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The Supreme Court considers Public Drains

Before they closed up shop at Hazelwood, the mine's managers found time to sue Latrobe City Council over the Morwell Main Drain. Hazelwood claimed that when the mine was privatised in 1990, responsibility shifted from the SEC to the Council.

The case went to the Supreme Court in 2015, and then to the Court of Appeal in 2016. Both courts found in favour of Latrobe Council.

The case revolved around the distinction between private drains and public drains. The *Local Government Act 1989* (section 198) tells us that 'public drains' are vested in the relevant council, without defining 'public drain.'

The Court found that the term is intended to embrace changing circumstances including changing notions of the difference between public and private.

The Ombudsman considers Local Government Committees

We are a little surprised to find the Victorian Ombudsman getting into matters we would normally associate with the Auditor General. Nevertheless, it's good to see an official interest being taken in Local Government committees.

In her December 2016 report, the Ombudsman looked at a dozen councils, and found that rural municipalities are more likely to have section 86 committees managing public halls and recreation reserves – which comes as no surprise. And she found that many are not well supervised.

Pity she didn't look at the dysfunctional and pointless distinctions between Local Government Act committees and Crown Land (Reserves) Act committees. Perhaps that's next.

The Parliament considers Freehold Roads

One of the most persistent and frustrating aspects of roads governance has been the ownership of pre-1988 freehold roads.

If they are 'public highways' they vest in the local council – but the title continues to show the erstwhile subdivider as registered proprietor. We have seen this anomaly result in delays to multi-million dollar developments, and the police being called in to pacify belligerent disputants.

DELWP has now framed a *Land Legislation Amendment Bill 2017*, which was introduced into Parliament on 21 March. Amongst other things, it proposes to amend section 59 in the *Transfer of Land Act 1958*.

If the Bill passes into law, a Council will be able to apply to the Registrar to have the title to a pre-1988 road brought into its name, without attempting to get the consent of the registered proprietor. ■

How do we tackle unauthorised retaining walls on roadsides?

Question asked by officers of a suburban municipality with steep cross-slopes and enterprising citizens.

It's a question which takes us into civil engineering, land law, and public policy. A full answer would surely need flowcharts, and so take us into graphic design.

In the municipality concerned, there must be a couple of hundred of these walls. Some clearly serve structural purposes, others are 'beautification' (at least in the eyes of Mr and Ms Citizen, the abutting owners) and some are little more than attempts to privatise the public roadside.

Perhaps the first observation to make is that our council has limited resources. Any approach here must be prioritised. If it's clearly dangerous, it goes to the top of the list; if there's a public complaint, it certainly gets inspected; and if the property has come to our attention for some other reason (a planning permit application, perhaps) then we'll use the opportunity to take a look at its associated roadside.

The next thing to say is that these encroachments cannot cause any alteration in the true title boundary. There is no adverse possession against *public highways* – which almost certainly includes all the roads we're discussing here. If Mr and Ms Citizen claim otherwise, head to your lawyers.

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Retaining Walls – continued…

There are two ways in which these walls came into being. They may have been put there by the road-builder, as an adjunct to the road's basic cut-and-fill earthworks. Or they may have been put there by some private party, as an adjunct to an abutting property. This leads into a key question: who is responsible for them – Council or the abutting landowner?

The *Road Management Act 2004* (the RM Act) helps us by recognising *road-related infrastructure* (a term which is nested within the term *road infrastructure*) and *non-road infrastructure*. Road-related infrastructure includes structures which support or protect the roadway or pathway, and in our opinion includes retaining walls of the first type – walls put there as an adjunct to the road earthworks. Here the Act tell us that the infrastructure manager is the responsible road authority – in other words, Council.

As for the second type of retaining wall, erected for the benefit of some abutting property, we're inclined to class it as non-road infrastructure. The Act informs us that its manager is the person responsible for the non-road infrastructure – which, frankly, isn't a lot of help.

Our first assumption, however, must be that the retaining wall outside the Citizens' house is the responsibility of Mr and Ms Citizen. The RM Act (Clause 6 of schedule 7) requires them to take reasonable steps to maintain the wall in a satisfactory state of repair, and to ensure no obstruction or danger to road uses, including persons with a disability.

As far as we can establish, there's no penalty for failure to observe Clause 6 of schedule 7. We are inclined to think there should be.

So what is Council's role? At section 38 the RM Act requires a council, in its capacity as road authority, to 'facilitate the appropriate use of the road reserve for non-road infrastructure…' In many circumstances a retaining wall will be an appropriate use but we're not so sure about so-called beautifications. Our advice to the council in question is to explore and define the meaning of 'appropriate use' in a formal adopted policy.

At the bottom of our imaginary flowchart we arrive at various alternative end-boxes. If it's a proposed new structure, the alternatives are simply 'approve it' and 'don't approve it.'

If it's an existing structure, the alternatives are 'legitimise it,' 'rectify it,' and 'demolish it altogether.'

Approve it; Legitimise it

New retaining walls may or may not require a planning permit, depending on the parameters of the local planning scheme. If they're more than 1.0 metre high they require a building permit – and may do even if they're less than 1.0 metre high.

They will certainly require a works permit under section 63 (and clause 16 of Schedule 7) of the RM Act. Here's where council can impose conditions on the design of the structure and the conduct of construction works. Note, however, that such a consent cannot touch on matters of visual amenity or aesthetics, cannot touch on many environmental concerns, and cannot require long-term indemnities. If you want to head in those directions, read on…

Both new and pre-existing retaining walls could be authorised under a local law, and their ongoing management formalised through an enforceable '173' agreement under the *Planning and Environment Act.1987*. This is enabled through section 121 of the RM Act, which extends the scope of a 173 agreement to include '*arrangements in respect of on-going maintenance and risk allocation*' for road works which may benefit nearby land owners. It's in one of these hybrid 121-173 agreements that we'd expect to find provisions relating to aesthetics, inspections, maintenance, insurance, and indemnities.

Rectify it; Remove it

The rectification and removal branches of our flowchart are more difficult to map out. In fact, we have difficulty finding any clear-cut process for rectifying deficiencies in pre-existing non-road infrastructure.

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Retaining Walls – continued…

The *Road Management Act 2004* provides (at section 90) for enforceable infringement notices – but the infringements in question relate to the conduct of new works, not the on-going maintenance of existing works.

Schedule 7, clause 20 looks promising. It empowers a road authority to require the removal or upgrade of existing non-road infrastructure – but there's one little catch: the road authority itself must bear the cost of the removal or upgrade.

Then there's the *Road Management (General) Regulations 2015* which provide (at clause 25) for the removal of objects 'deposited or left' on a road reserve, and for the associated costs to be recovered in a Magistrates' Court – but it would be a stretch of the language to describe a retaining wall as having been 'deposited or left.'

One avenue for enforcing remediation of a defective wall may be the *Building Act 1993* and the *Building Regulations 2006* – but only in limited circumstances.

The *Local Government Act 1989* (Schedule 10) empowers a council to remove gates and fences, and anything which is a danger to road users. It's a poorly worded provision, which seems to reflect an era when coach-roads cut through the bush to the goldfields. It authorises a council to require 'a person' to remove dangers, without specifying which person. These days, if a council wanted to make use of such powers, consideration should be given to proclaiming an appropriate local law.

At the end of the day, our advice would be something like this:

- Adopt a reasonable policy on these structures, prioritised, and with community inputs
- Consider introducing a local law to give teeth to this policy position
- Adopt hybrid 121-173 agreements for new structures and existing structures that conform to the policy
- Commence action against any dangerous or non-compliant structures, with a view to testing the relevant areas of law
- Cooperate with other councils and the MAV to propose reforms to the Road Management regulations. ■

Next edition…

The Public Land Consultancy is delighted to report that we are about to award our first
Certificates in Public Land Governance
More details in next edition of Terra Publica

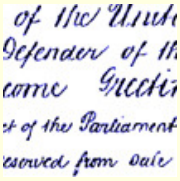
Our One-day Training Courses
April to June 2017

Leases and Licences
of Public Land
Friday 28 April

Crown Land
Law, Policy and Practice
Monday 1 May

Native Title
and Aboriginal Heritage
Friday 5 May

Land Law for Managers of
Rivers and Lakes
Tuesday 9 May



Easements, covenants and
Restrictions on Title
Thursday 11 May

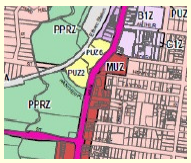
Roads Governance
Thurs 6 April - Melbourne
*Tuesday 16 May – **Mildura***
Thurs 1 June - Melbourne

The Law and
Subdivisions
Thursday 18 May

Offences and Enforcement
on Roads
Tuesday 23 May

Environmental Law
for Public Sector
Land Managers
Wednesday 24 May

Coastal
Land Governance
Thursday 25 May



Referral Authorities
and the Victorian
Planning System
Tuesday 6 June

Managing
Volunteers and Grants
Thursday 8 June

The Law governing
Works on Roads
Thursday 15 June

Property Law
for Statutory and Strategic
Planners
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