

How our retainers work...

Your authorised staff call our experts whenever they need our advice; we keep a dropbox log of time committed; we send you a quarterly invoice against your purchase order.

It's a service being taken up by metropolitan and provincial councils. If it interests you, please call David on (03)9534 5128

TERRA PUBLICA
February–March 2016

Melbourne Courses Venue: Law Institute of Victoria, 470 Bourke Street		
FULL DAY	Tues 12 April	Land Law for Managers of Roads, Streets and Lanes
FULL DAY	Tues 3 May	Environmental Law for Public Sector Managers
Half day (a.m.)	Thurs 5 May <i>(Special venue: Koorie Heritage Trust, Federation Square)</i>	The Aboriginal Heritage Act gets some Teeth
FULL DAY	Tues 17 May	Property law for Statutory and Strategic Planners
FULL DAY	Wed 18 May	Referral Authorities and the Victorian Planning System
Half day (a.m.)	Thurs 26 May	Land Information and its Interpretation
Half day (a.m.)	Thurs 9 June	Rivers and Lakes Governance
FULL DAY	Fri 17 June	Leases and Licences of Public Land
Half day (a.m.)	Wed 22 June	Unused and Little Used Roads
Half day (a.m.)	Fri 24 June	Managing Volunteers
Half day (a.m.)	Tues 12 July	Coastal Governance
FULL DAY	Wed 24 August	Land Law for Managers of Roads, Streets and Lanes
Half day (a.m.)	Tues 11 October	Road Discontinuations Closures and Deviations
Half day (a.m.)	Wed 12 October	Subdivisions – a Property Law Perspective
Regional Courses <i>NEW FORMAT: two half-day courses, back to back</i> Sign up for one, or the other, or for both		
Benalla	Wed 1 June (a.m.)	Road Discontinuations Closures and Deviations
	Wed 1 June (p.m.)	Unused and Little-Used Roads
	Tues 26 July (a.m.)	Encroachments and Utilities in Roads
	Tues 26 July (p.m.)	Protection of Roads under the RM Act
	Wed 31 August (a.m.)	Crown Land Governance
	Wed 31 August (p.m.)	Roads Governance
Ballarat	Tues 7 June (a.m.)	Encroachments and Utilities in Roads
	Tues 7 June (p.m.)	Protection of Roads under the RM Act
	Tues 4 October (a.m.)	Crown Land Governance
	Tues 4 October (p.m.)	Roads Governance
Bendigo	Thurs 21 July (a.m.)	Subdivisions – a Property Law Perspective
	Thurs 21 July (p.m.)	Referral Authorities
	Date to be set (full day)	Leases and Licences of Public Land
Geelong	Wed 15 June (a.m.)	Road Discontinuations Closures and Deviations
	Wed 15 June (p.m.)	Unused and Little-Used Roads
Horsham	Tues 13 Sept (a.m.)	Discontinuation Closure and Deviations
	Tues 13 Sept (p.m.)	Unused and Little-Used Roads
Mildura	Tues 16 August (p.m.)	Road Discontinuations Closures and Deviations
	Wed 17 August (a.m.)	Unused and Little-Used Roads
	Wed 19 Oct (p.m.)	Crown Land Governance
	Thurs 20 Oct (a.m.)	Roads Governance
Warrnambool	Wed 20 July (a.m.)	Crown Land Governance
	Wed 20 July (p.m.)	Roads Governance
	Tues 16 August (a.m.)	Encroachments and Utilities in Roads
	Tues 16 August (p.m.)	Protection of Roads under the RM Act
	Tues 8 Nov (a.m.)	Road Discontinuations Closures and Deviations
	Tues 8 Nov (p.m.)	Unused and Little-Used Roads
Warragul	Wed 13 July (a.m.)	Crown Land Governance
	Wed 13 July (p.m.)	Roads Governance
	Wed 3 August (a.m.)	Road Discontinuations Closures and Deviations
	Wed 3 August (p.m.)	Unused and Little-Used Roads
	Tues 6 Sept (a.m.)	Encroachments and Utilities in Roads
	Tues 6 Sept (p.m.)	Protection of Roads under the RM Act
Cost: Half-day courses \$330; Back-to-back half day courses \$550; Full day courses \$550 <i>inclusive of GST, course notes and refreshments</i>		
Enrolments and Enquiries – Jacqui Talbot – jacqui@publicland.com.au		