

URGENT - ROAD ALERT

~ ACQUISITION WITHOUT COMPENSATION~

Public acquisition of private land requires payment of compensation.

Certain private roads can be an exception.

Kellehers Australia is finding that an intricate linkage of old and new legislation exposes private land owners to real risk of land being taken into Council ownership.

Some are then asked by Council to buy back their own land!

It works like this:

A “public highway” vests in a Council.
[Local Government Act 1989]

“Road” is defined so widely that it includes private rights of way, passageways, bicycle tracks and pedestrian paths. [Local Government Act 1989]

These are the key spokes of the legal umbrella.

Two traps can then exist – one old, one new

Old Trap

Council declares the “road” discontinued. Upon discontinuance, Council is entitled to become the registered proprietor of the road land. Any registered right of way is extinguished. Then Council can sell the land to anyone for any price.

Yes, it can give away the land free of charge to someone other than the registered proprietor but pay the owner nothing. It can sell to one adjoining owner and exclude another.

It can invite the registered proprietor to buy back its own land!

New Trap Road Management Act 2004

This new Act requires all Victorian Councils to approve a Road Management Plan for the municipality by early next year.

The Road Management Plan system arises from a 2001 High Court decision that road authority liability extends beyond misfeasance (negligence in some action taken) to nonfeasance (negligently failing to take required action). The Road Management Plan is said to provide a policy defence against civil liability claims associated with management of the road network.

However, what many Councils are actually doing is including private land, e.g. private rights of way, in their plans. Sometimes this is inadvertent, sometimes deliberate. Sometimes the land is shown as public land. Sometimes it is described as a private right of way.

The effect, however, is the same for the owner. Upon approval of a Road Management Plan, all roads listed within it are automatically deemed to be a public highway. Thus, by the stroke of a pen, they become Council property.

The only notification to owners usually is a Notice in the Public Notices section of the local newspaper advising of Council's intention to approve a Road Management Plan.

Many Councils are extremely reluctant to make copies of the Plan available conveniently. Inspection over the counter is usually possible, but sometimes only part of the Plan is made available and clients are quizzed as to why they need to see any more. Often they are given the benefit of the Council officer's personal view of their legal position.

One Council insisted that our office had been given the complete Plan, but had actually omitted the entire Roads Register. When finally obtained, it removed our clients' ownership!

~ WHY DOES IT MATTER? ~

Road congestion is a serious matter on existing major roads.

Often rights of way and small roads play important roles in aiding traffic circulation.

There can be significant commercial issues. Ease of access to many businesses is key to their viability. Facilitating access directly assists sales. Impeding or removing it, directly hinders sales. Also loss of backup access to residential properties can impact quality of life and land value.

With the Melbourne 2030 report, an Urban Growth Boundary is set to restrict urban sprawl. All major development must occur within the boundary. Responding to this, many Councils have already identified key areas in which development will be fast tracked. If the existing road network is sold off for short term financial or political gain, development opportunities may be hindered or rendered very costly. Ultimately,

the community may have to fund the repurchase of land for secondary accessways. Greater links between asset management and strategic planning departments of Councils therefore seem to be urgently required.

~ OUR WARNING ~

In situations where important backup access is being obtained to land via a right of way or a small private road, it is critical to check the status of the land in the Road Management Plan.

Do it now!

If private land is included, object immediately, even if the objection period has passed.

Where a right of way or laneway exists and could possibly be useful in the future, check the Plan. Similarly, where an old right of way is fenced into a property, the Road Management Act will override property rights for persons in long-time possession of the land. Again you should object to this.

~ VALIDITY ~

Kellehers Australia is of the view that inclusion of private land in a Road Management Plan is beyond Council's statutory powers, unless the land has already become a public highway.

Should certain Councils refuse to correct their Plans we anticipate initiating a legal challenge.

If you are aware of situations of this kind, it is most important to object – even if the time for objecting has already passed.

~ CAUTION ~

Roads Law is complex and difficult. Leonie Kelleher, accredited specialist and author of *The Roads Manual* may be able to assist.

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