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The Road to Reform

Seven Tasks for Victoria's Law Makers

Reform of the *Local Government Act 1989* is back on the Parliamentary agenda. Assuming the Bill passes the upper house, we will soon have a *Local Government Act 2019*. But it won't immediately replace the entire 1989 Act. During the years 2020 and 2021 we will have two Local Government Acts, operating in tandem.

At the end of this process, the transition to the new Act will still be incomplete. Certain remnants of the 1989 Act, including those parts relating to roads, will continue to hang on – but not indefinitely.

This month's lead article has grown out of our very successful workshop 'Roads - Recent Twists in the Legal Roadmap' held at Russell Kennedy, Lawyers, earlier in November. Our thanks to the speakers, and to all the 130 participants.

Although it hasn't been broadcast, we can expect the 'roads' portions of the LG Act to be reviewed and reformed, sooner or later. It could make sense for them to be transferred across into the *Road Management Act 2004*. One way or another, we are surely heading towards a pretty fundamental rethink of statutory law as it relates to municipal roads.

1. Let's Figure out what a 'Road' is…

Of the several statutory definitions of 'road,' the LG Act 2018 definition is the least comprehensible. *Road includes street*, it commences. What about crescents and avenues? Read on: *and passages, and fords, and nature strips, and culverts*… What!? This list is a mere agglomeration of words and phrases collected over a hundred years. Its failure to reflect sound policy came to light in the current *Mayberry*[1] case, when the court was called on to unpack one phrase on the list '*right of way*.'

A tempting response to this deficiency might be to simply adopt the definition of 'road' found in the *Road Management Act 2004*. Trouble is, the RM Act definition has its own deficiencies: firstly, it is inclusive rather than comprehensive; secondly it treats physical roadways on Crown land as if they were road reserves, and thirdly, amongst its inclusions we find the phrase *public highway*. The first two deficiencies are unnecessary and remediable; the third deficiency is more challenging – it invites the transfer of *public highway* out of the common law and into statute.

Our first task for the State's politico-legal apparatus (whoever that may be, we're not sure) is thus: give us a workable definition of the word 'road.'

2. Let's redefine 'Public Highway'

The concept of the *public highway* is more than necessary, it is essential. It refers to land over which anybody is entitled to come and go, as of right. The problem is the somewhat obscure manner in which some (not all) roads become public highways: through the common law *doctrine of dedication and acceptance*. This doctrine no longer serves useful public policy ends.

Over recent years several important legal precepts have been shifted from common law into statutory law. The best known is Native Title – recognised initially by the High Court, but transferred into statute by the Keating and then the Howard governments. Of more relevance to roads we find the *Brodie* decision, in which the High Court redefined the common law governing road authorities' duty of care. The various States enacted statutory responses – Victoria's response being the *Road Management Act 2004*.

'Public highway' as a common law concept was central to the recent *Anderson*[2] case. The court concluded that the laneway in dispute was a *public highway* because it had long been open to and used by the public '*without force, without secrecy and without permission*.' As in the earlier *Calabro*[3] case, this finding had serious repercussions. In Calabro the finding caused the land to 'vest in fee simple' in the relevant Council, whether the Council knew it

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or not. It thereby undermined the principle of indefeasibility of Torrens title. As the Judge pithily remarked '*I do not wish to suggest that this is a satisfactory situation.*'

Our second task for the politico-legal apparatus is: redefine 'public highway' in terms which put it beyond dispute, and which reassure us that we can go about our day-to-day business without trespassing.

While we're at it, some thought could be given here to whether an 'unused' government road should be a public highway[4]. At present it is, but we suspect the farming community may have other views.

3. Let's restore *Indefeasibility*

Sir Robert Richard Torrens is remembered for a pond which Adelaide calls a river, but more importantly for the land title systems operating in many parts of the world, including Victoria. Here the *Transfer of Land Act 1958* establishes title by registration, guaranteed through indefeasibility[5]. This is the system whereby registration of title is deemed to provide a definitive account of land ownership, and whereby the registered proprietor is immune from contrary claims. Trouble is, there are exceptions.

Amongst those exceptions is a provision of the RM Act[6] causing public highways to 'vest in' the relevant Council. Before 2004, this provision was found in the Local Government Act[7].

The end result of this arrangement is that perfectly honest citizens proceed to use, develop, or even buy and sell roads. Their mistake? Believing their title documents. But that's not all: utilities, uncertain about the ownership of such roads, and therefore uncertain about rights in the nature of easements, will refuse to connect services along them.

Traralgon landowner Gino Tripodi has vowed to fight any decision made to declare that a lane on his property is a public highway.

***Latrobe Valley Express**, Nov 2013*

While we're at it, indefeasibility should surely also apply to rights in the form of abuttals. If a title shows that land abuts a road, then that right should be legally protected.

Task number three for the Law-Makers: Restore confidence in the Torrens system by (a) causing title documents for roads to show the correct proprietor, and (b) giving a degree of credibility to title documents which show road abuttals.

4. Let's de-cryptify '*Vests In*'

Hand in hand with deleting wrong names from title documents, we need to put the correct names onto those title documents. This brings us to the confusing phrase 'vests in'. It's a phrase which has been used in many Acts over the years, and it more-or-less means 'is owned by.' When it comes to land, 'vests in' often means 'has control and management of' without attributing beneficial ownership – although we may find 'vests in fee simple' which surely means 'is actually owned by.'

So task number four is – find phrases which clearly enunciate Councils' different roles. Let's clarify the fact that they have beneficial ownership of the land in freehold roads, they have control and management of the land in Crown land ('government') roads, and they have ownership of the materials and infrastructure in both types of road.

5. Let's keep the Power On

Road reserves have always served purposes other than the passage of vehicles. They have always been quasi-easements in favour of utilities. For most of history this was simply assumed, and not recorded on title or codified in statute. These days however, privatised utility companies want unequivocal confirmation of their rights.

In the case of new subdivisional roads (post 1991) such rights have been granted through section 12(3B) of the *Subdivision Act 1988*. In the case of government roads, such rights have been granted through Orders in Council made under section 138A(11) of the *Land Act 1958*. That leaves old (pre-1991) subdivisional roads.

To pursue this line of thinking, we need to recognise two different types of easement. A 'carriageway easement' is a strip of land owned by one party, over which some other land has rights of passage. An easement 'in gross' is land over which some utility has rights of usage, for its particular purposes.

It is well established that private rights of carriageway cannot (and need not) co-exist with a public highway – but it is essential that utility easements-in-gross are recognised to exist in roads, subject to all the planning and works consents which would normally apply. In the case of pre 1991 freehold roads, this is not the case: we have seen $100+ million developments where six-month long change-of-title processes were necessary before a power utility agreed to connect the electricity.

Task five is therefore: Find a way of reassuring utilities that they have rights in the nature of easements over all road reserves.

6. Let's rethink Discontinuations

While we have the ear of the Stare's politico-legal apparatus, let's revisit a problem which *Terra Publica* has been going on about for years[8]: the

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inconsistent statutory processes for discontinuing roads. On the statute book we currently find at least four Acts providing for doing away with roads – a process for which they can't even agree on a name.

Black Saturday victims Robert Dove and family – their farm and home rendered practically inaccessible by a road closure.

Weekly Times, *Nov 2011.*

The *Land Act 1958* and the *Planning and Environment Act 1987* call it road 'closure.' The *Local Government Act 1989* and the *Road Management Act 2004* call it road 'discontinuation.' And that's just the start of the inconsistencies.

The most serious inconsistency relates to public inputs. The Land Act gives abutting owners a power of veto, but other members of the public have no say whatsoever. The Local Government Act invokes the section 223 process, but gives abutting owners no particular say. The Planning and Environment Act invokes the full apparatus of the Planning Scheme Amendment.

The Planning and Environment Act alone recognises that loss of a road abuttal can devalue a property, in which case it allows compensation to be claimed.

Task number six: develop reasonable, equitable public policy around the process of doing away with roads. Let's start by adopting an agreed name for it!

7. Let's rethink Public Rights

In a recent *Terra Publica* we noted that under the *Domestic Animals Act 1994* you can appeal against Council's decision that your dog is dangerous. Under the *Racing Act 1958* you can appeal against Racing Victoria's refusal to licence you as a jockey. Under the *Cemeteries and Crematoria Act 2003* you can appeal against a Cemetery Trust which declines to bury you. But as for road-related decisions?

More than any other type of public land, roads are the domain of the public at large. You'd perhaps think that public rights would be paramount in road-related decisions – but not so. The only provisions of the *Road Management Act 2004* leading to VCAT are those relating to 'controlled access roads' – provisions which reinforce our concerns about abuttals, but which have never been used in 15 years. (Ah yes, there's another task for Law-Makers: have another think about controlled access.)

We note that the new Local Government Bill/Act offers many points of referral to VCAT – but they all relate to such things as councillor integrity, electoral fraud, and corruption. That may well keep VCAT busy, but there's no avenue of appeal for the poor ratepayer who objects to the back lane being omitted from the road management plan.

We see the new Bill/Act has a whole slab dealing with 'community accountability.' Here are 'good practice guidelines' and 'public transparency principles.' Perhaps these will protect the public interest – for now, let's give them the benefit of the doubt.

Task number seven for the Law-Makers (perhaps in a year or two): take a fresh look at what is appealable to VCAT, what's not appealable to VCAT, and what should be. ■

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[1] Mayberry v Mornington Peninsula Shire Council, Supreme Court of Victoria, Sept 2019
[2] Anderson v Stonnington City Council, VSCA, Sept 2017.
[3] Calabro v Bayside City Council, VSC, Dec 1999
[4] Fenelon v Dove, VSCA, July 2010
[5] Section 42, *Transfer of Land Act 1958*. See also *Calabro*, para 52.
[6] Clause 1(4), Schedule 5, *Road Management Act 2004*
[7] Sec 203(1), *Local Government Act 1989*, as it read from 1993 until 2004
[8] See for instance *Terra Publica*, Vol 11 No 1, February 2011

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