

## We will Fight Them on the Beaches

...and in the Parks and Gardens

When Mr Justice Wilcox found that the Noongar people had a legitimate claim to land in the Perth metropolitan area, he provoked an series of appalling responses from the nation's commentators and politicians.

The worst came from Attorney-General Phillip Ruddock, who announced that city people could be denied access to beaches, parks and gardens by native title owners.

Offering a very hollow echo of Winston Churchill, his outburst was either a surprising display of ignorance at the law relating to Native Title, or a mischievous attempt to foment racial controversy.



Many aspects of native title are subject to interpretation by the courts, but not so access to beaches. Section 212 of the Commonwealth Native Title Act 1993 expressly authorises the

confirmation of public access to and enjoyment of waterways, foreshores, coastal waters and beaches, and areas that were public places at the end of 1993.

The facts of the case are that after 180 years the Noongar people's traditional association with the land has finally been recognised. They may now move forward, on a parcel-by-parcel basis, to find how that association may entitle them to use Perth's remaining areas of unalienated Crown land. It will be a highly constrained entitlement: the Native Title Act precludes the recognition of any native title rights incompatible with other legally-granted rights and interests.

Justice Wilcox' decision imposed a further constraint: he found that the Noongar people's entitlement does not extend to offshore waters and islands.

What does that leave? Depending on a parcel-by-parcel assessment, it may leave at most:- the right to live on the land (but not to build anything); the right to maintain significant sites; the right to hunt, fish and gather; the right to conduct ceremonies; and the right to teach and learn traditional culture. In other words, not a lot.

**When it comes to land-related aboriginal rights, two clear trends are emerging. The first is that cultural heritage is proving a more effective vehicle of recognition than native title; the second is that native title rights are increasingly being recognised through mediation and consensus rather than through litigation.**

These trends are of particular relevance in the more  
*Continued page 2*

## Aboriginal Heritage; Whitefellas' Politics

The State Opposition vigorously contested the Bracks Government's new Aboriginal Heritage legislation when it was debated in Parliament.

They claimed it will delay development, duplicate the planning system, trample on private property rights, create a new bureaucracy, and impose draconian penalties. At the end of the day, the Government had the numbers, so the Bill passed. We now have a new *Aboriginal Heritage Protection Act 2006* – but...

Opposition leader Ted Baillieu has an ace up his sleeve: before the new State Act can be proclaimed, Canberra needs to repeal certain Commonwealth legislation which would otherwise over-ride it. It's a strange irony: in 1987 Premier Cain couldn't get legislation past the State Upper House, so he turned to the Hawke Government in Canberra to do it for him.

Hence we find ourselves with a Commonwealth Act applying to the whole of Australia (the *Aboriginal and Torres Strait Islander Protection Act 1984*) containing within it an Act-within-an-Act applying only to Victoria.



**Steve Bracks now needs John Howard to rescind what Bob Hawke put in place at John Cain's request.**

If the Liberal and National Parties in Victoria find the new State legislation so offensive, why should their federal colleagues come to the Labor Party's aid? It boils down to Commonwealth-State relations: so far, the Howard Government has taken the view that Victoria, like every other State and Territory, should take responsibility for its own Aboriginal Heritage. A Bill rescinding the Act-within-an-Act has already passed through the Senate, but hasn't yet been proclaimed.

*And in the lead up to a state election, who knows what might happen. ■*

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*A one-day introduction to the Law governing Aboriginal  
Heritage and Native Title in Victoria*

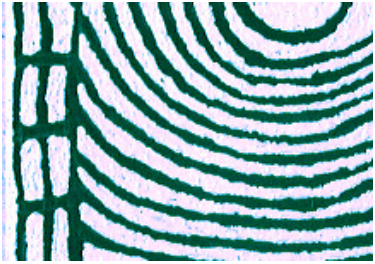
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## On the Beaches...

from page 1  
populated parts of Australia, where extinguishment is denser, and the aboriginal peoples more likely to have been displaced from their traditional country.

There is no registered claim over metropolitan Melbourne, because the Wurundjeri see their land-related interests as being best served through the cultural heritage system.



Josephie Naparulla (2001)  
Waterhole at Docker River (detail)

Here in Victoria, cultural heritage is about to be pushed right into the spotlight. Subject to ratification by Canberra, Victoria's new *Aboriginal Heritage Act 2006* will give a level of protection unparalleled elsewhere in the country.

Councils and property developers alike will soon be factoring cultural heritage assessments into approval processes, alongside vegetation retention, traffic

safety, runoff quality and all the other factors we accept as a proper part of the planning system.

As for recognition of native title, Victorian experience offers stark evidence of the benefits of mediation and consensus. The successful Wotjobaluk claim in the Wimmera was a consent determination, whereas the rejected Yorta Yorta claim to the Barmah Forest was a litigated determination. As we have observed before, the Yorta Yorta outcome reflected the failings of the legal system rather than the merits of the claim.

Concluding his Noongar judgement, Mr Justice Wilcox recommended that future native title cases be moved out of adversarial litigation and into mediation. His own conduct of the Noongar case had provided a clear lead, often adjourning from the courtroom to the river banks and kauri forests.

*"This litigation has significant implications for reconciliation between indigenous and non-indigenous Australians. It ought not be conducted like a game, where one side must triumph over the other."*

Phillip Ruddock himself has introduced changes to the Native Title Act designed to facilitate mediated outcomes. Perhaps he was just having an off-day when he provocatively invoked the image of native title owners overrunning our beaches. Or perhaps he was just getting mixed up with boatloads of West-Papuan refugees. ■



### How do I find out whether there is a Native Title claim over a particular parcel of public land?

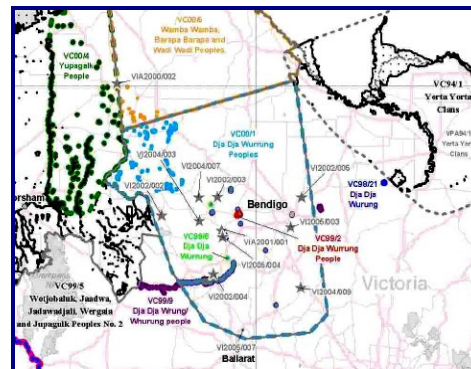
*Question asked by the Director, Economic Development for a large rural municipality*

Well, we're not altogether sure it's the right question. Native title may exist, whether there is a claim or not. And even if native title doesn't exist, cultural heritage values may.

But back to the question.

If the land is (or was) freehold, or if there are (or were) public works on it, then native title has been extinguished. If the land is in one of four specific areas of Victoria (the Barmah Forest being one) then native title for that land has been determined not to exist. If it is in a particular part of the Wimmera, we know that native title exists, and what's more we know the title-holders – namely the Wotjobaluk people.

Elsewhere, we must assume that native title exists, even though there may be uncertainty about the title-holders. Here we must comply with the Valid Future Act regime specified by the Commonwealth Native Title Act – whether there is an active claim or not.



There are 18 active claims in Victoria, and you'll find their details on the website of the National Native Title Tribunal:-

[www.nntt.gov.au/registers/Claims.html](http://www.nntt.gov.au/registers/Claims.html)

There are also 22 registered ILUAs (Indigenous Land Use Agreements) in Victoria, and you'll find them at the same website. ■

*Do you have suggestions for our Question & Answer column?*



**We have a disagreement  
with DSE about  
responsibility for a paper  
'Government Road'  
reserve. Is the Code of  
Practice of help here?**

*Question asked by a  
Municipal Assets Manager*

The Code of Practice - Operational Responsibility for Public Roads is only of value in certain limited circumstances. As a subordinate instrument made under the Road Management Act 2004 it cannot negate contradict or vary any matter specified in the RM Act itself – or in any other Act.

The Code may help in determining management responsibility for Arterial Roads and Non-Arterial State Roads (including bridges, drainage and lighting, and public transport facilities on those roads), but it's of no help in dealing with Municipal Roads and Freeways, where responsibility is assigned by the Road Management Act itself.

So the real question becomes: is the Government road reserve in question a Municipal Road? All Government Roads (i.e. road reserves laid out on Crown land) are Public Highways, and councils have care and management of all Public Highways on Crown land (Local Government Act sec 205(1)(c)).

The Road Management Act, section 3, defines a 'Municipal Road' as including a road referred to in section 205 of the Local Government Act, and therefore Government Roads are Municipal Roads. Section 36(c) of the RM Act says the Coordinating Road Authority for all Municipal Roads is the relevant council.

Councils therefore have care and responsibility for Government Roads, and are their Coordinating Road Authority. Note that this is the case whether the road is a 'Public Road' or not.

There are several exceptions to this general conclusion – including strata of a Government Road other than the trafficked surface (DSE is responsible), a Government Road declared to be an Unused Road under section 400 of the Land Act (DSE again), and those Government Roads which have been declared as Arterial Roads (VicRoads). ■

Wednesday 1 November 2006

## POLICY WORKSHOP

*A Review of Unused, Little-Used and Discontinued Roads*

### 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

**Venue: 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](mailto:workshop@publicland.com.au) or -
- Register on-line at [www.publicland.com.au](http://www.publicland.com.au)

**Workshop cost: \$220 inc GST**  
(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?

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Daisy Jugadal, *Springtime at Heasts Bluff*, (detail)

## THE LAND, ITS TRADITIONAL OWNERS, AND THE LAW

*A one-day introduction to the Law governing Aboriginal  
Heritage and Native Title in Victoria*

**Presenter**

**MEGAN GOULDING**

- *Principal, Goulding Heritage Consulting;*
- *Interim CEO, Wurrundjeri Council;*
- *Member, Archaeology Committee,  
Heritage Victoria*

### **COURSE SCHEDULE**

<b>Melbourne</b>	19 October 2006
<b>Ballarat</b>	9 November 2006
<b>Traralgon</b>	23 November 2006
<i>All courses</i>	<i>9:00 a.m. – 4:30 p.m.</i>

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Dorothy Jenkins, Training Course Co-ordinator

[dorothy@publicland.com.au](mailto:dorothy@publicland.com.au) Phone (03) 9579 2635

### **COURSE CONTENT**

#### **Aboriginal Heritage: the Current Legislative Environment**

- The Victorian *Archaeological and Aboriginal Relics Preservation Act 1972*
- the C'wealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
- Case Study: the Murray River bridge, Echuca

#### **Aboriginal Heritage: the New Victorian Legislation**

- The Victorian Aboriginal Heritage Act 2006
- What it will mean for aboriginal people
- What it will mean for developers
- What it will mean for municipalities and statutory planners

#### **The Aboriginal Peoples of Victoria**

- Their original association with country; their fragmentation and dispersal; their current groupings
- Aboriginal organisations and their roles

#### **Aboriginal Artefacts and Places**

- Case study: the Convincing Ground
- Case study: VicRoads and the Murchison bypass
- Past land-related measures, including Tyers, Corranderk, Framlingham and Condah

#### **Native Title and ILUAs**

- The myth of Terra Nullius
- The Mabo and Wik decisions
- The Commonwealth Native Title Act 1994
- Extinguishment; Valid Future Acts
- Indigenous Land Use Agreements

#### **Native Title Claims**

- The Federal Court and the Native Title Tribunal
- The Yorta Yorta claim for the Barmah Forest,
- The Wotjobaluk claim for the Little Desert
- Unresolved claims elsewhere in Victoria

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