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Dirt Road, Martumili Ngurra, 2009; Courtesy National Museum of Australia

Reconciliation is happening, but its pace is slow. One reason is the gap between State and Commonwealth systems. In many ways Victoria leads the way, but State law cannot overturn or contradict Commonwealth law.

Which brings us to the Victorian *Traditional Owner Settlement Act 2010* (the TOS Act), and its relationship with the Commonwealth *Native Title Act 1993* (the NT Act). The TOS Act provides for out-of-court Reconciliation and Settlement Agreements (RSAs) which must comply in their various ways with the NT Act.

Both Acts have important consequences for public land – although they differ in the nature and extent of that public land.

The key link between the two Acts is the Indigenous Land Use Agreement (ILUA), a provision of the Commonwealth Act, under which Traditional Owners agree to opt out of the future act processes under the NT Act, and instead comply with agreements made under the State Act. An ILUA can also bind Traditional Owners not to make future claims under the Commonwealth Act.

The Gunaikurnai Settlement Agreement

This RSA covers land in Gippsland, where the Federal Court had already made a positive determination of native title under the NT Act.

The RSA added an agreement for joint management of ten national parks and reserves, rights for Gunaikurnai people to access and use Crown land for traditional purposes, and funding for the Gunaikurnai to manage their affairs and respond to their obligations under the settlement.

Various hybrid agreements were made before the TOS Act was enacted. The Gunditjmara Settlement Agreement (in SW Victoria), and the Wotjobaluk Barengi Gadjin Settlement Agreement (covering the Wimmera) are linked to Federal Court determinations that the respective groups do hold native title over their country.

The Eastern Maar Peoples claim is still progressing, but has already demonstrated that some country can be covered by multiple agreements.

The Dja Dja Wurrung RSA

This Recognition and Settlement Agreement covers land in central Victoria, where a native title claim had been submitted, but had not yet been determined. The Dja Dja Wurrung entered into a binding agreement (in the form of an ILUA) to not pursue that claim under the NT Act. This RSA places various National Parks under joint management, and a Land Use Activity Agreement (LUAA) provides for the Dja Dja Wurrung to provide input to, or give consent to, certain activities taking place on Crown Land.

Similarly, the Taungurung RSA covers land where no native title determination has been made, but nevertheless provides a suite of agreements recognising the Taungurung people's rights over public land in the Goulburn River country.

The Yorta Yorta Agreements

This suite of agreements covers land in North-East Victoria, where the State's first native title claim had been bitterly opposed by no fewer than 470 parties. The Federal Court found that Native Title had been washed away by the tide of history – a decision upheld by a non-unanimous decision of the High Court. As a consequence, agreements under the TOS Act need not be accompanied by an ILUA.

Here, a Cooperative Management Agreement goes some way to reinstating the Yorta Yorta people's rights as Traditional Owners. It acknowledges their role in the protection, and maintenance of certain public land referred to as the Designated Areas.

A Joint Management Plan for the Barmah National Park has also been entered into under the *Conservation Forests and Land Agreement 1989*.

So overall, it seems the Victorian TOS Act has provided some additional avenues for delivering solid land justice outcomes to Traditional Owners, which have sometimes proved difficult under the Commonwealth NT Act. There's still a way to go: currently these agreements cover little more than half of the State. ◆

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Photo: Maribyrnong Hobsons Bay Star Weekly

Surely public land should be seen as a valuable asset. Surely!

But sometimes public land becomes a burden. There may be better uses to which some parcel could be put, or better uses for the dollar value that it might realise. The land manager (probably a council) faces two hurdles: legal process, and its own community. We have some advice on the former, but as for the latter – who can say?

Nillumbik Council eyes $17m land sale

Concerned residents say their council's attempt to sell off much loved parks and public space to developers could ruin the face of their neighbourhood.

Herald-Sun, 2018

Old subdivisions often delivered public open space. Land might have been set aside for 'Public Resort and Recreation' or 'Open Space Drainage and Sewerage' or just for unspecified 'Municipal Purposes.' For all sorts of reasons, we may now want to dispose of it.

First problem: a title search shows the reserve is still in the name of the original developer. Second problem: it's inappropriately zoned under the planning scheme. Third problem: various utility easements need to be created or removed.

That brings us to section 24A of the *Subdivision Act 1988*, inserted into that Act in 1991. Here we find a smorgasbord of powers to mess around with reserves – but only freehold reserves. Crown reserves are another story altogether.

Section 24A provides for a council to become the registered proprietor in lieu of the original developer. This is worthwhile even if we're not heading towards a sale: it causes the reserve to become 'council land' for the purposes of the *Limitation of Actions Act 1958*, and thus protects it from adverse possession.

24A also allows a council to remove a reservation – whether created in a pre-1988 or post-1988 subdivision. But that doesn't change the planning zoning – which could still be, say, PUZ or PCRZ – and so make the land virtually unsaleable.

But 24A can be used only if authorised by a planning scheme or a planning permit. In other words, it must pass the community opinion hurdle, possibly involving VCAT or a Planning Panel. So for land inappropriately reserved on title and inappropriately zoned under the planning scheme, we run the two processes together.

This is neatly illustrated by a recent amendment to the South Gippsland planning scheme. The amendment rezones a couple of old PPRZ reserves and concurrently grants a planning permit to authorise, under 24A, the transfer of title from some long-departed developers to the Council – with a view to the land then being sold for housing.

What will Council use the proceeds of these sales for? Back to section 24A: which tells us that if the land had been public open space (a defined term) then the proceeds must be used for certain 'recreational or cultural purposes.' Which invites a bit of creative accounting.

In the Nillumbik example, we are told that the funds will improve recreational opportunities across the municipality. In South Gippsland the funds will support the extension to the Great Southern Trail. In Maribyrnong the funds will go into management of Footscray Park.

Will that keep the community happy? Will the protests cease? That's another question! ◆

Turning to the Case-Law

Legislators do their best to write nice clear unambiguous Acts of Parliament. But they can't foresee all the litigious trouble-makers and nit-picking pedants out there – not to mention their lawyers. Which shifts our attention from the Parliaments to the Courts.

In a way, we're pleased to have the trouble-makers and nit-pickers – the judgements they get help the rest of us to understand what all those Acts of Parliament actually mean.

And sometimes, they prompt the legislators to go back and fix their mistakes…

How should we interpret the various Acts relating to Roads?

- Bass Coast Shire v King (*Supreme Court of Victoria Court of Appeal, 1997*)

  The *King* case reminds us that some back laneways can indeed be government roads.

- Calabro v City of Bayside (*Supreme Court of Victoria, 1999*)

  Calabro confirms that title documents to freehold roads are perilously unreliable.

- Anderson v City of Stonnington (*Supreme Court of Victoria Court of Appeal, 2017*)

  Anderson proves that public reliance on freehold titles can be unreasonable to the point of being lethally dangerous.

- Pulitano v Mansfield Shire (*Supreme Court of Victoria, 2017*)

  Pulitano is all about the sequencing of change-of-status processes. Do it in the wrong order and you'll be told to go back and do it again.

- Gray v Minister for EEandCC (*Supreme Court of Victoria, 2019*)

  Gray proves that something may not be a road reserve even if it functions as a trafficable roadway.

- Mayberry v Mornington Peninsula Shire (*Supreme Court of Victoria 2019*)

  Mayberry throws doubt on whether the 'public highway' status of a road extends to the full width of the road reserve.

- Fenelon v Dove (*Supreme Court of Victoria Court of Appeal 2010*)

  Fenelon confirms that a road may be a public highway even if it is put to other uses.

- Clarke v Shepparton (*Supreme Court of Victoria Court of Appeal 2017*)

  Clarke reminds us of the differences between a council acting as *road authority* as against *infrastructure manager.*

- Kennedy v Campaspe (*Supreme Court of Victoria Court of Appeal 2015*)

  Kennedy is a warning that councils as road authorities need take great care in setting and abiding by their road management plans.

- Howard Finance v City of Yarra (*Supreme Court of Victoria, 2020)*

  Howard Finance confirms that this body of law applies to all roads, even if they are only 1 metre wide!

How should we interpret the Fences Act 1968?

Question asked by a municipal Property Officer.

We are all familiar with the 50-50 rule: the cost of a dividing fence is typically apportioned equally between the abutting owners. There are exceptions: if I want a super-fence, then my neighbour has to pay only 50% of a normal fence – I have to pay 50% *plus* the gold plating.

The main exception is for fences along roads, where the road authority pays nothing (Schedule 5, *Road Management Act 2004*, reinforced by sec 109). A further exception is for the boundary between freehold and unalienated Crown land, where the Crown pays nothing (sec 31, *Fences Act 1968*).

But how about Council reserves? The *Fences Act 1968* (sec 4) provides a definition of owner – which excludes municipal councils in cases where the council land is 'for the purposes of a public park or public reserve.'

As we say on page 2, land might have been set aside for all sorts of purposes. 'Public Resort and Recreation' or 'Tree reserve' or Drainage and Sewerage' or unspecified 'Municipal Purposes.' Indeed, we have seen land marked 'Reserve' without any specified purpose.

Which of these can be described as 'public park or public reserve?' Seems to us that a tree reserve can be so described, but a drainage reserve cannot – but that's just our opinion.

We have searched in vain for case-law on this question. Trouble-makers and nit-pickers: please commence litigation!

So our advice to the Council Property Officer: use your judgement. And please let us know if your decision gets challenged. ◆

Our scheduled training courses, Winter 2021

Each course is comprised of three sessions, each of 2 hours duration.

	**Land Law for Managers of Rivers and Riparian Land**	Mon 7 June, 10.30am to 12.30pm Tue 8 June, 10.30am to 12.30pm Fri 11 June, 10.30am to 12.30pm
	**Referral Authorities and the Victorian Planning System**	Tues 8 June, 10am to 12pm Wed 9 June, 10am to 12pm Thurs 10 June, 10am to 12pm
	**Working with Owners Corporations**	Tues 8 June, 1pm to 3pm Wed 9 June, 1pm to 3pm Thurs 10 June, 1pm to 3pm
	**Roadsides and the Law**	Tues 22 June, 10am to 12pm Wed 23 June, 10am to 12pm Thurs 24 June, 10am to 12pm
	**Crown Land Governance**	Tues 13 July, 10am to 12pm Wed 14 July, 10am to 12pm Thurs 15 July, 10am to 12pm
	**Restrictions on Title**	Tues 13 July, 1pm to 3pm Wed 14 July, 1pm to 3pm Thurs 15 July, 1pm to 3pm
	**Offences and Enforcement on Public Land**	Tues 20 July, 10am to 12pm Wed 21 July, 10am to 12pm Thurs 22 July, 10am to 12pm
	**Land Information and its Interpretation**	Tues 27 July, 10am to 12pm Wed 28 July, 10am to 12pm Thurs 29 July, 10am to 12pm
	**Land Law and Subdivisions**	Tues 3 Aug, 1pm to 3pm Wed 4 Aug, 1pm to 3pm Thurs 5 Aug, 1pm to 3pm
	**Native Title and Aboriginal Heritage**	*Note this course is 2 x 3 hr sessions* Wed 4 Aug, 10am to 1pm Wed 11 Aug, 10am to 1pm

Cost: $440 per three-session course, including GST, course notes and certificate of attendance

Accreditation: These courses are eligible for CPD points for lawyers and FPET points for surveyors

Enquiries and Registrations:
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All these courses can be presented in your own offices.
Discounts for host organisations