

## ROADS



## Some Curiosities at the Intersection between Law and Policy

This edition of *Terra Publica* is devoted to the ever-fascinating subject of roads.

Let's start with road discontinuations. This area of law was already a mess but now, thanks to recent regulatory changes, has become even more of a shemuzzle.

There are at least five Acts under which a road can cease to be a road. The contradictions and inconsistencies between them commence with the very name we give this activity: the *Land Act* 1958 and the *Planning and Environment Act* 1987 call it *closure*, the *Local Government Act* 1989 and the *Road Management Act* 2004 call it *discontinuation*. But that's just the start.

The most important disparity between these heads of power relates to public consultation. The *Land Act* gives power of veto to abutting landowners, but no rights whatsoever to other members of the public. The *Local Government Act* empowers anyone to make a submission, but with no special rights to abutting owners, and no avenue of appeal. The *Planning and Environment Act* requires a Planning Scheme Amendment, usually with exhibition and the consideration of any unresolved submissions by an independent panel.

For Major Projects, the *Project Development and Construction Management Act* 1994 allows roads to be closed without any consultation, but with compensation to affected property-owners – a provision unique to that particular Act.

The *Road Management Act* is the latest in this series of attempts to specify a process for road closures. It seems to follow the model set by the *Local Government Act*, but with two major exceptions: firstly the Registrar of Titles is not empowered to issue a title for the closed road, and secondly, public consultation can be totally bypassed by regulation.

Regulations to this effect have now been made (the *Road Management (General) Regulations* 2005) which purport to apply this exemption to Unused Roads – *i.e.* roads to which section 400 of the *Land Act* applies.

**Taking this at face value, it would seem that a government road can be expunged from the cadastre without abutting owners even being informed – even if the road was essential for the orderly development or future subdivision of their property.**

Fortunately, the regulation cannot be taken at face value. Regulations cannot exceed the scope of their authorising Act, so the *Road Management (General) Regulations* 2005 can apply only to roads recognised by the *Road Management Act* itself. Section 160 of that Act inserted a new section 3A into the *Land Act*, which provides that roads to which section 400 of the *Land Act* applies are not roads for the purposes of the *Road Management Act*.

So it seems to us that this item in the regulations is null and void.

### So, what's to be done?

Option 1: The legislation could be amended to re-validate the regulation and the highly dubious public policy which it represents.

Option 2: Government could go away and have a bit of a think about the underlying policy. Who *should* be consulted when a road is closed? What rights should they have? What avenues of appeal? What compensation? And in what circumstances should these rules be bypassed?

There's no prize for guessing which option we would recommend. ■

Some photos in this edition are from [www.hobbiesplus.com.au/signspotters](http://www.hobbiesplus.com.au/signspotters)





There's a bit of confusion at the intersection of Swanston Street and A'Beckett Street, pictured above.

No doubt the Road Authority will, in the fullness of time, get around to sorting it out. But who is the Road Authority? The City of Melbourne or the Secretary for DSE?

Both roads are laid out on Crown land so they are roads under the *Land Act* 1958. Section 3A(2) of that Act states that the Road Authority is the Secretary for Sustainability and Environment, unless the Minister for Planning has specified otherwise. He hasn't, so the road authority is clearly the Secretary. Or is it?

Section 37 of the *Road Management Act* 2004 states that a council is the Road Authority for 'municipal roads' – a term defined in such a way as to include any road referred to in section 205 of the *Local Government Act* 1989. That particular section provides that a Council has care and management of all public highways on Crown land, with the exception of freeways, arterial roads, and roads vested in public authorities. Swanston and A'Beckett Streets satisfy this formula and are therefore municipal roads and therefore the road authority is clearly the council.

**It's a dilemma – and there are several ways of resolving it.**

Firstly there could be a costly legal battle between the Secretary for DSE and Melbourne City Council (or, for that matter, any other council in the state). Secondly there could be amending legislation. Thirdly, everybody could just ignore the anomaly and get on with life. Which is what motorists do every day of the week at the corner of Swanston and A'Beckett Streets. ■

## *Used Roads, Unused Roads and Re-used Roads*

Every non-metropolitan council is all-too familiar with government roads laid out by a nineteenth-century surveyor but never brought into use.

Section 400 of the *Land Act* allows a council to declare such a road to be an 'Unused Road,' whereupon it comes under DSE's control and is invariably licensed by DSE to an adjoining landholder.

**So far, so good. The problem is the method by which the road might cease to be an Unused Road and come back into a council's responsibility.**

The statutory method is found in section 407 of the *Land Act*. Council forms the view that the road should be re-opened, and informs DSE, which proceeds to cancel the licence.



The non-statutory method isn't in the *Land Act* – or anywhere else. If the licence lapses, or the licensee fences it out, then DSE simply asserts that the road has resumed its non-unused status, and council is once again responsible for it.

This would probably not be an issue if it weren't for section 3A of the *Land Act*, which provides that any road to which section 400 applies is not subject to the *Road Management Act*. It can't be made a 'public road' and placed on a council's Road Register.

For an Unused Road re-opened by the statutory method, it could be argued that a council's decision under section 407 nullifies an earlier decision under section 400, and thus the road comes under the *Road Management Act*.

But if it's reopened by DSE's non-statutory or 'implied' method, then we're not so sure. Somewhere on Council's books there will still be an un-rescinded decision under section 400.

We think it's a doozy for litigation, or maybe for the next Land (Fix-It-Up) Amendment Act. ■

Check out our website at:- [www.publicland.com.au](http://www.publicland.com.au)

## Roadside Weeds

### Who is responsible for weeds on roadsides?

Back in April 2004 we addressed this question on behalf of a reader. Two years later, it's still unresolved.

Under section 20(1) of the *Catchment and Land Protection Act 1994*, a landowner must take all reasonable steps to prevent the spread of regionally controlled weeds and established pest animals on his or her land. Section 20(2) extends that responsibility to roadsides that adjoin the landowner's land.

The conventional interpretation of the Act, offered at various points in the DSE and DPI websites, holds that (with a couple of exceptions) a landowner's responsibility for adjacent roadsides extends to both government roads and subdivisional roads.



**This interpretation can only be described as an attempted detour around the law.**

Paragraph 20(3)(h) of the CALP Act provides that in the case of roadsides which are "Crown land ... managed by a Minister or public

authority" the landowner is deemed to be "that Minister or public authority."

**Government Roads are, of course, Crown land. They are managed by a public authority, namely the municipality. It follows that weeds on the sides of government roads are not the responsibility of the adjoining landowner, but of the council. But is this good policy?**

*Yet again, we find ourselves at the intersection between policy and the law. They are inextricably mixed, but in our humble opinion the former should drive the latter, not vice-versa. In this case, the government appears to agree.*

Our information is that the whole business is 'under consideration' and will be the subject of a forthcoming statement by Minister Thwaites. ■

## Unused Roads and Public Highways

Many licensees of Unused Roads will tell you they hold a lease. They don't.

*"The rights conferred by this Licence are non-exclusive, do not create or confer upon the Licensee any tenancy or any estate or interest in or over the licensed land..."*

If they held a lease, they would enjoy exclusive occupation. They don't.

So who else may enter an Unused Road? As far as we're concerned, anybody. Sure, the road is unlikely to be built, and may well be impassable to wheeled traffic, but that's not the point: you or I or anybody else has a right to pass and repass along that road. That's the meaning of the term 'public highway' in the common law.

All government roads are public highways (see *Bass Coast Shire v. King*, Supreme Court of Victoria Court of Appeal, [1997 2 V.R. 1]).

Although the *Road Management Act 2004* does not apply to Unused Roads, it reinforces the longstanding rule that a public highway...

*...can only be extinguished if (it) is discontinued as a road in accordance with section 12 or discontinued as a road or permanently closed as a road under a power to discontinue or permanently close a road conferred by or under any other Act.*

Nevertheless, the view persists in some quarters

that if a council considers the road to be 'not required for public traffic,' then suddenly everybody except the licensee - including other abutting owners - has somehow become prohibited from passing along it.



But let's not get bogged down in legal interpretations. What's needed is clear policy: just who *should* be allowed onto an unused road? What responsibilities should they have to the licensee and *vice versa*?

First fix the policy, then fix the Acts to reflect the policy. Simple. ■

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# LAND LAW FOR MANAGERS OF ROADS STREETS AND LANES

A ONE-DAY COURSE FOR ROAD ENGINEERS, PROPERTY MANAGERS  
AND STATUTORY PLANNERS

<b>MELBOURNE</b>	Tuesday 6 June
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<b>MILDURA</b>	Thursday 22 June
<b>HAMILTON</b>	Tuesday 4 July

<b>WANGARATTA</b>	Tuesday 18 July
<b>DANDENONG</b>	Tuesday 25 July
<b>COLAC</b>	Tuesday 1 August
<b>MARYBOROUGH</b>	Tuesday 8 August

## COURSE CONTENT

### **What is a 'Road?'**

- Roads as road-users know them
- Roads as property lawyers know them
- 'Public Highways' and the common law
- Easements and common property roadways

### **Land Status and Control in Victoria**

- Crown land, Freehold land, Reserves, Forests, Parks
- What is meant by title and Native Title
- The status of land in roads and roadways
- Closed roads, discontinued roads and unused roads

### **How Roads are Owned and Managed**

- The roles of VicRoads, councils and service utilities
- Road Authorities and the Road Register
- Ownership of unused roads in old subdivisions
- Encroachments and 'adverse possession'

### **Dealings with Roads**

- How roads are created and discontinued
- How they may be used and tenanted for non-road purposes
- Controls over vegetation, heritage and aboriginal sites
- How planning schemes deal with roads

### **The Acts of Parliament governing Roads**

- The *Road Safety Act 1986* and the Road Rules
- The *Land Act 1958 & Crown Land (Reserves) Act 1978*
- The *Local Government Act 1989*
- The *Transport Act 1983*
- The *Road Management Act 2004*
- The *Planning and Environment Act 1987*



## Land Law Jargon Explained

This course will enable  
you to tick all the boxes...

- |                        |                          |
|------------------------|--------------------------|
| Government Road        | <input type="checkbox"/> |
| Subdivisional Road     | <input type="checkbox"/> |
| Unused Road            | <input type="checkbox"/> |
| Discontinued Road      | <input type="checkbox"/> |
| Arterial Road          | <input type="checkbox"/> |
| Declared Road          | <input type="checkbox"/> |
| Freeway                | <input type="checkbox"/> |
| Controlled Access Road | <input type="checkbox"/> |
| State Highway          | <input type="checkbox"/> |
| Road-Related Area      | <input type="checkbox"/> |
| Roadside               | <input type="checkbox"/> |
| Public Highway         | <input type="checkbox"/> |
| Public Road            | <input type="checkbox"/> |
| Access Street          | <input type="checkbox"/> |
| Collector Street       | <input type="checkbox"/> |
| Carriageway Easement   | <input type="checkbox"/> |

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Training Course Co-ordinator

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## Your Presenter

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Public Policy.*