TERRA PUBLICA

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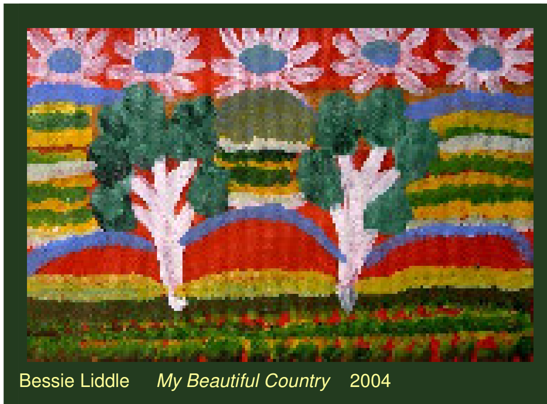
King Canute, Sir William McDonald, and the WJJWJ

Geomorphologists tell us that the Wimmera's Little Desert was last inundated by the sea some 200 million years ago. It remains a place where tides continue to turn.



Bessie Liddle *My Beautiful Country* 2004

Here, in 1970, we saw the end of the colonial cornucopia culture. Sir William McDonald, Minister for Lands in the Bolte Government, had been attempting to continue his predecessors' work of carving up and handing out a seemingly endless supply of Crown land.

What he saw as properties waiting to be brought under the plough by worthy settlers, the nascent conservation movement saw as a threatened ecosystem demanding to be preserved. The latter view prevailed, and Sir William was swept away by the tide of history – not to mention the voters.

In recent weeks the Little Desert has seen another turning of the tide. It was not, as some commentators reported, a determination that native title exists – we have understood that since Mabo – but the first-ever (for Victoria) acknowledgement of the owners of that title.

White-fella's law now recognises the rights of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk peoples to hunt, fish, gather and camp in Crown land covering 269 square kilometres along the banks of the Wimmera River. They in turn have conceded that native title does not exist in the rest of their claim area – and in so doing have relinquished potentially valuable royalties to huge mineral sand deposits.

In a parallel Indigenous Land Use Agreement (ILUA) the state government granted them freehold title to three parcels of culturally sensitive Crown land, and recognised the claimants' close cultural ties to a larger area.

But back to our littoral metaphor. In the Mabo case Mr Justice Brennan observed *"when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared."* Those words resounded in the Federal Court some years later, when Mr Justice Olney ruled that the Yorta Yorta's traditional ties with their country (the Barmah Forest) had been eroded away by the tide of history.

The Yorta Yorta ruling led many of us to believe that no native title claim would ever succeed in Victoria. We were wrong. Mr Justice Merkel,

…continued

Quiz: ***What is the plant pictured here? And what has it to do with our new Professional Development course -***

"VEGETATION AND THE LAW"

Answer – Page 4

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King Canute... *continued*

in granting a consent determination under the Native Title Act, made a significant advance in this area of law. His judgement recognises that traditional practices need not remain in some pre-1788 cocoon to qualify as continuous association with the land, but can evolve over time.

But there are bigger lessons to be drawn from the case. Agreements are hard work: over 400 parties had to concur with the outcome, but the principal factor differentiating the WJJWJ outcome from the Yorta Yorta outcome was politics. The Kennett Government opposed the Yorta Yorta claim in the Federal Court; the Bracks Government through Attorney-General Rob Hulls supported resolution of the WJJWJ claim through negotiation and a consent determination.

And what about Canute? A wise king, he demonstrated to his sycophantic courtiers that the forces of nature will trump even the powers of monarchs. By transposing his eleventh-century stunt from the Sussex beach to the banks of the Wimmera River (and bouncing between metaphor and analogy), we might support the view that consensus agreements will trump adversarial litigation, and politicians will trump lawyers. And, at the end of the day, tides do indeed turn. ■

"Section 86" Committees

by
Caroline Morgan,
Lawyer, Maddocks

One option open to councils in managing public land is to establish a "section 86 committee".

Section 86 of the *Local Government Act* 1989 (**the Act**) enables councils to establish special committees, which may be the subject of delegations from the council. It also recognises the possibility of establishing advisory committees, whose role it is to provide recommendations to the council, although they do not have any formal delegated powers.

Special committees may be comprised of councillors, council staff, other persons or a combination of such persons. An instrument of delegation to a committee should clearly articulate the nature of the delegation, and any conditions or limitations under which the delegation is to be exercised. Section 86(4) also imposes certain limitations, including the power to borrow money or enter into contracts for an amount exceeding that previously determined by the council.

The process for establishing a special committee is relatively simple. It involves:

- resolving to establish the committee, including setting out its purposes, members (and their voting rights), delegated powers, and reporting obligations back to the council; and
- delegating, via an instrument of delegation, certain council powers to the committee to enable it to function effectively.

An advantage of this option is that it enables participation by council staff or councillors in the decision-making processes of the committee, and could be widened to include other interested members of the community. These persons would have decision making powers, and so some autonomy.

The council is also able to impose conditions on the exercise of the delegated powers and so control it to an extent. This option also often ensures that the council will have continued access to funding from the Commonwealth and State Government (which may not be the case where an external body is appointed to manage the land).

One potential disadvantage of a section 86 committee concerns financial flexibility and entrepreneurial capacity. A special committee is also unlikely to result in a reduction of costs to the council or a greater return.

Other options open to a council in managing public land include:

- entering into a management contract for the land with an external service provider, in accordance with s186 of the Act (and section 15 of the *Crown Land (Reserves) Act* 1978 if the land is Crown land); and
- leasing the land to operators, in accordance with s190 of the Act (and section 17 *et seq* of the *Crown Land (Reserves) Act* 1978 if the land is Crown land); and
- establishment of a municipal enterprise, in accordance with s193 of the Act.

Each of these options has its strengths and weaknesses, but perhaps the issue of note is the implications for public liability and risk. For example, some options can involve the shifting of risk to the contractor or other entity managing the land through the obtaining of appropriate releases and indemnities backed up by appropriate insurances. Section 86 does not allow such shifting of risk. ■

Letter to the Editor

Naming Private Roads

The *Privately Owned Roads* article (*Terra Publica, October 2005)* was interesting, particularly as there is a fairly large "gated community" retirement village being developed in Ballarat East at the moment. There are also a couple of smaller ones in other suburbs of the City.

One of the issues that these developments raise is the naming of roads. Each development tends to use "unit 2/25 Smith Street" as the mailing address format, where Smith St is the street the development fronts. While this may be fine for a small block of units, it is not really sufficient in larger developments.

Clearly named and signed roads are essential to enable emergency services, taxis and deliveries to find the right unit, and I believe that roads in these developments should be named. The problem is that, as far as I can determine, these roads don't come under the *Geographic Place Names Act* or *Local Government Act* and names are usually chosen without reference to Council.

In the most obvious case, one older retirement village in Sebastopol has several internal roads with names that duplicate existing street names elsewhere in the same suburb.

As the City's Place Names Officer, I try to identify and record names given to common property and other private roads, so at least these names aren't re-used elsewhere, but I can't do much about names that are already duplicated.

Thanks for *Terra Publica*. There is always something of interest in every issue.

Kind regards

Ron Woods
Place Names & Technical Officer
City of Ballarat

Native Vegetation Retention
Review of Exemptions

By **Brendan Sydes,**
Principal Solicitor,
Environment Defenders Office

An Advisory Committee of Planning Panels Victoria is currently reviewing the exemptions to the native vegetation retention provisions in the Victorian Planning Provisions (VPPs).

Just what these exemptions should be is controversial, and it will be a challenge for the Panel to come up with recommendations for exemptions which do not undermine the government's native vegetation policy goals.

In 2006 The Environment Defenders Office will be presenting a new course "Vegetation and The Law" on behalf of The Public Land Consultancy

The review covers exemptions under clause 52.17 of the VPPs, together with exemptions in various overlays and under the timber production provisions in clause 52.18.

A range of activities are at present exempt from the native vegetation retention provisions. These activities include clearing of vegetation on sites of less than 0.4 of a hectare, the removal of dead vegetation, various "rural activities" and vegetation removal for the construction of buildings.

In many cases, no permit is required for these activities under any other provision of the planning scheme, so the clearing of vegetation can occur without any scrutiny of whether the "avoid, minimise, offset" goals of the government's Native Vegetation Framework have been met.

There is no data on the amount of clearing that occurs pursuant to the present exemptions; because no permit is required clearing under the exemptions is not recorded. The uncertainties caused by this lack of data are compounded by a high degree of variation amongst councils in their interpretation of when an exemption should be available.

Despite the lack of data, it is obvious that the incremental clearing of native vegetation has the potential to undermine the "net gain" policy the Native Vegetation Framework. It is of particular concern that exemptions can be used to clear significant habitat or vegetation that is rare or vulnerable.

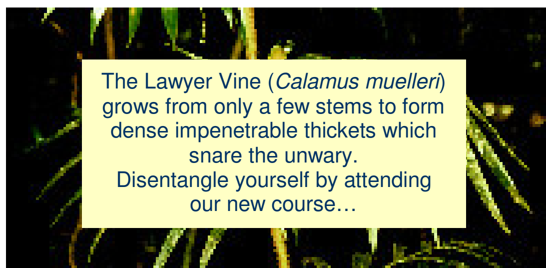
There seems to be general agreement that some refinement of the existing exemptions is necessary – many are poorly drafted and difficult to understand – and there is also general agreement that the practicable operation of the planning scheme requires that some clearing of native vegetation be exempt from permit requirements.

The Advisory Committee is due to report to the Minister by February. ■

Readers of Terra Publica should not act on the basis of its contents which are of a general nature, capable of misinterpretation and not applicable in inappropriate cases. They do not, nor are they intended to, constitute legal or specific advice. The Public Land Consultancy is available to provide advice on public land matters and will, on request, arrange legal advice for clients from its associate Maddocks, of 140 William Street, Melbourne.

In 2006 The Public Land Consultancy will be offering a new one-day professional development course

VEGETATION AND THE LAW



The course will be presented on our behalf by The Environment Defenders Office

COURSE CONTENT

The Legislation

- The *Planning and Environment Act* 1987, Planning Schemes; Native Vegetation Controls
- The *Flora and Fauna Guarantee Act* 1988 and Rare and Endangered species
- The *Catchment and Land Protection Act* 1994 and control of Weeds
- The *Environment Protection and Biodiversity Conservation Act* 1999 (Commonwealth)
- The *National Parks Act* 1975 and the *Crown Land (Reserves) Act* 1978
- The *Heritage Act* 1995, The Register of Significant Trees and Aboriginal scarred trees
- The *Road Management Act* 2004 and Roadside Management Plans
- The *Forests Act* 1958, Forestry Activities and Fire Control

Legal Processes

- Passage through Parliament of an Act of to create/revoke a Flora Reserve
- Making a Planning Scheme Amendment to create or remove a Vegetation Protection Overlay
- Consideration by VCAT of objections to a vegetation clearance permit
- Prosecuting a breach of a Planning Permit condition
- Bringing an interlocutory injunction to stop illegal clearing
- Placing a covenant or restriction on title to protect vegetation
- Making a Local Law governing the removal of garden trees
- Bringing / defending a negligence action arising from a dangerous tree

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- *We can run the course for your staff, in your own offices or off-site ·*
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Maximum Class size: 10 students

Enquiries and Bookings

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9579 2635

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