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# "A Remarkable Omission"

*A system of categories that supports effective and efficient public land management.* That's what the Government requires from the statewide assessment of public land currently being conducted by the Victorian Environment Assessment Council (VEAC).

So – is there some deficiency in the current system of categories? In one submission, Environment Victoria (EV) points to Crown Water Frontages as being a 'remarkable omission.' We can only agree.

*"This category of public land is missing from the list of public land categories... This is a remarkable omission given the value of river frontages and the many recommendations made by VEAC in the past."*

The importance of riparian land, both Crown and freehold is well-understood, but poorly reflected in land law. VEAC may recommend that some specific area be set aside as a 'Streamside Reserve' but for most waterways the good old *Land Act 1958* and *Crown Land (Reserves) Act 1978* continue to thwart sound management outcomes.

In its submission EV points to the numerous previous LCC reports on the subject, dating back to the Rivers and Streams investigation of 1991.

EV is not alone in advocating special attention to riparian land. In another submission to VEAC, the Anglers' Association bemoans impediments faced by recreational fishers wanting access to rivers. Trust for Nature envisages recognition of instream freshwater conservation reserves to parallel the State's marine protected areas. Our own submission advocates reform of the 'temporary / permanent' designation which perversely impedes the rationalisation of Crown frontages when rivers change course.

But for us the most telling submission comes from the Gunbower Landcare Inc. Gunbower? That's between Echuca and Kerang. It's a submission that surely epitomises the concerns of communities across the State: people who want to see native vegetation instead of weeds, respect for aboriginal heritage, habitat for birdlife, and decent water quality. People prepared to contribute to on-the-ground management – and prepared to devote hours to assembling submissions to public inquiries.

Eliza Tree: *Major Mitchell at Kow Swamp*, 1836

Here's what Gunbower Landcare's submission is all about. Above: Kow Swamp in 1837, as reconstructed by Castlemaine artist Eliza Tree. Below: Kow Swamp in 2015. Goulburn-Murray Water (G-MW) gives it a mention in their recent Land and On-Water Management Plan: *Poorly managed grazing resulting in damage to Aboriginal burial sites, shell middens and oven mounds, water quality decline, erosion and damage to riparian vegetation.*

Gunbower Landcare: Over-grazing at Kow Swamp, 2015

All this won't be remedied by a new cadastral land category. Not on its own. But we would argue it's an essential start. ■

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# The 12mm Stumble

## *Kennedy v Shire of Campaspe*

## At Long Last…

### Some Guidance on the Road Management Act

*By Peter Hamilton of the Victorian bar*

The Court of Appeal has handed down its decision – a first step to filling the void of judicial decisions in *Road Management Act 2004 (Vic)* cases.

The facts are straightforward. On 23 July 2007, the Plaintiff, Irene Kennedy, tripped on a footpath's lip. She fractured her wrist. She sued the local council, Shire of Campaspe (Echuca), for damages in negligence and for statutory breaches of the RMA.

Before the incident, the Council inspected the footpath on 6 July 2007 and before that on 4 January 2006, an 18 month and two days gap between inspections. This was a technical breach of the Council's Road Management Plan (the Plan) that provided Council would inspect the path at least every 18 months.

The Council denied liability. In particular, it relied on the following statutory defences:

1. Section 102: unless the Council had actual knowledge of the hazard at the time of the fall, it would not be liable in a claim for negligence or breach of statutory duty for failing to repair or remove the hazard, provided it complied with the Plan;
2. Section 103: the Council is not liable for the wrongful exercise or failure to exercise a function where the act or omission was consistent with policy (in this case, the Plan); and
3. Section 105: if the Council complied with policy (in this case, the Plan), then that proves the Council took reasonable care to ensure the footpath was not dangerous to foot traffic.

In the lower court, the Judge accepted that the RMA shielded the Council from any liability under each of those sections.

The Judge found that the 18 month and two day gap was a technical breach that was cured by the Council when it inspected the footpath on 6 July 2007, about three weeks before the incident. The Judge did not decide the claim in negligence because, on his view (on the correctness of which the Court of Appeal did not comment), the RMA defences would have provided the Council with complete immunity.

The Court of Appeal accepted Kennedy's argument that the Council breached its Plan, albeit by two days, and therefore it could not rely on the statutory defences to defeat Kennedy's claim. It said the Council did not cure its breach before the incident because it had not received a report on, nor acted upon any recommendations following, the 6 July 2007 inspection.

However, the Court of Appeal said there was a lack of evidence for it to find the Council, if it had complied with the Plan, would have removed the hazard between 4 July 2007 and the date of incident, 23 July 2007.

Because the Council could not rely on the RMA defences, it now opens the door for Kennedy to argue the Council is liable under the general common law principles of negligence for failing to identify and effect repairs (or warn Kennedy) of the hazard.

The Court of Appeal therefore remitted the matter to the County Court.

**The upshot**

The Court of Appeal decision shines a light on the exposure a defendant may face when it does not comply with its Road Management Plan, even for 'technical' breaches.

Although causation of injury may present difficulties for plaintiffs, the decision provides some comfort to plaintiffs that the defences under the RMA are not as watertight as they may have seemed before this decision. ■

## Plans, Policies, and *Reasonableness*

*By David Gabriel-Jones*

A decade after passage of the *Road Management Act 2004*, Victorian municipalities can thank the Shire of Campaspe for finally putting it to the test. Campaspe refused to settle a negligence claim out of court.

The Act requires a road authority to inspect, maintain and repair a public road in accordance with a standard. If the authority has a plan, then that plan becomes the standard; if there is no plan, then it may have a section 39 policy – which then becomes the standard; if it has neither a plan nor a policy then it

*Continued* p. 3

# The 12mm Stumble

## *Kennedy v Shire of Campaspe*

Plans, Policies, Reasonableness… *continued*

must inspect, maintain and repair to a 'reasonable level.' This regime, defined at section 40 of the Act, was central to the Court of Appeal's analysis of the Kennedy case.

A road authority's defences against negligence claims would appear to be very strong. Sections 102, 103 and 105 all seem to support the principle enunciated by the Ipp report back in 2002: a public functionary should not be held liable *"…where the failure to take precautions to avoid the relevant risk was the result of a (reasonable) decision about the allocation of scarce resources…"*

Campaspe had a plan, and a 'proactive' policy, and acted in a totally reasonable manner to allocate its 'scarce resources.' The plan specified the frequency of inspection of footpaths; the policy guided maintenance activities over and above the scope of the plan, and, in our opinion, reasonableness governed the entire operation.

Nevertheless, at the end of the day Campaspe found that the RM Act defences were of no value. It had failed to meet the 18-month inspection frequency by 2 days; having failed to comply with its own plan, it could not fall back on its 'proactive' policy, nor on the defence of being reasonable. Such is the clear import of the hierarchy of duties specified by section 40.

Having thus lost the benefit of the Act's statutory defences, Campaspe must now reconstruct its case (back in the County Court again) in terms of the common law: exactly what the parliament had attempted to put to one side, back in 2004. We will once again hear all about the Brodie and Ghantous cases which precipitated the Act in the first place.

**Where next? Our prediction is that two contradictory responses will emerge. Firstly, a demand for ever-more rigid adherence to ever-more prescriptive road management plans; and secondly, abandonment of rigid plans in favour of more flexible policies, or even good old-fashioned *reasonableness*.** ■

# Riparian Land

## What *Terra Publica* has had to say …

### Shall we Gather at the River?

*Riparian land needs protection, not only from marauding Sunday-schoolers, but from those recalcitrants who still see rivers as tips, quarries, and cheap watering troughs for their stock.* TP, June-July 2006

### Towards a Riparian Land Management Act

*We already have the Coastal Management Act 1995 and the Road Management Act 2004. Now we need the Riparian Land Management Act 2007.* TP, December 2006

### How to get Stock out of the River?

*There are at least half a dozen heads of power which you might expect to regulate stock access to Crown waterways. Each one, however, has some deficiency which currently renders it ineffective.* TP, January 2008

### Riparian Values and Missing Links

*A fourteen point strategy for reforming the governance of land along rivers.* TP, June 2008

### Up the Creek

*In the nineteenth century, many Crown Allotments alienated as freehold were bounded by the centreline of an abutting watercourse…* TP, March-April 2011

### Up the Creek. Again

*How the Crown land along tributaries of tributaries was de-reserved not by an Act of Parliament, but by the stroke of a pencil.* TP, December 2012

### Waterways – A Cadastral Taxonomy

*Geographers, ecologists and hydrologists may classify rivers in terms of their geomorphology, biological characteristics, or flow regimes. For legal purposes, however, waterways often need to be described in terms of their relation to the cadastre* TP, September-October 2013

For the full Terra Publica archive, go to www.publicland.com.au/terra_publica_archive

### Letter to the Editor

Dear Terra Publica,

I noted in your June-July 2015 newsletter the line, "It could be argued that the LCC (and its successors, the ECC and VEAC) **have now done their job**. There is little if any Crown land out there waiting to be allocated – either for dairy farms or for **National Parks.**"

However, as identified in our extensive 2014 Nature Conservation Review, there is still over 3 million ha of high conservation value public and private land required for secure and permanent protection, of which a minimum of 1.4 million ha is needed on public land to meet the basic Comprehensive Adequate & Representative (CAR) criteria for Victoria's ecosystems.

That would make up about the last 20% of the park system on public land, and there is still a bigger lift to happen with private land conservation initiatives. It is in our view wrong to argue that the national parks estate is complete.

**Matt Ruchel**
*Victorian National Park Association.*

# Our One-day Training Courses
## September to December 2015

*Unless otherwise noted, all courses are at **Law Institute of Victoria**, 470 Bourke Street Melbourne*

### Crown Land
Law, Policy and Practice

*Wed 2 September (full)*
*Mon 23 Nov – **Horsham***
*Friday 4 December*

### Managing
Volunteers and Grants

*Friday 11 September*


### Leases and Licences
of Public Land

*Tues 15 September*

### Land Law and
Coastal Adaptation

*Wed 16 September*

### Referral Authorities
and the Victorian Planning System

*Thurs 17 September*
*Thurs 19 Nov – **Ballarat***


### Offences and Enforcement
on Public Land

*Tues 13 October*

### The Law and
Subdivisions

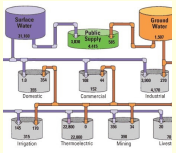
*Wed 14 October*
*Mon 26 Oct – **Jemena** (full)*

### Native Title
and Aboriginal Heritage

*Tues 20 October*
*Fri 23 Oct - **Geelong** (full)*

### Easements
and Restrictive Covenants

*Tues 27 October*



### Land Law for
Service Utilities

*Tues 17 November*

### Environmental Law for
Councils as Land Managers

*Wed 25 November*

### Land Law for Managers of
Roads, Streets & Lanes

*Mon 30 Nov - **Shepparton***
*Fri 11 December*

### Land Law for Managers of
Rivers and Lakes

*Fri 4 Sept - **Huntly** (full)*
*Wed 9 Sept - **Traralgon** (full)*

### Risk Management
and the Law

*Date to be fixed*

**Cost $550 per person**
including GST, Course notes and working lunch.
Discounts for host organisations

**Enrolments and Enquiries** – Jacqui Talbot – jacqui@publicland.com.au

Unless otherwise noted, all courses are at
**Law Institute of Victoria**,
470 Bourke Street Melbourne

All courses are of one-day duration;
starting time 9:00 am, finish 4:30 pm

For details of all these courses go to www.publicland.com.au/professional_development