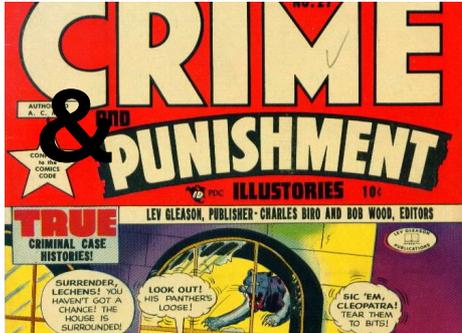


## CRIME, NO PUNISHMENT

The law makes something a civil offence or even a crime, but there are no prosecutions. Is everybody being remarkably good? It's conceivable, but frankly improbable.



The Road Management Act applies only to public land, the Aboriginal Heritage Act to all land – but they have this in common: neither body of law has been keeping the courts busy.

The **Road Management Act 2004** contains an extensive set of provisions designed to clearly frame a Road Authority's duty of care, and to provide defences against claims of negligence. Yet in nearly ten years these provisions have never been put to the test.

In 1996 Mrs Anna Perovic tripped over a deep bluestone gutter in Sturt Street, Ballarat. The ensuing case went to the Supreme Court of Victoria Court of Appeal. In 2002 Ms Margaret Haley tripped over mesh netting on a temporary footpath in Maryborough and her case ended up in the same court. The respective judgments shed light on the law as it stood before the RM Act – but we search in vain for equivalent illumination now.

*It's not because people have started to watch where they walk. It's not because councils have eliminated trip hazards. It's because the insurance companies have, for nine years, settled all claims out of court.*

Across the State, councils are working away at refining and implementing their road management plans, believing that by so doing they are protecting themselves from claims such as those brought by the unfortunate Mrs Perovic in Ballarat and Ms Haley in Maryborough. But the insurance industry has preferred not to have this assumption tested.

It's much the same with the Wrongs Act, which was amended in 2003 to give added protection to public authorities. In almost 10 years these protections have never been invoked in a court of law to defend a council's road management performance.

From 1 July 2013, Victoria's councils are being hit by insurance premium hikes (of up to 46%, we hear) and a doubling of excesses. Odd, when Lloyds Australia report that between 2004 and 2012 their average Public Liability premium dropped by 65%.

The Victorian Competition and Efficiency Commission (VCEC) has now commenced an inquiry into the tort law reforms of 2003. The Government's terms of reference explicitly mention this general reduction of claims and premiums, but suggest the reforms might 'disproportionately restrict the rights of plaintiffs (who may be) being denied compensation or being under-compensated.'

Elsewhere, tort law reform may be delivering its promised benefits, but not for Victoria's road authorities. Statutory defences are not being invoked, premiums are rising when they should be falling, and VCEC is being urged to swing the pendulum in favour of claimants. Something's badly wrong!

\* \* \* \* \*

When we search the legal library for cases arising from the **The Aboriginal Heritage Act 2006** we find a second empty shelf. This Act creates a suite of criminal offences with very substantial penalties, but there have been zero prosecutions – a failure which concerned many of the parties lodging submissions to the recent review of that Act.

Native Title Services Victoria (NTSV) noted "there has not been a single case prosecuted under the offence provisions of the Act" and recommended significant re-prioritisation within Aboriginal Affairs Victoria (AAV). Premier Napthine is shifting AAV into the Department of Premier and Cabinet, and we wait to see whether it will get more teeth.

The Director of Public Prosecutions (DPP) linked the failure to the test 'knowingly' which is applied a dozen times through the Act. A person must not *knowingly* harm something despite *knowing* that the thing harmed was Aboriginal cultural heritage. For a prosecution to succeed, it is necessary to prove the requisite mental state of the offender.

The alternative to a 'state of mind' offence is a 'strict liability' offence. Elsewhere, it is held that ignorance of the law is no excuse: our cars must be roadworthy whether we are familiar with the Road Safety Act or not, and regardless of whether we happen to be motor mechanics. Various submissions to the review saw this as a way forward; the Government assures us it 'will investigate' a number of reforms including warning notices, strict liability offences and random compliance checks. ♦

- **Land Law for Roads Streets and Lanes**  
Melbourne, Tuesday 13 August  
Shepparton, Thursday 22 August

- **Native Title and Aboriginal Heritage**  
Melbourne, Tuesday 10 September

## PUNISHMENT, NO CRIME

Four police officers arrived in three cars to arrest farmer Tony Powell for criminal damage to an electric fence which a neighbor had illegally placed on his land. The local Magistrate pronounced him guilty and fined him \$1000.

Tony and Kathy Powell's sheep farm lies in delightful headwaters of the Glenelg River, on the western slopes of the Grampians. Their land's abuttal to the river is what led to Tony's arrest and four punishing years of harassment and distress.

Several months and thousands of dollars after the arrest, the Supreme Court found the prosecution case fatally flawed. Judge Robson refused to remit the matter for retrial: "I do not believe justice would be served by putting Mr Powell through another hearing where there is little to suggest that justice would be served." He quashed the Magistrate's decision, and awarded costs against the police.

What was it all about? Crown land boundaries. The boys in blue had been seriously misinformed about the riparian cadastre. Not surprising, when you consider the complexities of the corresponding body of law (see [Terra Publica, February 2013](#)), but altogether unacceptable when you consider that they were acting under advice from the local office of DSE – which had no excuse for misinterpreting Crown boundaries.

The Surveyor General has since confirmed what anybody attending our 'Rivers' course learns – that early surveyors adopted centerline-of-the-river boundaries, that the 1881 reservation did not undo earlier grants of freehold, and that section 385 of the Land Act is still on the statute books. ◆

- **Land Law for Managers of Rivers & Lakes** *Melbourne Thurs 1 Aug*  
*Traralgon Tues 27 Aug*  
*Geelong Thurs 12 Sept*

## Fences, Repaired

In our [January 2013](#) edition, we bemoaned a legislative error which, if uncorrected, would have placed a multi-million dollar fencing burden onto Councils and Parks Victoria.



With remarkable alacrity, Parliament has accepted our recommendation and restored the Crown Land (Reserves) Act to say what everybody believes it should say – that Councils and other reserve managers should not be liable for fencing costs. You can read all about it in the Attorney-General's speech on the *Justice Legislation Amendment Bill*, [Hansard](#), 17 April 2013. ◆

## Environmental Law for Councils as Land Managers

A one-day course for  
Victorian Local Government

*When it comes to good environmental management,  
Victoria's municipalities should be leading by example.*

This one-day course focuses on the land which Council itself manages, and the law governing its usage and protection.

### The Day's Objectives

- To clarify which land a Council controls and manages, including reserves, roads, and roadsides
- To explain a Council's legal powers and obligations as land manager
- To provide a clear overview of environmental legislation, regulation and enforcement .
- To promote a culture of early risk identification and sound risk management

### Who should attend

Professional, administrative and technical staff – from on-the-ground operations supervisors through to senior managers.

### Course presenter

*Grant Arnold, Associate with The Public Land Consultancy. Grant comes to us from DEPI where he was Statewide Manager, Regional Planning, responsible for DSE's statutory and strategic input into Victoria's land use planning*

*system. Earlier, he was Director of Agriculture Policy with the Department of Primary Industries.*

### Cost

\$495 per student Including course notes, working lunch and GST. Discounts for host councils.

### Forthcoming Presentations

- **Ballarat** Thursday 18 July
- **Bendigo** Thursday 1 August
- **Traralgon** Thursday 15 August
- **Melbourne** Thursday 29 August

### Enquiries and Registrations

Jacqui Talbot – [jacqui@publicland.com.au](mailto:jacqui@publicland.com.au)  
Lesley Simons – [lesley@publicland.com.au](mailto:lesley@publicland.com.au)  
Phone (03) 9534 5128

## Q & A

### Should we give the creek a name?

*Question asked by a Place Names Officer with a provincial city.*

It seems that certain landowners abutting the said unnamed creek objected to it being given a name. Why? Well, if a watercourse has a name, land within 200 metres becomes an 'Area of Cultural Significance' (ACS) for the purposes of the Aboriginal Heritage Act 2006.

Now, if your land's in an ACS then, unless there has been significant ground disturbance, you must

undertake a Cultural Heritage Management Plan (CHMP) before acting on your planning permit – and this is something the landholders wanted to avoid.

Sorry guys, we have no sympathy for you.

If there's Aboriginal heritage there, then it's a criminal offence to knowingly meddle with it, whether the creek has a name or not. And if these landholders are savvy enough to know about ACSs and CHMPs, then they're surely going to pass the *knowingly* test...

Our advice to the Place Names Officer: proceed in line with the guidelines under the Geographic Place Names Act, and disregard any submissions with such dubious, indeed ulterior, motives. ♦

## ALERT

**Grant Arnold**  
Associate, Public Land  
Consultancy

### Roadside Weeds

Responsibility for roadside weeds has been, for many years, problematical (see *Terra Publica*, Easter 2012, p2).

The *Catchment and Land Protection Act 1994* included provisions that, on the surface, make adjoining owners responsible for pest management on adjoining roadsides. However road-related legislation cast doubt over whether this was the case, and politics cast doubt on whether it *should* be the case.



A working party tasked with reporting back to Government on the best way forward recommended that municipal councils take responsibility for weeds and pests on roadsides under their control and that legislation be amended to clarify this.

The *Catchment and Land Protection Amendment Bill*, introduced on 28 May, provides, in effect, for municipal councils to have responsibility for regionally prohibited weeds, regionally controlled weeds and established pest animals on the roadsides of 'Municipal roads' as defined in the *Road Management Act*. The Minister will be empowered to require councils to prepare roadside weed and pest animal management plans. It is likely that State government funding assistance will be tied to the preparation and delivery of those plans.

*But, here at Terra Publica we've noticed that the legislation may not provide all the clarity that is needed. The authors appear to have overlooked roadsides of Arterial Roads in urban areas. As the Bill stands, Vicroads would be responsible for weeds, although councils would remain responsible for all other management functions.*

### Native Vegetation Clearing

Another very significant issue for councils and land managers generally will be the reforms around native vegetation regulations. The existing native vegetation rules, which many would argue have delivered significant environmental benefit, have been the source of considerable angst for farmers and land developers for many years.

The reforms, scheduled to start to take effect in early September, have been designed with a greater emphasis on the level of risk of proposed clearing on biodiversity assets rather than on the vegetation itself.

This level of risk will influence the extent of documentation needed to support an application and the decision process. Importantly, proposals involving low impacts will have more flexible and lower cost offset options.

Fundamental to the reforms is the replacement of 'Victoria's Native Vegetation – A Framework for Action' and its Net Gain principle, with the *Permitted Clearing of Native Vegetation – Biodiversity Assessment Guidelines* and their objective of "No net loss in the contribution made by native vegetation to Victoria's biodiversity". The concepts of avoid, minimise and offsetting remain, albeit in a less hierarchical way.

Tools to assist in determining the level of risk are being developed. Implementation is underway, with changes to the VPPs scheduled for September 2013.

These and other environmental and heritage laws are factored into our new course targeted to local government. – see page 2. ♦

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.

## Where do you stand?

*A couple of new slides we've slotted in to our 'Roads Law' course*

Section 40 of the Road Management Act says (paraphrasing) – a road authority has a statutory duty to inspect, maintain and repair a public road to the standards it has itself set in its road management plan.

### Here's Dilemma Number 1:-

It's a well accepted concept in management (and in sport, and in life in general) that you set goals a little beyond your reach. You aspire. You aim to do better next year than last. You set the bar high.

But there's another view: you don't set yourself up for failure. Especially when that failure could put you at the wrong end of some complaint, litigation or insurance claim. So you set the bar a little lower.

- RM Act sec 40: road authority's duty is to maintain roads to standards in its own management plan (or policy standards)
- A council CEO... *We should aspire to high standards... adopt higher standards of service*
- A lawyer... *Road Authorities are adopting unduly high management standards, and are thus setting themselves up for failure*

If the law says 'must do' or 'must not do,' then you either do or don't do, as the case may be. But if the law says 'need not do' then what?

Section 107 of the Road Management Act says – a road authority does not have a duty to manage roadsides, or roads left off the Road Register.

### And here's Dilemma No 2:-

Municipalities have limited budgets, so you don't go around spending ratepayers' money on work you are not obliged to undertake. Leave the hazard un-remediated: the law (or in the worst scenario, your insurance) will protect you.

But there's another view: When you hear about the dangerous tree next to the school bus stop, or the storm-water pit with a missing cover in the back lane, then you do what the citizens expect of their council: you go and make it safe.

- RM Act sec 107: A council has no duty to manage roads which are not public roads; and no duty to manage any roadsides
- One Municipal Engineer... *If we don't have a legal duty to maintain (roadsides or roads omitted from the road register), then we won't maintain them...*
- Another Municipal Engineer... *If we know of hazards, we'll go out and fix them, even if the law says we don't have to...*

So - where do you stand? ◆

## Professional Development Training Course Schedule July - September 2013

- Building Law Melbourne Tues 23 July
- Coastal Adaptation Melbourne Wed 17 July  
Traralgon Wed 7 August  
Melbourne Wed 4 Sept  
Geelong Wed 18 Sept
- Crown Land Colac Thur 8 August  
Shepparton Tues 3 Sept  
Traralgon Tues 17 Sept
- Environmental Law for Councils Ballarat Thur 18 July  
Bendigo Thur 1 August  
Traralgon Thur 15 August  
Melbourne Thur 29 August
- Leases and Licences Melbourne Tuesday 6 August
- Native Title and Aboriginal Heritage Melbourne Tuesday 10 Sept
- Risk Management Melbourne Tuesday 20 August
- Rivers and Lakes Melbourne Thurs 1 August  
Traralgon Tues 27 August  
Geelong Thurs 12 Sept
- Roads, Streets and Lanes Melbourne Tues 13 August  
Shepparton Thur 22 August
- Service Utilities Melbourne Thursday 5 Sept
- Subdivisions Melbourne Friday 19 July
- Volunteers and Grants Melbourne Wed 24 July  
Geelong Wed 14 August  
Bendigo Wed 28 August  
Wangaratta Wed 11 Sept

### Enquiries and Registrations:

Jacqui Talbot – [jacqui@publicland.com.au](mailto:jacqui@publicland.com.au)  
Lesley Simons – [lesley@publicland.com.au](mailto:lesley@publicland.com.au)  
(03) 9534 5128

Cost: \$495  
*inc GST, course notes and working lunch.*  
*Discounts for course hosts.*

All Courses are one-day duration  
9:00 a.m. to 4:30 p.m.

**Lawyers:** CPD points;  
**Surveyors:** FPET points