

Phyllis Thomas (Booljoonngali) *The Escape 2000* (detail)

“How large is the Convincing Ground?” someone asked an elder of the Gundidjmara people, traditional owners of land around Portland.

Her answer: “How far can you run with a bullet in you?”

There may be doubt about its size, but there’s no doubt about its reality: despite the bleatings of revisionist historians, this is the site of a massacre. It’s mentioned in contemporary documents of squatter Edward Henty and the Protector of Aborigines, George Robinson. Perhaps more pertinently, it’s emblazoned in the collective memory of the traditional owners: “*The Convincing Ground is a place where the spirits of my people are still there, laughing and feasting. The land will always hold their spirits...*”

Despite our best efforts, we as a society have failed to protect this site – or were they our best efforts?

The Planning Scheme failed to protect the Convincing Ground – arguably due to the people administering it, rather than to any intrinsic deficiency of the *Planning and Environment Act 1989*. You’ll find the Auditor-General’s report on

this aspect of the case at www.audit.vic.gov.au. Trouble is, it’s a report which addresses the wrong question. The A-G asks: ‘Was the Shire of Glenelg’s planning system working?’ but a far more illuminating report would have asked ‘Why wasn’t the Convincing Ground protected?’

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They’re two very different questions

The *Native Title Act 1994* failed to protect such sites when it recognised retrospective extinguishment of Native Title on freehold land. Likewise, Victoria’s *Archaeological and Aboriginal Relics Preservation Act 1972* is of little use here, because it relates only to physical relics.

Some deficiencies in Victorian law were remedied in the 1980’s when the Cain Government, despite the opposition of the State upper house, was able to turn to Canberra to enact the *Aboriginal and Torres Strait Islander*

Heritage Protection Act 1984 and the *Aboriginal Lands (Lake Condah and Framlingham Forest) Act 1987*. Whether any offences have been committed at the Convincing Ground against the former Act is now in the hands of the Federal Police – but even so, *post-hoc* criminal charges are no substitute for prevention.

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Professional Opportunity – Sessional Training Course Leader

VEGETATION AND THE LAW

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PRIVATELY OWNED ROADS A NEW PERSPECTIVE



By
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We are all familiar with privately owned roads created prior to the introduction of the *Subdivision Act* 1998 (the Act) which are still registered in the name of the original subdivider and all of the complex issues of ownership and control which such roads give rise to.

Now developers are looking at privately owned roads from an entirely different perspective. They offer a means of giving developers greater control over the standard of construction and quality of maintenance and landscaping of such roads within their large residential developments, be they master plan developments or so-called 'gated communities'.

For developers, the benefits of greater security and privacy which such privately owned roads offer compare favourably with more conventional publicly owned roads which vest in the local council as a public highway under the provisions of the Act. Such privately owned roads might be common property within a residential subdivision owned by a body corporate or be owned by a service company or recreational club servicing a more resort style residential development.

One example is Sandhurst Estate at Carrum where all roads within the residential subdivision are owned by Sandhurst Club Pty Ltd which is the company that administers the Estate and its recreational facilities. The Club includes lot owners amongst its members.

But beware, for developers and local councils alike there are many legal and practical issues to consider before embracing this new-found concept of privately owned roads. These include the following:

- the need to secure access rights for lot owners by means of registered easements of carriageway to be created on the plan of subdivision over the privately owned roads;
- satisfying local council requirements with respect to observance of minimum standards for construction and maintenance of the roads, access requirements for emergency vehicles and garbage trucks and the requirements for provision of postal services to each individual lot within the residential development;
- the prospect that privately owned roads will be rateable for the purposes of municipal rates and land tax;
- recognition of the fact that privately owned roads do not enjoy the status of public highways and therefore can be subject to encroachments and possible adverse possession claims;
- issues of liability and risk which need to be addressed with appropriate public liability and building insurance in respect of the privately owned roads; and
- recognition of the fact that privately owned roads may nevertheless still be subject to the road and traffic powers of the local council pursuant to the provisions of the *Local Government Act* 1989 because they still constitute 'roads' within the meaning of that Act.

It is apparent that making a decision to pursue a residential development with privately owned roads is no straightforward matter and that many issues need to be carefully considered by developers and local councils alike before embracing such a concept.

For those issues which are of concern to the local council, these can potentially be addressed in the form of an agreement pursuant to section 173 of the *Planning and Environment Act* 1987 to be registered on the title to the privately owned roads and possibly other land within the subdivision.

Such a section 173 agreement could impose obligations upon the developer with respect to the minimum standards to be observed for construction and maintenance of the roads and some of the other matters of key concern to local councils (as identified above). ■

Convinced? *Continued from page 1*

The *Heritage Act* 1995 is limited to non-aboriginal sites – so it's not the avenue by which you would expect an aboriginal site to be protected – and yet the Convincing Ground has just been nominated under that Act for inclusion on the Victorian Heritage Register – as much because of its connection to the early whaling industry as its connection to the people massacred by the said whalers. (See www.heritage.vic.gov.au > recent recommendations)

The *Victorian Environment Assessment Council Act* 2001 failed to protect the site, because (as we've noted in previous editions) it forbids VEAC from considering freehold land. VEAC's predecessor the LCC recognised the site's importance way back in 1973, but was powerless to recommend its acquisition.

So – how should we protect public values on private land? Counter-economic restrictions, prohibitions and criminal offences – even when they work – are only part of the answer.

We believe there is a compelling case for a systematic program of acquisition by the state of high-significance at-risk freehold land. But we should also be looking at better ways of protecting public values on land which remains in freehold ownership.

The time has surely come to look at commercially attractive incentives for land-owners. Models are available: in Victoria we're familiar with Trust for Nature covenants, and Tasmania has its Protected Areas on Private Land Program. (See www.abc.gov.au/landline > archives > September 2005.)

That's the way of the future. We're convinced. ■

Where exactly is the seaward boundary of our municipality?

Question asked by a coastal planner



Firstly, here's an unpaid promotion for Melway. It isn't the Government Gazette, but for many day to day purposes it's pretty reliable. If you get a counter inquiry about your municipal boundaries, your best initial answer is – check the yellow lines in the Melway.

But even Melway doesn't attempt to define coastal boundaries. Turn to Map 56: it shows a yellow line down the centre of the Yarra – dividing the City of Melbourne from the City of Hobsons Bay – but it just peters out at the river's mouth.

So the answer to our coastal planner's question starts with section 3(3A) of the *Local Government Act* 1989. This reads:-

3(3A) If the boundary of a municipal district is described by reference to the sea coast ... that boundary is to be taken to be the line for the time being of the low water mark on that sea coast.

When this definition was first inserted into the Act in 1995 (the capital letter 'A' in the section number flags it as a post-1989 amendment) this provision read 'high water mark.' The amendment to 'low water mark' was made in 1997 – thus giving coastal councils control over the inter-tidal zone.

But as coastal planners know, many planning schemes go well out to sea. The Mornington

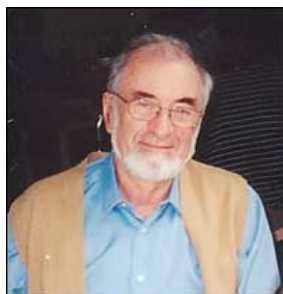
Peninsula Planning Scheme goes to low water mark along the ocean and Western Port coastlines, but 600m out to sea on the Port Phillip coast. It's an example of councils exercising their functions outside their municipal boundaries – which they may be permitted to do under section 3E(2) of the *Local Government Act* 1989.

It's the same with some other functions – councils may be authorised under the *Crown Land (Reserves) Act* 1978, the *Marine Act* 1988, or the *Port Services Act* 1995, for instance, to exercise powers outside their boundaries.

If you read section 3(3B) of the *Local Government Act*, you'll see that it's possible for a council's seaward boundary to be set at some location other than low water mark. The City of Greater Geelong, for instance, extends 200 metres out to sea along most of the Corio Bay foreshore.

What are the consequences of these sometimes inconsistent boundaries? When a council is dealing with some coastal activity or development, it must know exactly how far its jurisdiction extends. Planning powers may extend 600m out to sea, but Local Laws may terminate at the municipal boundary.

And where exactly is low water mark anyway? That's a question you will have to put to a surveyor. ■



Letter to the Editor

Philip Maguire, in asserting his entitlement to graze his cattle on Crown land, as his forebears had done, raises some interesting issues for us all (Terra Publica, July 2005).

No doubt at the time when the practice started, the cattlemen were considered to be doing society a favour, helping to control the bush-fire menace and in the process putting otherwise useless scrub and bush to some practical, productive use. Thus there was a benefit to society as a whole, not just the cattlemen.

Over time we have come to understand the situation is not really what we thought it was. Many of the farm practices we all supported and encouraged, we now find are rendering the land less productive, indeed degenerating to real wasteland, even desert.

Studies have suggested 40% of the land should be native trees, bush, scrub, swamp (wetland) in order to ensure the long-term viability of the rest of the land on which we depend for our cattle grazing, our crop cultivation and other human social and economic activities.

If this means our past practices must be curtailed or in some cases abandoned, then clearly those who have managed the land in this initially acceptable fashion, should not now have to bear the burden on their own as they change to sustainable practices.

Any decision made on necessary changes should be based on full discussion and collaboration with those who will be directly affected. This should include open and public assessment of the science purporting to justify the need for change.

If the science proves to be right, the process of public examination and assessment of the science will educate us all, including the cattlemen in this case, not only on the need to change, but would facilitate the evolution of optimum solutions which will involve the otherwise dispossessed. On the other hand, if the science under scrutiny proves to be defective, it is as well we all should know about it so that otherwise harmful social antagonisms can be allayed.

(Dr) Moss Cass
Carlton

Professional Opportunity

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We need someone to present this new course.

Applicants should be suitably qualified in environmental science or environmental law. A background in adult training and/or Victorian local government or statutory authorities would be an advantage.

The position would suit enterprising self-managing persons seeking sessional work.

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