

“It was the Road’s fault, your Honour”

In 2001 the High Court threw out the ‘nonfeasance’ defence.

Until the *Brodie* case, common law had differentiated between injuries caused by a road authority’s actions, and injuries caused by its inactions. A council could be held liable for a hole it had dug in the road, but not for another hole which it had merely failed to fill in. With non-feasance overturned, Victoria redefined a road authority’s duty of care through the *Road Management Act 2004*.

Public land, including roads, is territory where bad things happen. We have been horrified by some of the Coroner’s reports we’ve been reading lately. Here’s the dilemma faced by land managers: should we be anticipating disasters, taking action to prevent disasters, or just resigned to the fact that disasters are going to happen?

Death ‘L’ happened in Gariwerd National Park. Ms L climbed over a fence at a popular lookout, slipped and fell to her death. The Coroner recommended that Parks Victoria

install additional signage (which it has done), but noted that *‘adventurers and park attendees may continue to climb fences to access lookouts in order to get a photo or for their own curiosity.’*

Death ‘S’ involved no suggestion of contributory negligence. Ms S was simply walking through a Crown land reserve in Templestowe. A tree fell on her – and with it a hive of angry bees. The poor woman died of multiple injuries and bee-sting poisoning.

In this case the Coroner had some pertinent observations about Manningham Council’s management of the reserve – stemming from a reading of section 15(1) of the *Crown Land (Reserves) Act 1978*. This provision sets out a Committee of Management’s *powers*, which it does not explicitly describe as *duties*.

Nevertheless, the Coroner found that *‘death may have been prevented if the Council had actively engaged in discharging its statutory obligations to maintain the area where the incident occurred as envisaged by 15(1).’*

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Boroka Lookout, Gariwerd National Park

Does a land manager’s duty of care extend to the protection of fools and idiots?

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Authorised Officer training for Department of Transport and Planning

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Can one parcel of Crown land have two statuses, simultaneously?

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Our Calendar of Professional Development courses, November-December, 2023



Lorne foreshore –
new fencing along the
fatal embankment

The Road's fault... – continued

Manningham, to its credit, did not argue about the distinction between powers, functions and duties, but informed the Coroner that it had already taken steps to reform its public land management systems.

It would identify and assign responsibility of areas of Crown Land under its control. It would adopt reactive and proactive routine inspections of those areas. It would implement risk reduction options or strategies, including the removal of trees which posed an unacceptable risk. In short, it was transposing road risk-management systems onto Crown reserves.

Death 'G' was different from the others in that it went from the Coroner's court to the Supreme Court of Victoria, and from there to the Court of Appeal. In 2003 Ms G suffered a fatal fall down an embankment in the Lorne foreshore reserve, and her family were suing the Committee of Management. The Courts considered the Committee's duty of care: was the risk *obvious*, and was the Committee's response *reasonable*.

The Court of Appeal summarised the test: *'What is required ... is an assessment of all the circumstances including the likelihood of death or injury and the cost and practicality of any possible response.'*

Having set out the test, it then judged the Committee to have failed it: *'the Committee's failure to take any steps was unreasonable and constituted a breach of duty.'*

Death 'G' occurred in February 2003. In December of the same year Parliament amended the *Wrongs Act 1958*, addressing the liability of public authorities. The 'cost and practicality' of risk-reduction measures is now codified in section 83 *Principles concerning resources, responsibilities etc. of public authorities*.

Does all this make life any easier for public land managers? On the contrary: risk management has, frankly, moved higher up the list of matters on the agenda.

As for Ms L, Ms S and Ms G, we can only offer our deepest sympathies. And note that their cases helped refocus us from the days when we could argue *'It was the road's (or mountain's, or tree's, or embankment's) fault, your Honour.'* ♦

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. If required, we can obtain formal legal advice from one of its legal associates.

Lunchtime Conversations

On the Second Tuesday of each month, 12 noon to 12:45 pm
Topics: anything public land related – from Back Lanes to Mountain Cattlemen

To enrol for the next Conversation [click here](#)

Q Can one parcel of Crown land have two governance regimes simultaneously?

A Question asked by the CEO of a Committee of Management

Surprisingly, the answer is YES.

Surely that should not be the case: one parcel should have one legal status, and one unambiguous governance regime. Yes, there may be chains of accountability: a sub-tenant answers to a head tenant who answers to a delegated manager who answers to the representative of the Crown itself. Complex maybe, but not confused.

But now and then we find one parcel of land which has two statuses – two governance regimes simultaneously. Here we are talking about Crown land reserves which are simultaneously Government road reserves.

Way back then, tracts of Crown land were permanently reserved ‘for public purposes.’ Here we are talking about river frontages, coastlines, and some forests. The said public purposes were unspecified, but included rights to come and go, rights of access to and from abutting properties.

The time came when these ‘public highway’ rights needed to be formalised. A strip of land was proclaimed to be a government road reserve – but the underlying public purposes reserve was not revoked.

The road reserve has a Coordinating Road Authority (CRA) and the Crown reserve has a Committee of Management (CoM). In some places this dual status is not a problem, because the CRA and the CoM are one and the same – namely the local municipality.

But in the case which gave rise to this question, they are two separate entities. The CRA has responsibility for the road reserve, and the CoM has responsibility for the Crown reserve. Trouble is, the road reserve and the Crown land reserve are one and the same. One parcel of land has two governance regimes, simultaneously.

Our advice: Come to a mutually acceptable agreement. Build a good relationship with each other! ♦

Offences and Enforcement on Roads



Department of Transport and Planning

We are pleased to have been engaged by the Department of Transport and Planning to deliver 6-hour training courses for their entire Incident Response and Surveillance teams.

Session One *Roads as seen by Legislators*

David Gabriel-Jones
The Public Land Consultancy

- *What is (and what's not) a Road*
- *Roads: Control and Management*
- *Acts relating to Accidents*
- *The Law and Roadworks*

Session Two *Infringements and Enforcement*

Colin Almond
HWL Ebsworth Lawyers

- *Enforcement and Prosecutions*
- *Enforcement Officers*
- *Enforcement Systems*
- *Exercising Discretion*

Road Management Act 2004
'A person must not be appointed as an authorised officer under this section unless the person has completed appropriate training or qualifications as determined by the Secretary or by the relevant road authority making the appointment.'

Professional Development, Nov-Dec 2023

*NOTE: some presentations are 3 sessions, each of 2 hours duration;
others are 2 sessions, each of 3 hours duration*





	<p>Land Law and Subdivisions <i>Presenter: Mark Bartley</i></p>	<p>Tues 21 Nov, 10am – 1pm Wed 22 Nov, 10am – 1pm</p>
	<p>Roads Governance <i>Presenter: David Gabriel-Jones</i></p>	<p>Tues 27 Nov, 10am – 12pm Wed 28 Nov, 10am – 12pm Thurs 29 Nov, 10am – 12pm</p>
	<p>Leases and Licences of Public Land <i>Presenter: Richard O'Byrne</i></p>	<p>Tues 28 Nov, 10am – 12pm Wed 29 Nov, 10am – 12pm Thurs 30 Nov, 10am – 12pm</p>
	<p>Restrictions on Title <i>Presenter: Nick Sissons</i></p>	<p>Tues 5 Dec, 10am – 1pm Wed 6 Dec, 10am – 1pm</p>
	<p>Crown Land Governance <i>Presenter: David Gabriel-Jones</i></p>	<p>Tues 12 Dec, 10am – 12pm Wed 13 Dec, 10am – 12pm Thurs 14 Dec, 10am – 12pm</p>
	<p>Native Title and Aboriginal Heritage <i>Presenter: Henry Dow</i></p>	<p>Tues 12 Dec, 10am – 1pm Wed 13 Dec, 10am – 1pm</p>

Cost:
\$495 including GST,
course notes and certificate
of attendance

Accreditation:
These courses are eligible for
CPD points for lawyers, planners,
valuers, and FPET for surveyors.

Enquiries and Registrations:
Fiona Sellars
(03) 9534 5128
fiona@publicland.com.au

More courses we will schedule for 2024

			
Land Information and its Interpretation	Statutory Approvals on Public Land	Offences and Enforcement	Working with Owners Corporations

Enquiries and Registrations: Fiona Sellars (03) 9534 5128 fiona@publicland.com.au

*The Public Land Consultancy acknowledges that our core work relates to the lands of
Victoria's Traditional Owners. We promote recognition of Indigenous rights through
study, policy and the law.*