

Not a Satisfactory Situation

“I do not wish to suggest that this is a satisfactory situation.”

So said her Honour Justice Rosemary Balmford, handing down judgement in a 1999 Supreme Court case brought by one Antonio Calabro against the City of Bayside.

The less than satisfactory situation to which she was alluding is the yawning chasm between the law governing property titles, and the law governing roads.

On the first side of the chasm stands the principle of indefeasibility of title, a cornerstone of the Torrens system.

Most people take comfort from this principle which holds that, apart from limited exceptions, a person with a registered interest in land holds that interest subject only to the other interests that are recorded on the title.

No less an authority than Chief Justice Sir Garfield Barwick expressed the view that the system not merely records title, but actually confers it: *“the Torrens system of registered title is not a system of registration of title but a system of title by registration...”*

It is a principle clearly stated in statutory law: Section 42 of the *Transfer of Land Act 1958* is headed “Estate of registered proprietor paramount.”

The trouble is, this just isn't true.

On the other side of the chasm is the law relating to ownership of pre-1988 subdivisional roads. This

started life as section 203 of the *Local Government Act 1989*, then was moved to section 204, and more recently has been shifted into schedule 5 of the *Road Management Act 2004*. It provides that if a road has become a ‘public highway’ then it vests in fee simple in the relevant council, free of any encumbrances such as leases and mortgages.

Unable to straddle the chasm stands the Registrar of Titles. Charged with maintaining the integrity of the Torrens system, the Registrar has no way of knowing whether a pre-1988 road has become a public highway, and even if this difficulty were overcome, has no authority to make the necessary amendments to the titles in question.

The land in Bayside doesn't look like a road: it is unmade, unlit, un-named, and does not appear on the Melways – but it had been marked as ‘road’ on a 1930 plan of subdivision. Evidence was tendered that back in the 1930s the land had been used by school children, youths on bikes, and a gentleman going to and from the beach. This was sufficient for the common law to recognise it as a public highway.

A pre-1988 subdivisional road may become a public highway through the workings of the common law doctrine of dedication and acceptance. In simple terms, this requires a competent owner to manifest an intention to dedicate land as a public road, and an acceptance by the public of the proffered dedication.

In half a dozen court cases learned judges have attempted to define and refine the doctrine: what if the road is a cul-de-sac? What if the offer of dedication is withdrawn? What if the public stops using the road? What if it's not the public as such, but just abutting owners?

At the bottom of the chasm lies the unfortunate Mr Calabro, the purchaser of the land in question. Evidence was tendered to the court that he bought the land from a previous title-holder for \$58,000, of which \$48,000 was secured by mortgage, and he so became the registered proprietor of the land. But what he had bought was worthless.

The land had belonged to the municipality since 1 November 1989, being the date section 203 of the *Local Government Act* came into operation.

The Registrar of Titles didn't know it, and neither did Council – which was fortunate for Council, ...continued



because had it known, its subsequent actions could have been portrayed as inducing Mr Calabro to act to his own detriment.

Faced with the chasm, her Honour turned to the body of law dealing with apparently contradictory statutes, which holds that, other things being equal, the more recent provision prevails. The Transfer of Land Act predates the Local Government Act, so section 42 of the former must be read as subject to section 203 of the latter. "I do not wish to suggest" she continued, "that this is a satisfactory situation."

Terra Publica has no argument with the proposition that roads should be public property, and that freehold roads should be owned by the

municipality. But should private property be expropriated without compensation? In many cases, pre-1988 subdivisional roads were laid out so long ago that the registered proprietor is long dead, or, if a company, has long since been wound up. But we shouldn't take that for granted.

Should private property be expropriated without due process? Relying on courts to interpret the vagaries of the common law, on a case-by-case basis, is not necessarily the same thing as due process.

The Parliamentary Law Reform Committee is sitting around waiting for terms of reference. Perhaps they should ask Mr Calabro. ■

Easements Over Crown Land

Some of our recent work has involved the creation of rights over one parcel of Crown land in favour of another. On freehold, this is what we know as an easement; often created under the Subdivision Act, often for purposes such as access or utilities. On Crown land there's no easy parallel; you have to search around through the legislation. Here's what we came up with...

Dominant Tenement (land benefited by easement)	Servient Tenement (land burdened by the easement)		
	Unreserved Crown Land	Reserved Crown Land	Freehold Land
Unreserved Crown Land	No provision for permanent easements – but easement-like rights may be established by OinC under sec 138A(11) Land Act 1958 Rights to use may be conferred on the occupier of the neighbouring land (but would not run with the land) under 3-year licences or 21-year leases Obligations may be imposed on the occupier of the servient tenement through conditions in a Land Act lease (for the life of lease)	No provision for permanent easements – but rights to use may be conferred on the occupier of the neighbouring land (would not run with the land) under 3-year licences or 21-year leases Obligations may be imposed on the occupier of the servient tenement through conditions in a CL(R) Act lease (for the life of lease)	Agreement between landowner and Secretary for DSE (section 69, CF&L Act 1987)
Reserved Crown Land	OinC under sec 138A(11) Land Act 1958	As above	As above
Freehold Land	OinC under sec 138A(11) Land Act 1958 Ministerial easement under section 339B Land Act – but the dominant tenement must have been alienated under section 339A (i.e. a stratum grant)	As above	Easements may be created under Subdivision Act By Deed By Prescription

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Happy Snaps

As a consultant, it's always good to see the end results of one's work.

There's a case for sending council planners out to walk around the completed developments they granted (or refused) permits for, maybe years earlier.



Left – canal over road; Above – road under canal

Here we take a look around Martha Cove, a \$650 million canal-based development which we consulted on back in 2004.

What the photos don't show are the cadastral boundaries: the inland end of the canal is freehold land; the seaward end is unreserved Crown land; along the way it traverses a VicRoads road reserve and freehold owned by the Shire.

Our advice related to establishing the four different tenure regimes needed for this vital 50 metre stretch. ■

Members of the public want access to a major waterway in our municipality. It appears that the land titles of the adjacent land owner extend to the centre of the creek, & he owns land on both sides! Do you know of any 'public right of way' legislation that would allow public access to the waterway itself or along the bank?

Question asked by a Land Management Officer with an outer Melbourne municipality

Q&A

The widespread belief that there are public rights along watercourses has become something of an urban (and rural) myth – especially amongst recreational anglers.

The myth may date back to 1983, when the Land Act was amended to ensure public rights of recreational entry onto licensed Crown frontages. It may date back to 1905, when the Water Act was amended to revoke centre-of-the-river title boundaries. It may date all the way back to 1881, when Crown land abutting some 280 rivers and lakes was permanently reserved for public purposes.

But it's a myth which fails to factor in certain key considerations: was the land still Crown land in

1881? If not, the reservation of that year had no effect. Is this land to which the 1905 expropriation applied? If it was, our angler's dilemma is not helped by the fact that the expropriation wasn't recorded on title.

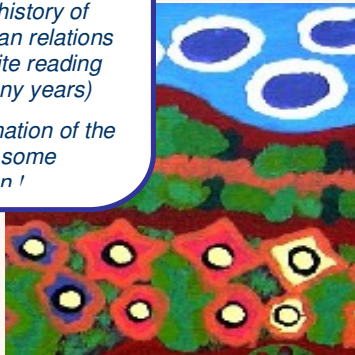
Is the land we want to walk on 'frontage' or is it 'bed and banks'? And if it's frontage, is it licensed frontage?

Compounding all this is the fact that not only is the angler unaware of the answers to these questions, but so is the land owner. And the land owner has the shotgun and the guard dogs.

So our advice to the angler is this: if you must go fishing, take two mates. One, a surveyor. The other, a lawyer. ■

Professional Development Courses March – April 2007

Thankyou so much for a wonderful presentation yesterday. I have not previously been presented with such a succinct history of aboriginal / european relations in Victoria. (despite reading about this for many years)
I await the proclamation of the new Act with some anticipation !



The Land, its Traditional Owners and the Law

An introduction to Native Title and Aboriginal Heritage in Victoria

Presenter: Megan Goulding
Interim CEO, Wurrundjeri Land Council;
Principal, Goulding Heritage Consulting

Thurs 8 March WARRNAMBOOL
Thurs 22 March SALE
Mon 26 March MELBOURNE WATER
Wed 28 March NORTH-WEST CMA
Tues 3 April SHEPPARTON

Congratulations on bringing clarity to the convoluted 'road map' of road management in Victoria. I especially liked your flow chart. It has been distributed to all my colleagues.



Land Law for Managers of Roads Streets & Lanes

Presenter: David Gabriel-Jones
Thursday 22 March COBRAM
Friday 23 March COBRAM



Vegetation and the Law

Presenter: Brendan Sydes
Principal Solicitor,
The Environment Defenders Office
Tuesday 27 March PRESTON



Crown Land Law, Policy & Practice

Presenter: David Gabriel-Jones
Tuesday 3 April CAMPERDOWN

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Phone (03) 9579 2635

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