

Beyond Timber Creek

It was in June 1992 that Eddie Mabo defeated Joh Bjelke-Petersen in the High Court. It was an event which in 1993 precipitated the Commonwealth Native Title Act. But Commonwealth law affecting Native Title goes back a further 17 years, to October 1975, when the ill-fated Whitlam Government celebrated the proclamation of its Racial Discrimination Act. The implications of that earlier legislation are only now being tested.



David Frank, 2016: Gough Whitlam and Vincent Lingiari

In 2010 Victoria passed the Traditional Owner Settlement Act (the TOS Act) which enabled Native Title holders to forgo their rights under the Commonwealth Act in favour of Recognition and Settlement Agreements (RSAs), which may include Land Use Activity Agreements (LUAAs). It's an arrangement which is only partially implemented: the Djaara people and the Taungurung people each have LUAs over their respective countries, but the rest of the State still comes under the Commonwealth Act.

In 2020 Victoria set up a First Principles Review of the TOS Act. It is a review which turns our attention to those 17 years between the Whitlam Act and the Mabo decision. In short, many land use decisions made during that period disregarded Native Title and thereby, it seems, contravened the Racial Discrimination Act.

Timber Creek, NT

Let's take ourselves to a remote part of the Northern Territory, to a place called Timber Creek. It has been the subject of escalating

litigation, ending up in the High Court. The case gives us a methodology for calculating the dollar value of Native Title, in circumstances where it is being compromised or extinguished. Fifty percent of the land's unimproved capital value, plus interest, plus compensation for cultural loss. We are not just talking about the NT: this applies right across Australia.

So where this line of argument heading? Between 1975 and 1992 we continued to carve up Crown land and alienate it as leasehold or freehold, just as we had done for the previous 140 years. In doing so, we contravened the Racial Discrimination Act.

A Retrospective LUAA

It was an error which, using the Timber Creek formula, points in the direction of many millions of dollars compensation to Traditional Owners. The First Principles Review of the TOS Act floats two models for calculating this compensation. First, a detailed review of the State's records to identify each and every defective land use decision made over those 17 years. Second, the adoption of some '*expansive and all-encompassing agreement, rather than investigating the minutiae of each individual rights breach.*'

Here at The Public Land Consultancy, we balk at the prospect of fighting through the detail of 17 years of Crown land decisions, statewide. Our recent audit of compliance with the Djarra LUAA looked at decisions relating to only one part of the State, over a period of 9 years. In examining 44 public sector agencies, we identified generic or systemic deficiencies, without attempting to catalogue site-specific failures, which may have been numbered many hundreds.

Yoorrook

We await with interest the findings of the Yoorrook Justice Commission.

Those findings may well recommend a review of the TOS Act, retrospective compensation, and additional training for public sector agencies. ♦

Page 2 *What's a Controlled Access Road?*

Page 3 *Trestle Bridges: Unsafe, More Unsafe, Lethally Unsafe*

Page 4 *Our Calendar of Professional Development courses June-Aug 2024*

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What is a Controlled Access Road?

Question arising from three sources:

- Our formal training sessions for VicRoads Inspection Officers
- An attempt by a council to block a farmer's gate
- A Parks Victoria officer involved in rewriting the PV road register

Normally, the boundary between a private property and an abutting road reserve is permeable. The owner or occupier can cross over it without seeking permission. This has always been the common law, now codified as section 9 of the Road Management Act 2004.

But there are circumstances where, for a variety of reasons, we may want to prevent or limit such rights of access. The best-known example is, of course, the freeway.

Another device that may be employed is the tree reserve: a feature of a subdivision which causes nearby lots to not have an actual abuttal.

When the RM Act was drafted, somebody dreamed up an additional mechanism: the Controlled Access Road (the CAR). You can read all about it at section 42 and Schedule 2 of the Act. Those details include publication of notices in the Government Gazette and, here's the nub of the business – no such notice has ever been published. There simply are no Controlled Access Roads.

So what?

VicRoads Inspectors at least need to know about CARs, and that crossing the boundary of a CAR would be an offence – but it is a pretty abstract piece of knowledge.

*Join Us for a Lunchtime
Conversation*

Tuesday 11 June 2024,
12 noon to 12:45 pm



Not Fit For Purpose *A look at the Crown Land (Reserves) Act 1978*

For further information:

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As for the Council which wants to stop farm machinery using a residential area, it has to find some other way of dealing with the issue: it can't simply apply CAR rules to a street which isn't a CAR.

And Parks Victoria need not bother thinking about CARs, because all PV roads are within National Parks or Crown Reserves, not within road reserves at all. Perhaps some properties abutting Parks should have legal access across their boundaries, but that's another matter. ♦

Readers of *Terra Publica* should not act on the basis of its contents which are not legal advice, are of a general nature, capable of misinterpretation and not applicable in inappropriate cases.

Unsafe, More Unsafe, Lethally Unsafe

In recent times we have been thinking about trestle bridges. Unsafe but repairable trestle bridges, and lethally dangerous trestle bridges.

If we are looking at a disused railway, we expect to find bridges. Once they carried massive steam locomotives and their cargoes. Some are concrete and steel, and with a little work could be re-opened for pedestrians and cyclists. Others are timber and, although picturesque, are now in a state of sad disrepair. The new path for any rail trail must skirt around them.



Another case we have handled recently related to a timber bridge across a river. It had once provided practical, but not legal, vehicular access to only one property. Now in a state of collapse, the property owners expected the relevant council to repair it at ratepayers' expense.

Our advice to council: just tear the thing down before anybody gets hurt. The landowners will have to rethink making use of their legal access, elsewhere.

But the worst case we've consulted on is so-called Chinaman's Bridge at Numurkah. Abandoned for 30 years, it is not merely dangerous, but lethally so. Nobody wants responsibility for it:



The Board of Land and Works built it in 1891, but VicRoads de-arterialised it in 1995, inflicting it onto the Shire of Strathbogie. In 2017 Strathbogie discontinued the road altogether, whereupon it became Crown land under the control of DEECA. So who manages it now? Answer: nobody.



The situation has been made more complex by Heritage Victoria and the National Trust. They regard the bridge as being of State or National significance. It can't be torn down or even repaired without heritage consent.

Well, when the time comes, we will be submitting our report to the coroner. ♦

The Public Land Consultancy acknowledges that our core work relates to the lands of Victoria's Traditional Owners. We promote recognition of Indigenous rights through study, policy and the law.

Professional Development, June-Sept 2024

*NOTE: some presentations are 3 sessions, each of 2 hours duration;
others are 2 sessions, each of 3 hours duration*

	Crown Land Governance <i>Presenter: David Gabriel-Jones</i>	Mon 17, Wed 19, and Thurs 20 June, 10am to 12noon Tues 30, Wed 31 July and Thurs 1 August, 10am-12noon
	Land Law and Subdivisions <i>Presenter: Mark Bartley</i>	Tues 25 and Wed 26 June; 10am to 1pm.
	Roads Governance <i>Presenter: David Gabriel-Jones</i>	Tues 16, Wed 17, Thurs 18 July, 10am – 12 noon
	Leases and Licences of Public Land <i>Presenter: Richard O'Byrne</i>	Tues 6, Wed 7, and Thurs 8 August, 10 am to 12 noon
	Land Information and its Interpretation <i>Presenters: David Gabriel-Jones and Robert Steel</i>	Tues 13 and Wed 14 August, 10am-1pm
	Native Title and Aboriginal Heritage <i>Presenter: Bridgid Cowling</i>	Tues 10 and Wed 11 Sept, 10am – 1 pm

Professional Development 'In-House'

We are getting an increasing number of requests to deliver one-day training courses 'in-house'. It's usually the same 6-hour course as we offer on-line over 2 or 3 mornings, but packed into one day.

Rivers and Riparian Land

Our presenter Jo Slijkerman has presented this one to North-East CMA in Wodonga and East Gippsland CMA in Bairnsdale.

Land Law and Subdivisions

Mark Bartley, from HWL Ebsworth, recently presented this course *in-house* for Hume Council and the Vic Health Building Authority.

Offences and Enforcement on Roads

We ran three *in-house* sessions specially tailored for VicRoads, at Port Melbourne, Ballarat, and Ringwood.

Land Information and its Interpretation.

Earlier this month we ran this course, *in-house*, for 15 professional staff of Major Road Projects Victoria.

Native Title and Aboriginal Heritage

We have run this course *in-house* for several municipalities, including Indigo, Central Goldfields, Mitchell, and Hobsons Bay, and also for the Corangamite CMA, and DEECA.

Cost:

\$495 including GST, course notes and certificate of attendance

Accreditation:

These courses are eligible for CPD points for lawyers, planners, valuers, and FPET for surveyors.

Enquiries and Registrations:

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