

OH, MY EARS AND WHISKERS!



*'Then you should say what you mean,'
the March Hare went on.*

*'I do,' Alice hastily replied; 'at least - at
least I mean what I say - that's the same
thing, you know.'*

'Not the same thing a bit!' said the Hatter.

Do Acts of Parliament mean what they say? Or, indeed, say what they mean?

Mr Justice Nathan discussed these weighty questions in the 1992 Richmond Abattoir case, which touched on the meaning of *"permanently reserved land shall not be sold, leased or licensed ... and any purported sale shall be absolutely void"* – a phrase which appears in section 8 of the *Crown Land (Reserves) Act 1978*.

He found the words to be *"... unequivocal and peremptory. Unless words are to be laundered of all substance 'absolutely void' means totally and without exception. It would be difficult to conceive of an expression less free of doubt."*

And yet there was doubt, arising from some further words in the section – *"except as authorised by this or any other Act."* Justice Nathan ruled that the *Local Government Act 1989* was just such an authorising 'other Act,' and that therefore Richmond City Council could indeed sell the Crown land which had been used as an abattoir, despite its permanent reservation.

The Government had different ideas. It had until then been under the impression that only Parliament could authorise dealings with permanent reserves. It moved to make the words of section 8 say exactly what they had been intended to mean – that an authorising Act must *"expressly and not merely by implication"* allow dealings in reserved Crown land, and that **"any Act which authorises the sale, leasing or licensing of land, without expressly referring to Crown land or reserved land, must not be taken to authorise the sale, leasing or licensing..."** of reserved Crown land. And just to re-exert Parliament's authority, it made the amendment

retrospective. But at this point the plot gets curiously and curiously. No-one, it seems, checked on the repercussions of these new words.

There's plenty of reserved Crown land being managed by various statutory authorities under Acts other than the *Crown Land (Reserves) Act 1978*. And it's being leased and licensed – but are these dealings valid?

Councils by-and-large recognise that they can't use the *Local Government Act 1989* to (for instance) sell Crown land to recover unpaid rates under section 181, although they can sell Crown land acquired in the course of a road deviation under section 207B. But we have certainly seen Councils issue leases over Crown reserves which don't even purport to be made under the CL(R) Act and totally fail to comply with the requirements of that Act.

Many government schools occupy Crown reserves. The *Education Act 1958* contains powers to lease, licence and enter into agreements relating to land – which seem to conform to the strictures of the CL(R) Act. Section 68(3), for example, empowers the Minister for Education to lease or license any *"land of the Crown reserved for any educational purpose..."*

Continued - page 3

In This Edition

Oh, My Ears and Whiskers!	Page 1
<i>If words mean what they say, many leases of Crown land are null and void</i>	
Governments and Communities in Partnership	Page 2
<i>A Conference at Melbourne University will study Community Involvement in Land Management</i>	
The Race for 7C	Page 2
<i>The Government has discovered that public land needs protection from Adverse Possession</i>	
54 Seconds	Page 3
Native Vegetation versus 'Arrive Alive'	
<i>VCAT finds a pathway between the Roadside Trees</i>	
POLICY WORKSHOP: -	Page 4
Unused, Little Used and Discontinued Roads	
<i>A Forum for 1 November 2006</i>	
Our Forthcoming Courses	Page 5
<i>Our Professional Development Schedule for September-October-November 2006</i>	

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“GOVERNMENTS AND COMMUNITIES IN PARTNERSHIP”

A Conference at Melbourne University 25 – 27 September 2006

Below are extracts from the abstracts of two papers. For full details of the Conference, visit
www.public-policy.unimelb.edu.au/conference06/index.html



Community Partnerships on the Victorian Coast – Real or Imagined?

Barbara Norman
RMIT University

Community engagement and partnerships with government are a significant component involving coastcare initiatives, indigenous engagement, and community planning processes.

The purpose of this paper is to examine case studies to determine whether coastal community partnerships are giving effect to the principles of the Victorian Coastal Strategy. Case studies will include Point Nepean, the Gippsland Lakes and the Geelong region. These case studies explore different dimensions of the coastal challenges in Victoria and assess their potential to impact long term environmental protection through partnerships.

Conclusions are drawn regarding possible lessons for the Australian coast more widely.



Committees of Management as Government-Community Confluence

Arnaud Galois
PhD Candidate

In this paper I wish to give a taste of what this particular government-community confluence is like. I do this through close descriptions of four diverse examples of Crown land Committees of Management, from data collected from archives, interviews and observations.

I discuss these examples in light of the following questions:

- (a) How efficient do the committees appear in their role as managers of public resources?*
- (b) How much community engagement is present in the workings of these committees and the reserves they manage? and*
- (c) What level and type of government engagement exists between these committees and other arms of government?*

THE RACE FOR 7C

John Thwaites and Rob Hulls are engaged in a neck and neck race to protect public land from adverse possession. At this stage Rob Hulls appears to be winning.

On 20 July 2006, Minister Hulls introduced a Bill to protect common property created in plans of subdivision (sure, it's not really *public* land, but somewhere on the cusp between public and private land – perhaps we should call it semi-public land) The Bill is called the **Owners Corporation Bill**, and if passed will insert anew section **7C** into the *Limitation of Actions Act 1958*:-

7C. Adverse possession of common property

Despite any rule of law or provision made by or under this or any other Act but without limiting section 7, the right, title and interest of an owners corporation, or an owner of a lot affected by the owners corporation, in land which is common property affected by the owners corporation is not affected by reason only of any possession of that land adverse to the owners corporation or the lot owner by another owner of a lot affected by the owners corporation, irrespective of the period of that possession.

(By the way, an 'Owners Corporation' is the thing we used to call a Body Corporate.)

Not to be outdone, Minister Thwaites introduced another Bill on 10 August 2006 to protect Water Authority land. His Bill is called the **Water (Governance) Bill** and, if passed will also insert a new section **7C** into the *Limitation of Actions Act 1958*:-

7C. No title by adverse possession against water authorities etc.

Despite any rule of law or provision made by or under this or any other Act, but without limiting section 7, the right, title or interest—

- (a) of an Authority, within the meaning of the Water Act 1989; or
- (b) of the Melbourne Water Corporation under Part 6 the Melbourne Water Corporation Act 1992; or
- (c) of a licensee under Division 1 of Part 2 of the Water Industry Act 1994—

to or in any land is not affected by any possession of that land adverse to the Authority, Corporation or licensee (as the case requires) irrespective of the period of that possession.

Both Ministers are trying to catch up with their colleague Candy Broad, who inserted section **7B** back in 2004, and so protected some (but not all) Council land; and whoever was Minister for Transport way back in 1993, and inserted section **7A** to protect Railway land.

What's going on is the slow but sure transposition of adverse possession from the common law to statutory law – and its long overdue reform in the process. Modern society has no place for legalised theft of public land – and many cases of adverse possession are nothing less than that.

So, will there be two sections **7C** in the Limitation of Actions Act? We guess that the Office of the Chief Parliamentary Counsel will sort that one out. ■

54 Seconds

Native Vegetation versus Arrive Alive!

By Annette Jones, Solicitor
Environment Defenders Office (Vic)

The recent case of **VicRoads v Mount Alexander Shire Council [2006] VCAT 1430 (21 July 2006)** highlighted the tensions between two government policies. It involved an appeal against a decision of Mount Alexander Shire Council to refuse a permit for the removal of roadside trees on a section of the Pyrenees Highway.

For VicRoads, the case was about road safety, and the fact that the road concerned (between Elphinstone and Chewton) had a bad record for run-off-the-road accidents.

Council and local objectors questioned whether sufficient efforts had been made to avoid the removal of the trees in accordance with the Native Vegetation Framework. They submitted that other measures, such as reduction in speed limits, would decrease risk without the need to remove native trees.

The stretch of road concerned is 6 km long, and a speed reduction from 100 kph to 80 kph would add just 54 seconds to the trip. VicRoads argued, however, that the nature of the highway was such that it would be unrealistic to expect drivers to honour an 80 kph general speed limit.

VicRoads had originally applied to remove 136 live and 17 dead native trees as part of the *arrive alive!* road safety strategy. This number was considerably reduced by the time Council made its decision to refuse a permit for the removal of 63 live trees and 6 dead trees. VicRoads appealed the refusal to grant a permit to VCAT.

The Tribunal considered whether the risk of harm to motorists justified the removal of vegetation and whether the requirements of the Native Vegetation Framework had been satisfied.

The Tribunal expressed surprise that the State Policies section of the Planning Scheme contained no policies relating to road safety. The Tribunal also noted the lack of scientific evidence regarding whether priority should be given to reduced speeds versus implementing appropriate clear width zones.

Arguments based on the heritage value of the vegetation were given little weight, because Council had not included the area in a Heritage Overlay.

The appeal was granted in part with 50 trees permitted to be removed and 19 trees retained. These 19 trees were saved because they were on part of the road to be bypassed by a planned future realignment. ■

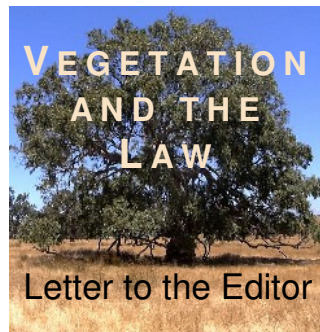
EARS AND WHISKERS... *cont from p.1*

Many hospitals occupy Crown reserves. They are managed by Boards which, according to section 31 of the *Health Services Act 1988*, are capable of 'purchasing, taking, holding, selling, leasing, taking on lease, exchanging and disposing of real and personal property' – but do those words mean what they say? Or do the words of the *Crown Land (Reserves) Act 1978* mean what they say?

Section 132 of the *Water Act 1989* empowers water authorities to lease land – but does this extend to Crown reserves vested in those authorities? Section 9(4) of the *Transport Act 1983* empowers the Director of Public Transport to lease railway land – or does it? Plenty of railway land is reserved Crown land.

Depending on whether the words in Acts mean what they say (or say what they mean) there could be quite a few Alice-in-Wonderland tenures out there...

The prospect is quite alarming. To quote the White Rabbit - *Oh, my ears and whiskers!* ■



Melton Council recently hosted the course "Vegetation and the Law" for internal staff.

Attendees included Council's CEO (Neville Smith), Planning & Development General Manager (Luke Shannon) and staff from Council's Environment and Planning units.

The course content and manner in which it was presented enabled attendees to learn a great deal about vegetation and the law.

The facilitator's presentation skills, relevant experiences and humour fostered an environment suited to learning. His tailoring of the course to suit our requirements enabled us to spend extra time on issues relevant to our Council.

I would have no hesitation in recommending this course to others.

Rodney Thomas
Environmental Services Coordinator
Melton Shire Council



- WORKSHOP OBJECTIVES:
- *To explore and analyse issues relating to 'bottom-end-of-the-spectrum' roadways*
 - *To frame a series of proposals to be put to government for policy and legislative reform*

Principal Speakers

- **Mark Hayes**, Partner, Maddocks
- **Michael Dowling**, Partner, Maddocks
- **Rob Steele**, Licensed Surveyor (previously with VicRoads; now with DSE Wodonga)
- **David Gabriel-Jones**, Principal, The Public Land Consultancy
- *Plus* - a Property Manager from a metropolitan municipality

**Maddocks, 140 William Street,
Melbourne**

**Wednesday 1 November 2006
9:30 a.m. – 4:00 p.m.**

REGISTRATIONS

- Fax your details to: 9534 5128
or -
- Email your details to:
workshop@publicland.com.au
or -
- Register on-line at
www.publicland.com.au

Workshop cost: \$220

(don't pay yet; we will invoice you later)

The Issues

- **Responsibility for roads not on the Road Register:** is risk exposure minimised by including roads on, or omitting them from the Register?
- **Policy contradictions between various statutory processes for road discontinuation:** what rights *should* be available to third parties?
Title to old subdivisional roads: is the system working?
- **Ownership of discontinued Government roads:** should the State government retain the value of the land?
Does this foster good planning outcomes?
- **Unused Roads under the Land Act 1958 –** their status, tenure, and transfer: are they private property or public highways?
- **Common Property 'Roads:'** do Councils have adequate systems for controlling their creation in subdivisions?
- **Encroachments, Public Highways and Adverse Possession:** time for further reform of the Common Law?

*If you want to suggest additional issues,
we would be pleased to hear from you....*

Professional Development Courses September - November 2006



Forthcoming Course

The Land, its Traditional Owners and the Law

An introduction to Aboriginal Heritage and Native Title
Check our website for details

Land Law for Managers of Parks,
Gardens and Reserves

Thursday 19 October

Ballarat

Thursday 16 Nov

Dandenong

Presenter: Dr Geoff Parr-Smith



Vegetation and the Law

Thursday 28 Sept

Dandenong

Friday 27 October

Shepparton

Thursday 30 November

Preston

Presenter: Brendan Sydes

Principal Solicitor, Environment Defenders Office

Crown Land
Law, Policy and Practice

Thursday 14 September

Maddocks, Melbourne

Tuesday 21 November

Dandenong

Presenter: David Gabriel-Jones

Land Law for
Managers of Roads
Streets and Lanes

Thursday 7 September

Preston

Tuesday 26 September

City of Yarra

Tuesday 3 October

Maddocks, Melbourne

Tuesday 14 November

VicRoads, Traralgon

Tuesday 28 November

Geelong

Presenter: David Gabriel-Jones

Land Law for Managers of
Rivers, Lakes and Catchments

Tuesday 17 October

Sale

Thursday 9 Nov

G-M Water, Tatura

Presenter: David Gabriel-Jones

Land Law for
Coastal Authorities

Thursday 5 October

Melbourne

Presenter: David Gabriel-Jones

For full details of all our courses, go to:-

www.publicland.com.au then to:- Professional Development

ENQUIRIES AND REGISTRATIONS

To book into one of these courses, or to arrange a course
at your offices, contact our Training Course Co-ordinator,
Dorothy Jenkins

dorothy@publicland.com.au Phone 9579 2635

For all courses -
Cost - \$440 per participant
including GST, course notes and
working lunch

Duration - 9:00 a.m. to 4:30 p.m.
Maximum Class Size - 10