

ALL STAND! *This court is now in session*

Our next Lunchtime Conversation will be on the subject of court judgements. Some twenty of them – all with implications for public land governance.

Is public land governed by parliaments, the public service, or the courts? It is said that the legislature makes laws, the executive enforces laws, and the judiciary interprets laws. Well, that's more-or-less true, but a bit of an over-simplification.

If we look at a string of court cases relating to public land, we find a triangular interaction between parliament, the bureaucracy and the courts.

For example - in *Melville*, the court applied the law, although the case 'reeked of artificiality.' The bureaucracy prompted parliament to amend adverse possession law, and so Council land is now protected from theft. In the *Richmond Abattoir* case, the Supreme Court undermined the Lands Department, which immediately prompted the legislature to overturn the decision, thereby entrenching the archaic system of sacrosanct 'permanent' Crown reserves.

In *Calabro*, the court bemoaned certain statutory deficiencies, the legislature failed to take any notice, and the bureaucracy (local government, that is, not state government) has suffered the consequences for 25 years.

Moving across to common law, we find the High Court making fundamental changes which leave the legislature no alternative but to rewrite statutory law. Here we include the *Mabo* case, which prompted the Native Title Act, and *Brodie*, which prompted the Victorian Road Management Act.

The *Brodie* case reminds us of a further complexity: the federal and state hierarchy. Victoria (nor any State) cannot unilaterally bypass the Commonwealth.

The *Yorta Yorta* decision in the Federal Court decision was so disastrous that State Parliament gave us the Traditional Owner Settlement Act. But it falls to traditional owners themselves to relinquish their rights under the Commonwealth Act in favour of a Settlement Agreement under the State Act. Across Victoria, various TO groups are well advanced down that track.

There is still plenty scope for interaction around the courts-bureaucracy-legislature triangle. Join our Lunchtime Conversation – we would welcome your inputs. ■

Joh knew all about it...



Now Don't You Worry About That

Michael Forde (Counsel examining):-

What do you understand by the doctrine of the separation of powers under the Westminster system?

Sir Joh Bjelke Petersen:- *No, I don't quite know what you're driving at... I believe in it very strongly, and despite what you may say... Between the Government and the – Is it? ... Well you tell me! And I'll tell you whether you're right or not. Don't you know?*

*PAGE 2 Arising from
our last Lunchtime
Conversation*

*PAGE 3 Case Law –
Looking forward to our next
Lunchtime Conversation*

*PAGE 4 Forthcoming
presentations of training
courses*

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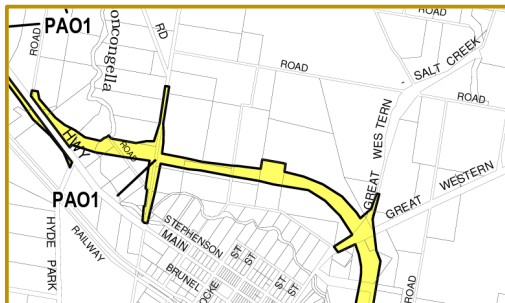
Q Can land status be changed through planning schemes?

A *A question arising in a recent Lunchtime Conversation*

Our first answer is NO. A planning scheme *allows* changes to occur, or *prevents* changes from occurring, but does not *cause* anything to happen.

And what are those changes? Planning schemes have to do with the use of land, or the development of land, NOT the actual legal status of the land. All the apparatus of the planning scheme cannot cause Crown land to become freehold, or State Forest to become National Park, or a road reserve to become a railway.

If we want to make such a change, it may well be accompanied by some planning scheme amendment, but it must be caused by some other processes.



What about the PAO? That's the Public Acquisition Overlay – often in the form of a yellow splash painted across the landscape. Well, the PAO flags some agency's intention to acquire that land, whereupon that agency may (or may not) change its legal status through some other process. The PAO certainly devalues the land, but does not, of itself, change its ownership, let alone its legal status.

Our second answer: Yes, a planning scheme may change land status, through the Road Closure Overlay (RXO). Curious. At the moment the relevant amendment is published, the road ceases to be a road, and the RXO becomes redundant. Curious indeed. ■

Some court cases we will be looking at in our next Lunchtime Conversation...

Ward v State of Victoria – High Court of Australia – How a murder redefined the location of the Vic/NSW State border

Director of Public Prosecutions (DPP) v VicRoads and Downer – Supreme Court of Victoria Court of Appeal – confirmed that roads are indeed workplaces, and you can't hide behind your sub-contractors.

Gosling v Lorne Foreshore Committee of Management – Supreme Court of Victoria – a CoM has a duty of care to the public, even to people careless of their own safety.

Fenelon v Dove – Supreme Court of Victoria Court of Appeal – an Unused Road held under grazing licence is still a public highway.

First People of the Millewa Mallee v State of Victoria – Federal Court – Here's how native title claims should be handled – as against the disastrous Yorta Yorta determination.

VicRoads v Pearce, and Bottos v CityLink – both Supreme Court of Victoria – abutting owners can't adversely possess road reserves, but road authorities can adversely possess abutting freehold !

Monash v Melville - Supreme Court of Victoria – How public land could be stolen from a Council – before the *Limitation of Actions Act* was amended to protect it.

The Richmond Abattoir case – which leads us to conclude that dozens of Crown land leases are in fact illegal...

Lunchtime Conversation
Tuesday 11 November 2025
12 noon to 1:00 pm
[Click here to book in](#)

Roads – A Compendium of Case Law

We are firmly of the belief that road governance should be framed by policy makers, not by the courts – nevertheless, the two perspectives often go hand in hand. The courts provide insights and interpretations of the law, to which policy makers sometimes respond, but sometimes don't...

Brodie v Singleton Shire Council High Court, 2001	The common law of 'Non-Feasance' is dumped. Negligence applies to road authorities.
Bass Coast v King VSCA 1998	All government roads are public highways – without requiring 'acceptance' by the public.
Johnson v Shire of Moyne SCV 2012	The process for revocation of an Unused Road licence.
Pulitano v Mansfield, SCV, 2017	The process for discontinuing a road
Fenelon v Dove VSCA 2010	An unused government road is still a public highway
Calabro v Bayside SCV 1999	Indefeasibility of title is overturned. For older road reserves, title documents cannot be believed.
Alesios Fishing P/L v Geelong VCAT Preliminary matter 2022	Reconfirming the <i>Calabro</i> decision. One of the big-four banks sold land it did not own.
DPP v VicRoads and Downer County Court with referrals to VSCA 2017	Roads are workplaces, and therefore subject to the OH&S Act. A head contractor cannot divest responsibility to a sub-contractor.
Mayberry v Mornington Peninsula SCV 2019	Dedication and acceptance may apply only to the trafficked portion of a road reserve, not necessarily to the full width (!!)
Anderson v Stonnington VSCA 2020	An abutting owner cannot close a back lane, even if 248 acts of nuisance have been committed on it
Kennedy v Shire of Campaspe VSCA 2015	Non-Compliance with a Road Management Plan can expose a Council to negligence actions.
Clarke v Shepparton VSCA 2017	Council acting as infrastructure manager is different from Council acting as road manager
Roads Corporation v Pearse, SCV 2012.	An abutting landowner can not adversely possess VicRoads freehold...
Bottos v CityLink SCV 2021	... however, a road authority can adversely possess abutting private land.
Peninsula Blue v Frankston VCAT 2015	Approvals for access to an Arterial Road

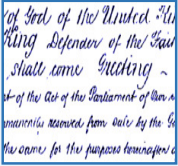
Readers of *Terra Publica* should not act on the basis of its contents which are not legal advice, are of a general nature, capable of misinterpretation and not applicable in inappropriate cases. If required, we can obtain formal legal advice from one of our legal associates.

 Native Title and Aboriginal Heritage On Country <i>We can run this course for you, in collaboration with your Traditional Owner group</i>	Roads Governance Wangaratta Gateway Inn Tues 2 December 9 am – 4pm <i>Special presentation for municipalities in the North-East</i>	FPET <i>Further Professional Education and Training for Surveyors:</i> Score 6 FPET points • Restrictions on Title 28 and 29 Oct • Property Law and Planning 11 and 12 Oct • Working with Owners Corporations 18 and 19 Nov
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Professional Development, Oct-Dec 2025

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



	Restrictions on Title 28 & 29 October Places available		Roads Governance Online presentation 5-7 November Places available
	Property Law and Planning 11 & 12 November Places available		Roads Governance North-East special Gateway Inn Wangaratta Tues 2 December 9 am – 4pm
	Coastal Land Management 25 – 27 November Places available		Working with Owners Corporations 18 & 19 November Places available
	Crown Land Governance 9-11 December Places available		Native Title and Aboriginal Heritage 9 & 10 December Places available

*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*