

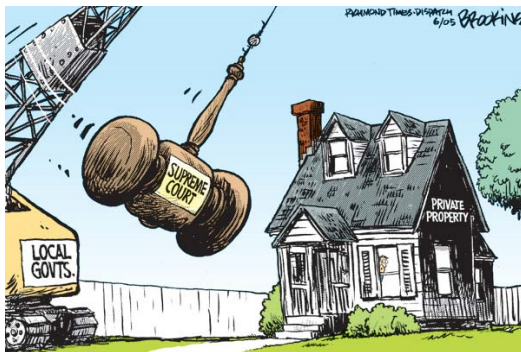


## EMINENT DOMAIN



Strewh, Americans use weird lingo. Kidnapping and torture are known as 'extraordinary rendition,' flat-earth ignorance is 'intelligent design,' and compulsory acquisition is 'eminent domain.'

That's a phrase they use at the contested boundary between private property and public interests. We laid-back Australians laughed at 'The Castle,' but for Americans eminent domain is an ideology-laden battleground.



On this side of the Pacific, it's a debate which is certain to intensify as we seek policy responses to urban consolidation, bushfires and coastal erosion. Acting in the public interest, governments will inevitably become more intrusive in their acquisition of private property rights.

In Victoria, our framework for compulsory acquisition is the *Land Acquisition and Compensation Act 1986*, whose statutory intent is the facilitation of land acquisition 'for public purposes.'

But what is a 'public purpose?' Here we turn to some 60 other Acts – from the *Major Transport Projects Facilitation Act 2009* to the *Westernport (Crib Point Terminal) Act 1963* and the *Sale Station Relocation and Development Act 1981*. In each case Parliament has, in effect, decided that some project or projects serve a public purpose, and has authorized their managers to invoke the LA&C Act.

Although these projects serve a public purpose, the land does not necessarily end up in public ownership or even in public use. It's the prospect of publicly-acquired land ending up in private ownership which has fuelled the U.S. outrage.

In a controversial 2005 case (*Kelo v City of New London*) the U.S. Supreme Court, by a 5 to 4 majority, allowed a municipality to seize private property in the course of an urban redevelopment. The majority deferred to the legislature's prerogative to determine what justifies the use of eminent domain, and allowed the municipality to implement its 'carefully considered development plan.' The minority fuelled the radio shock-jocks by opining: "today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner..."

In this and several similar cases, the relevant legislature set itself up for criticism by failing to adopt clean, transparent, competitively neutral processes. In the *Kelo* case, the principal beneficiary was the pharmaceutical company Pfitzer; in Mesa Arizona the beneficiary was an Ace hardware store, and in a more recent case on Manhattan, the beneficiary was the New York Times. One media-naïve city mayor justified eminent domain not on the grounds of improved civic amenity or economic gain but on the grounds of increasing the city tax base. And in the *Kelo* case, the defenders of eminent domain are left trying to explain why, after four years, the site of Susan Kelo's home is still a weed-infested vacant lot.

Here in Victoria, we know that public policy may justify compulsory acquisition: we have always needed to build railways, or roads, or ports; Premier Dick Hamer initiated the buy-back of penguin habitat on Phillip Island, and Premier Brumby the easement for the north-south pipeline. In each case some people were disadvantaged, but compensated.

**The next round of policy development will be far more difficult. Should the state force or merely encourage urban consolidation? Abandonment of indefensible bushfire-prone homes? Retreat from advancing coastal erosion?**

**Add some closely related questions: is the taxpayer liable to compensate private property owners who have made unwise decisions? And is the planning process as we know it capable of directing the public sector's own land-use decisions?**

It's a policy quagmire. Don't know what expression they'd use Stateside – but here we say: *strewh!* ♦



PLANET (the DPCD PLanning NETwork)

### RE-WORKING PUBLIC LAND

Thursday 10 December 2009

David Gabriel-Jones and Robyn Pollock

Details – Page 3

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## The Erosion of the Common Law

Bit by bit, our parliaments are shifting large areas of law out of the courts and across into legislation.

Native title, first recognized by the High Court in *Mabo*, was then codified as the Commonwealth *Native Title Act* 1993. In Victoria, slabs of the law relating to negligence were reformed through the *Road Management Act* 2004 and the *Wrongs and Other Acts (Law of Negligence) Act* 2003. Next to make the move should be the 'doctrine of accretion.'

The common law has long failed to have anything useful to say about coastal and riparian erosion – but until recently it hadn't mattered all that much. However, the time is rapidly approaching when governments must recognize this as a policy issue to be addressed by the legislature rather than the judiciary. Meanwhile, here's what we have to try to cope with...

Many (but not all) coastal and riparian boundaries in Victoria were defined by their relationship to a water feature: we might find annotation on title such as 'high water mark' or 'Port Phillip' or 'full supply level.' Then we have Crown reserves also defined in such terms: 'one chain from high water mark' or 'three chains from the southern bank of the Murray at ordinary winter flow' – whatever that may mean. Other boundaries were set out as a series of measured straights, with surveyed lengths and bearings, known as 'metes and bounds.'

When a body of water encroaches onto (or recedes from) dry land, these title boundaries may or may not move with it. It all depends on how the shift occurred and how the boundary had originally been defined. If the shift was artificial (like a beach renourishment) or catastrophic (like a storm or a flood) then the title boundary remains where it was, regardless of whether it was a topographic-feature boundary or a metes-and-bounds boundary.

But if the shift was gradual and imperceptible, then the boundary may have moved with it.

This is the area of common law called the doctrine of accretion. It has various features which serve no logical policy purpose.

In general, boundaries defined by metes and bounds don't move – unless it can be shown that the original surveyor had the intention of following or reflecting the topographic feature.

Crown land is protected from adverse possession, but not from the doctrine of accretion. As a result, Crown land can end up in freehold ownership.

The doctrine responds principally to changes brought about by natural forces, but may operate even if the shift resulted from some artificial cause such as construction of a groyne or upstream dredging.



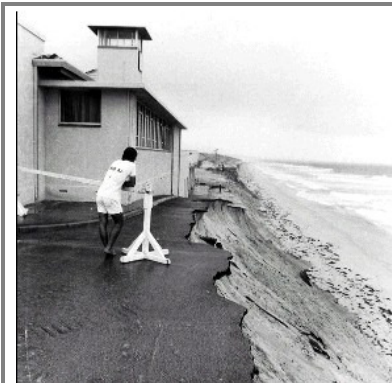
Photo – Sydney Morning Herald

Reserved Crown land suffers a peculiar fate at the hands of the doctrine – some reserves can end up wider than they originally were, others may be transformed into unreserved Crown land. Yet others, where a river once ran, may end up high and dry in the middle of somebody's back paddock.

This is a body of law which came out of the Privy Council of the House of Lords, and frankly should be sent back there. As we start to get serious about climate change, our own policy makers need to take control of its impact on property rights – for the sake of private and public land alike. ♦

References:-

[DSE Guideline 1993](#) ; [Scottish review 2001](#)



### Wednesday 25 November - Melbourne LAND LAW FOR COASTAL AUTHORITIES An Intensive one-day professional development course

For staff of councils and government authorities with responsibility for the governance and management of coastal lands and waters.

- ❖ Coastal land status – freehold, Crown land and the seabed
- ❖ Authority over coastal lands and offshore waters
- ❖ Coastal leases, licences and other tenures
- ❖ The use and development of coastal lands and waters

To register contact Lesley Simons  
at [lesley@publicland.com.au](mailto:lesley@publicland.com.au) or 9534 5128

# False Representations

As vendors and their agents surely know, it's against the law to misrepresent a property that's up for sale. Section 12 of the *Fair Trading Act 1999* says:-

A person must not ... make a representation that is false, misleading or deceptive in any material particular.

**Penalty:** 600 penalty units, in the case of a natural person; 1200 penalty units, in the case of a body corporate.

Nevertheless, there are many utterly fraudulent property descriptions currently on the web. Google the following phrases and you'll soon identify the perpetrators:

- *40.47 hectares (100 acres) freehold plus approximately 4.8 ha (12 acres) which is a former road reserve along two boundaries and is covered by a fully-paid 99 year lease which expires in 2102. The leased land is within the boundary fence.*

In this case the vendor is misrepresenting a *licence* as a *lease*, a *road reserve* as a *closed road*, and an *ephemeral arrangement terminable at 3 months' notice* as something set in concrete for 99 years.

There are plenty more examples, albeit less blatant:-

- *Approx 24 acres of mainly cleared grazing ground, plus approx 6 acres of leased unused roads on 99 year lease starting 1-10-1994.*
- *One owner three bedroom home set on approx 1.5 acres plus a further 1 acre on a 99 year lease.*
- *4.2 acres plus 99 year lease on 3 acres of unused roadway...*

Right now we are dealing with three cases where such misrepresentations have resulted not only in the land being overvalued, but purchasers actually constructing houses in the wrong place. In each case, the purchaser falsely believed that "their" land extended to the fence-line, whereas 20 metres of that land was in fact a road reserve liable to be re-opened to traffic at any time.

**In one case, a 35-metre wide buffer around a new house was suddenly reduced to 15 metres; and in another case a 20-metre buffer was reduced to Sweet Fanny Adams.**

Failing to use an accredited estate agent is no excuse for the vendor – but using an agent is hardly a guarantee against error. In fact some of the examples above come from estate agents, who should know better.

As the *Estate Agents (Professional Conduct) Regulations 1997* say:-

An estate agent ... must have a working knowledge of ... any other laws relevant to the functions performed by the estate agent

Ho Hum. ♦



## RE-WORKING PUBLIC LAND

Melbourne @ 5 million

THURSDAY 10 DECEMBER

*This seminar will change the way you see opportunities with public land.*

### Course Context:

Effective growth management of new central activities districts demands smarter utilisation of public land including Crown land, parks and reserves, roads and lanes, rivers and foreshores. Councils and planners should be catalysts in determining the best use of public land and recognising the opportunities that these holdings represent.

### Designed for:

Strategic and statutory planners, economic development officers and assets team members, landscape designers, and civil and traffic engineers.

### Learning outcomes:

- Identify innovative approaches to the use and re-use of public land
- Understand a new role for councils/planners as initiators of change
- Realise how our historic legacy of public land can be harnessed
- Learn about the law and governance of public land beyond the planning system

### Course presenters:

David Gabriel-Jones is Principal of The Public Land Consultancy

Robyn Pollock is a practising urban designer and registered architect. She lectures at Melbourne University's Architecture Faculty.

**Thursday 10 December 2009**

**Venue:** Metropole, 44 Brunswick Street Fitzroy

**Time:** 9.15am – 5.00pm

[Click here for Registration Form](#)

## Our training course schedule up to Christmas

Wed 28 October	<a href="#">Roads, Streets and Lanes</a>	Melbourne
Thurs 29 October	<a href="#">Service Utilities</a>	Russell Kennedy, Melbourne
Tues 10 November	<a href="#">Leases and Licences</a>	Geelong
Wed 11 November	<a href="#">Rivers and Lakes</a>	Wangaratta
Thurs 12 November	<a href="#">Crown Land</a>	Wangaratta
Mon 16 November	<a href="#">Crown Land</a>	Melbourne
Tues 17 November	<a href="#">Leases and Licences</a>	Maddocks, Melbourne
Fri 20 November	<a href="#">Leases and Licences</a>	Wangaratta
Mon 23 November	<a href="#">Rivers and Lakes</a>	Traralgon
Wed 25 November	<a href="#">Coasts</a>	Melbourne
Thurs 26 November	<a href="#">Roads, Streets and Lanes</a>	Colac
Tues 1 December	<a href="#">Roads, Streets and Lanes</a>	Melbourne
Thurs 3 December	<a href="#">Crown Land</a>	Colac
Fri 4 December	<a href="#">Rivers and Lakes</a>	Colac
Mon 7 December	<a href="#">Crown Land</a>	Shepparton
Thurs 10 December	Reworking Public Land	(See DPCD column, Page 3)
Thurs 10 December	<a href="#">Service Utilities</a>	Russell Kennedy, Melbourne
Tues 15 & Wed 16 Dec	<a href="#">The Aboriginal Heritage Act</a>	Glenelg Hopkins CMA, Hamilton

Our training course coordinator, Lesley Simons, will be pleased to assist with inquiries and registrations. She may be contacted at [lesley@publicland.com.au](mailto:lesley@publicland.com.au) or on (03) 9534 5128

### Staff at The Public Land Consultancy

Here at The Public Land Consultancy we're going through a reorganisation and expansion.

**Dorothy Jenkins** is moving on to do her PhD at Monash. She has been the backbone of the organization for quite a while now, and we wish her all the best in academia.

**Leslie Simons** is joining us as Business Manager. She is a barrister and solicitor with her own practice in conveyancing and immigration law. At The Public Land Consultancy her core job will be coordinating the training courses, which she will pick up over the next few weeks from Margaret and Natasha.

**Margaret Mills** and **Natasha Herbert** are continuing on, but because of other demands on their time will be handing much of their work over to Leslie.

Margaret will be laying the groundwork for our next conference (in April 2010, on riparian land governance, probably in Bendigo).

**Sylvanie Morgan** continues on as bookkeeper (perhaps that's the only word in the English language with three double letters in succession).

### Our Presenters

**Andrew Walker** practices at the Victorian Bar. Amongst his previous positions he was corporate counsel for the City of Melbourne

**Astrid Di Carlo** is Senior Associate with the law firm Russell Kennedy

**Karen Hayes** has a strong background in both public and private property. As well as working with The Public Land Consultancy, she is Property Consultant to the City of Yarra

**Brendan Sydes** is Principal Solicitor with The Environment Defenders Office

**Megan Goulding** is a heritage archaeologist and interim CEO of the Wurundjeri Tribe Land Council

*Readers of Terra Publica should not act on the basis of its contents which are of a general nature, capable of misinterpretation and not applicable in inappropriate cases. They do not, nor are they intended to, constitute legal or specific advice. The Public Land Consultancy is available to provide advice on public land matters and will, on request, arrange legal advice for clients from its associate Maddocks, of 140 William Street, Melbourne.*