



It's a courtroom term used by a barrister in reference to another barrister. Possibly with a hint of sarcasm: *'My learned friend is misinformed on this matter and is leading the court up the garden path.'*

In this edition we take a look at legal cases where the phrase might well have been used. They include some cases which went to court, so all the details are on the public record, other cases which went to court, but we won't embarrass the learned friends in question by identifying them, and various cases so clear-cut they don't need to go to court. Surely.

**Here's a parcel of Crown land which once used to be a road reserve, but is no longer. The road had been discontinued. Here's an abutting owner who walked up and down the ex-road. He was charged by the police with trespass. The lawyer who instructed the police informed the magistrate that the road had previously been, but no longer was, a public highway. Therefore (somehow) it was an offence to walk on it.**

"I'm not interested in what the land status *used to be*," said the magistrate, "Please tell me what the land status *actually was* at the time of the alleged offence." Well, it was unalienated and unreserved Crown land, wasn't it? "Good, now tell me what offence a member of the public is committing by being on such land."

At this point the police prosecutor realised that she had been misled by the instructing lawyer, abandoned the case and walked out of the court. "Not wasting police time on this rubbish." We wonder what transpired later between the police and the instructing lawyer.

**End result:** the instructing lawyer learned (we hope) that you and I can legally walk back and forth on unalienated and unreserved Crown land. The police prosecutor learned not to take at face value future instructions from that particular lawyer.



**Here's a couple who had recently purchased a nice peri-urban smallholding. Looking at their title and the section 32 statement they realised that a fair slab of the bottom paddock, enclosed within the property's fence line, was designated 'government road.' Their lawyer assured them that this was of little or no concern: a mere 'encumbrance on their title' or perhaps an 'abandoned easement.'**

But then along came the local council, requiring removal of the obstructing fences and buildings. The lawyer cried 'shock horror' and demanded that the council take measures to have the road 'removed from my clients' title.' Oh dear, what can we say? Correspondence followed!

**End result:** the lawyer learned (we hope) the difference between freehold land and Crown land. There may be an option for the couple to purchase the road reserve, at full market value, from the Crown, but otherwise what we had could only be described as an unauthorised encroachment restricting passage and thus constituting a nuisance at common law.

*Continued...*

Pages 2 and 3  
*A few more cases from the Supreme Court and VCAT*

Page 3 **Workshop:**  
**Valuing Public Land**  
In collaboration with Matheson  
Stephen Valuations

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*Our schedule of forthcoming training course presentations*

*My Learned Friend (continued)*

**Next – here’s a farmer whose freehold paddock went right down to the edge of the riverbank. A neighbour built an electric fence on it, in the mistaken belief that the frontage was Crown land over which he (the neighbour) held a grazing licence.**



The farmer demolished the fence. The local magistrate accepted the prosecutor’s case, and the farmer was convicted of criminal damage. Six months later he was exonerated by the Supreme Court in Melbourne.

**End result:** the local magistrate and the prosecution lawyer learned (we hope) that not all riparian frontages are Crown land. Perhaps they should be, but that’s another matter.

**And here’s** a landowner looking to subdivide a large freehold block, and collect quite a few dollars. The subdivision would require internal roads to be set aside and constructed, at the landowner’s expense (as is normal). But one of those internal roads had already been constructed by the local council, with the landowner’s consent, at ratepayers’ expense.

**The landowner’s lawyer persuaded him to demand that the local council purchase the land on which that internal road had been constructed.** Not only would the cost of construction be transferred from the developer to the ratepayers, but also the cost of providing the land constituting the road reserve.

**Our response:** this learned friend is really trying it on! If the proposed subdivision proceeds it will, in due course, simply cause this road to vest in the council free of charge. In fact, it could be argued that it has already become a public highway through dedication and acceptance, and is therefore already owned by the council, regardless of what the title says.

**Finally,** here’s a lawyer who, on behalf of a client, trotted out Google maps as evidence that some land was, or was not, a road. Should have read the judgement in the *Calabro* case, where the plaintiff’s lawyer “*relied heavily on the absence of any indication of the subject land as a road in the Melway Street Directory. It is no criticism of the usefulness of that publication to say that no statutory or other provision was drawn to (the court’s) attention which would give it the force of law.*” Very true.

Google earth, Google street-view and Google maps are extremely useful tools (thank you, Google) but no, my learned friend, don’t expect them to stand up as evidence in the courtroom. ♦

**Often, litigation is a waste of time and money.**

The court is simply restating some well-settled interpretation of the law. The dispute should have been resolved much earlier.

But at other times court cases serve to illuminate the law – for better or for worse. The [Ward](#) case informed us that Victoria has no jurisdiction over the southern bank of the River Murray. [Mayberry](#) opened up the frightening possibility that only part of a road reserve might be open to the public.

**Such cases are, in our opinion, an invitation for government to rethink the corresponding area of law.**

*And here’s another recent one that invites a policy examination...*

**Adverse possession** is the common law proposition that ownership of land may be changed through 15 years’ unauthorised occupation.

In Victoria, there is no adverse possession against the Crown – but it seems the Crown can adversely possess private freehold.

In the case [Bottos v CityLink](#) the Supreme Court found that if noise walls encroached over the road boundary, the land changed ownership.

Oh boy, what precedents might this set?

## Q & A

### If we use 24A, will we be challenged?

*Question raised in the course of consultancy work for a rural municipality*

#### **Answer: Yes, very probably!**

That's the essence of section 24A of the *Subdivision Act 1988*.

It's a provision which enables a council to change land status and land ownership (of certain freehold land, that is, not Crown land) and therefore is highly likely to attract objections and dissent.

And that's why the use of 24A must be authorised by a planning scheme or a planning permit. The public at large gets an opportunity to have their say, and council's decision is subject to review by a planning panel or VCAT.

#### **Having said that, recent case law tends to support the use of 24A.**

In *Sayonara v East Gippsland*, VCAT approved a proposal to change ownership of a pre-1988 reserve from its original owner to the Council, without compensation, but to leave the land designated as a reserve.

In *Hughes v Ballarat*, VCAT approved Council's proposal to (a) bring a pre-1988 reserve into its own name, and (b) revoke the reserve status – thereby causing the land to become ordinary freehold land which Council could then on-sell.

So – Yes, your decisions and policies are open challenge, as is right and proper, but you might wish to bring precedents like these to the attention of objectors (and their lawyers). ♦



### On-line Workshop 30th August 2022

## The Value of Public Land

Public land has two distinct sets of values.

Firstly, it has *amenity* value. It provides some social or civic benefit.

Secondly, it has *monetary* value. Land is a commodity with a dollar value.

*There are times when the two sets of values intersect...*

This workshop will explore these questions, in the context of public land law, the accounting standards, and expectations of responsible governance.

#### **Workshop facilitators:**

- David Gabriel-Jones, Principal, The Public Land Consultancy
- Briony Stephen and Tessa Leigh-Lancaster, Certified Practicing Valuers, Matheson Stephen Valuations

**Date and Time:** Tuesday 30<sup>th</sup> August 2022 from 1:00pm to 4:00pm

**Cost:** \$250 per registrant, plus GST.

#### **Bookings and Enquiries:**

Fiona Sellars (03)9534 5128,  
[fiona@publicland.com.au](mailto: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.*

## Training Courses, July-August 2022

NOTE: some courses are three sessions, each of 2 hours duration;  
others are 2 sessions, each of 3 hours duration.

	<b>Crown Land Governance</b> <i>Presenter: David Gabriel-Jones</i>	Tues 19 July, 10am – 12pm Wed 20 July, 10am – 12pm Thurs 21 July, 10am – 12pm <b>Sorry, Course Full</b>
	<b>Crown Land Governance</b> <i>Presenter: David Gabriel-Jones</i>	Tues 26 July, 10am – 12pm Wed 27 July, 10am – 12pm Thurs 28 July, 10am – 12pm
	<b>Roads Governance</b> <i>Presenter: David Gabriel-Jones</i>	Tues 2 Aug, 10am – 12pm Wed 3 Aug, 10am – 12pm Thurs 4 Aug, 10am – 12pm
	<b>Referral Authorities and the Victorian Planning System</b> <i>Presenter: Mark Bartley</i>	Tues 9 Aug, 10.30am – 1.30pm Wed 10 Aug, 10.30 am – 1.30pm
	<b>Crown Land Governance</b> <i>Presenter: David Gabriel-Jones</i>	Tues 16 Aug, 10am – 12pm Wed 17 Aug, 10am – 12pm Thurs 18 Aug, 10am – 12pm
	<b>Working with Owners Corporations</b> <i>Presenter: Tim Graham</i>	Tues 23 Aug, 10am – 12pm Wed 24 Aug, 10am – 12pm Thurs 25 Aug, 10am – 12pm
	<b>Native Title and Aboriginal Heritage</b> <i>Presenter: Anoushka Lenffer</i>	Wed 24 Aug, 10am – 1pm Wed 31 Aug, 10am – 1pm
	<b>Restrictions on Title</b> <i>Presenter: Nick Sissons</i>	Tues 6 Sept, 10am – 1pm Wed 7 Sept, 10am – 1pm

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

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

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

*All these courses can be presented in your own offices.  
Discounts for host organisations*

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to some  
recent  
clients

