



## ST KILDA PALACE BURNS DOWN - AGAIN

Last week's fire at the Palace was not the first. Back in 1968 the *Age* reported "*Within minutes the 55-year-old timber and stone ballroom was blazing from end to end... Within half an hour the blaze had reduced the ballroom to a smouldering hulk.*"

That fire led to an insurance payout, which led to a five-year wrangle between the then lessee and the government as lessor, and the resolution of that wrangle fuelled the series of legal disputes that were resolved only last month.

The seminal judgements in this row were handed down by VCAT Deputy President Macnamara on 15 Nov 2006. They review a sorry history of dealings between various tenants and the old Lands Department – and in doing so provide a gold-mine of material for *Terra Publica* articles.

Two rich auriferous seams running through the judgements keep surfacing in many Crown land cases.

One seam is the culture of tenants' proprietary interest. No freehold tenant would imagine themselves to hold any greater interest in a property than was expressly stated in the lease, and no freehold landlord would feel obliged to concede any greater interest. But on Crown land, tenants, imbued with a false sense of ownership, have been known to turn to everything from political lobbying and PR stunts to legal prevarication in an attempt to intimidate their landlords – and the landlords often cave in.

The second seam is the past inability of public sector landlords (epitomised by the old Lands Department) to make sound decisions – due to lack of any clear set of driving principles on which to make them, and the structural deficiencies of public sector systems.

We can only sympathise with one witness who saw a period in the 1960s-1970s thus: "I cannot begin to describe the nature and extent of the frustration, delays and general lack of cooperation which we suffered in relation to our dealings with the State's officials in relation to the site."

One nugget from the gold mine is the 1968 fire. The insurance moneys were paid, not to the tenant, but to the Secretary for Lands. The lease was silent (or ambiguous) on how the moneys were to be applied – thus providing an object lesson for today's tenure negotiators: ensure any lease you're entering into specifies not only what must be insured, but also who gets the pay-out, what must be done with it.

For the then tenant the 1968 fire was an opportunity to seek a longer-term lease – without any competitive tendering. Documents quoted in the VCAT judgement saw the term sought slide from 36 years to 50, to 60, to 70 and finally to 75 years. The government saw the fire as an opportunity to provide more car parking, and to widen Marine Parade. The old St Kilda Council intervened with its own 'St Kilda Foreshore Action Plan' which Lands Minister Borthwick dismissed as 'Castles in the Air.'

Five years later the premises were finally reinstated, the insurance moneys having been drawn down to meet progress payments. Trading recommenced, and continued until 2007 – providing punters with (as the *Age* puts it), opportunities to spill overpriced drinks into sticky carpets while being deafened by loud bands.

No new lease was executed, but an Order in Council had been made which gave a conditional commitment to a new lease – an Order which was central to the lessee's recent series of claims. VCAT held that the conditions required by the Order had not been satisfied, and that consequently the Crown was under no obligation to issue the longer lease. It was a close call: any reading of the judgement leaves the clear impression that if only a few things had been done a little differently, lease reversion would not have been 2007, but 2030, or even 2045.

Now the issues of property law have been cleared up, even if the debris hasn't. The site moves, phoenix-like, towards its next incarnation. We are optimistic about today's managers doing better than the old Lands Department.

Port Phillip Council, under CEO David Spokes, has been appointed as Committee of Management, as envisaged by the *Land (St Kilda Triangle) Act 2006* – but has actually taken on a more demanding role: under a MOU with the state government it has run the process of setting the development parameters and choosing a preferred developer. Spokes tells us he relishes the prospect of moving well beyond a council's traditional role as Planning Authority and into actual project management.

So – will we see the emergence of a new paradigm for management of Crown land? And will the legal action move from the civil courts to the criminal? It's a case of 'Watch This Triangle.' ■

*Reference: State of Victoria v Bradto Pty Ltd (Palace Entertainment Complex) (Retail Tenancies) [2006] VCAT 2299*



## MAPPING ABORIGINAL HERITAGE

The May edition of *Terra Publica* looked at problems with the interpretation of the *Aboriginal Heritage Regulations* 2006. The Regulations refer to information on geological maps which is not easily related to property boundaries.

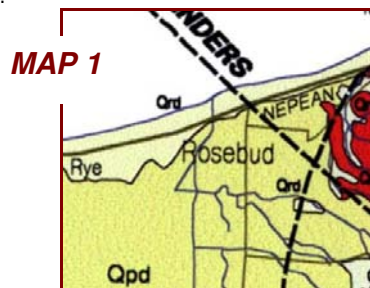
Take, for instance, an application for a three dwelling development in Rosebud. Is it on a 'sand sheet,' and therefore in an area of cultural heritage sensitivity? Regulation 38 defines a 'sand sheet' as follows:

- (3) In this regulation, *sand sheet, including the Cranbourne sand sheet* means an area identified as "Qpd" on the Geological Survey of Victoria 1:250,000 map series sheet SJ55-9 entitled "Queenscliff" second edition, 1997).

The map in question is found like this:

- Start at [www.dpi.vic.gov.au](http://www.dpi.vic.gov.au)
- Go to [Minerals and Petroleum](#)
- Go to [Product Catalogue](#)
- Go to [State Geological and Mineral Maps](#)
- Go to [Geological Maps 1:250,000](#)
- Choose the 'Queenscliff' map, then 'Download'
- Enter your details, and a hyperlink to the map will be emailed to you promptly.

Map 1 is a detail from this download. Clearly, many properties are completely inside or completely outside the area marked "Qpd," but what about those near its edge?



Aboriginal Affairs Victoria now offers a more detailed map tool for your assistance. You find it like this:

- Start at [www.dvc.vic.gov.au](http://www.dvc.vic.gov.au)
- Go to [Indigenous](#), then to [AAV](#)
- Go to [Heritage Services](#)
- Go to [Maps](#), then to [Map Page](#)
- Check the legend, and open the map you need.

If you're interested in a property at Rosebud, open the 'Sorrento' map. Map 2 is a detail from it.

This data has limitations: it still doesn't show property boundaries, and although it shows 'areas of cultural sensitivity' in green, it doesn't identify the specific Regulation that caused them to be so designated.

MAP 2



Here's a third way to get into this data, and this time you get the geological and cadastral information superimposed.

- Start at [www.dpi.vic.gov.au](http://www.dpi.vic.gov.au)
- Go to [Minerals and Petroleum](#)
- Go to [Explore Victoria Online – GeoVic](#)
- Then to [Explore Victoria Online](#) under the map.

You now have three tools to focus in on the area you're interested in – (i) right click gives a rectangle definition tool; (ii) there's zoom in/out tool, and (iii) you can enter the scale you want directly into the box below the map.

Now choose the layers of information you want displayed:

- Open the folder icon marked 'Land Status and Boundaries' and choose the [Property Address](#) layer (this is only available when the map scale is 1:40,000 or smaller)
- Open the folder marked 'Geology,' then the folder marked 'Geological Interpretations' and choose the [Geology polygons](#) layer.
- Now click on [Refresh](#).

The map of your chosen area will appear, showing the two chosen layers. It will look like this:

MAP 3



Now you have a map which shows individual property boundaries, but the polygonal definition of the geological feature is pretty crude. We can only hope that it approximates the edge of the shape marked on the Geological Survey (Map 1) which, after all, is the one officially recognised by the Regulation.

A further problem we encountered in trying to use this dataset is the legend. Not all the colours used in the maps seem to be reflected in the legend, and the identifying nomenclature is not the same as in the Regulations. As you can see from Map 3, the coloured area is designated 'Qd2,' not 'Qpd.'

No doubt AAV and DPI between them will be refining these systems further. We'll keep you informed. ■

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## What is a Pre-emptive Right? Does it have anything to do with Riparian Rights?

*Question asked by  
a DSE Property Officer*

This question takes us back to the 19<sup>th</sup> century, when imported English land law was under challenge from an emerging Australian egalitarianism.

A Pre-emptive Right (or PR) was a device enabling the squatter to by-pass the queues and auctions frequented by lower-class aspirants to land ownership.

A Riparian Right, on the other hand, was one of the common law rights accruing to land ownership, under which a land owner was deemed to own the water running over the land, including that in any boundary watercourse.

In Victoria (or the Port Phillip District, as it was then known) the Pre-emptive Right was part of the transition from the Wild West to the rule of law. The squatters had previously taken up as much land as they liked, but were eventually compelled, against their vigorous protest, to settle for a mere one-square-mile, or 640 acres, of their run. The pay-off was the PR.

PRs were just one instrument by which Crown land became freehold. The more usual process was the grant of a Crown Allotment – and there are other processes, too. The land in question is now fee-simple freehold, whether it was originally a PR or a CA.

Following the English tradition, rights to land included rights to water. This came to an end with the Deakin Royal Commission of 1884, and the Irrigation Act of the same year which asserted the Crown's ownership of water. These were revolutionary times, but political reality dictated that not all rights could be withdrawn. As a result, 'Private Rights' to take water for domestic, stock, and kitchen gardens were recognised as inviolate – and they have been treated as such ever since (see section 8, Water Act 1989). Whether a property has private rights or not is another question – the answer to which has nothing to do with whether the freehold title traces back to a PR or a CA.

So where's the connection between 'Pre-emptive Rights' land and riparian rights to water? There was a persistent belief amongst owners of the former that they held the latter. We don't really know how it originated, just that it's false. ■

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## Can a Catchment Management Authority be appointed as a Committee of Management?

*Question asked by  
a CMA Waterway Manager*

Yes, CMAs can be appointed as Crown land Committees of Management.

The Crown Land (Reserves) Act 1978 allows various types of entity to be appointed as Committees – including “a body corporate established by or under an Act for a public purpose.”

CMAs are bodies corporate established under the Catchment and Land Protection Act 1994. Their charters under that Act don't explicitly use the term 'public purpose,' but there can be no doubt that they do indeed serve a public purpose.

This can be a stumbling block for some appointments. The local sporting club or youth organisation may well regard itself as serving a 'public purpose,' but an examination of its charter will reveal it to be serving the interests of its own membership – thus rendering it ineligible to be appointed as a CoM.

But the CL(R) Act only authorises one side of the arrangement. We need also to ask whether the entity under consideration has the power to accept any such appointment.

Again, this can be a trap for the inexperienced. A School Council satisfies the formula in the CL(R) Act – but its own charter under the Education Act 1958 does not allow it to accept such an appointment.

The Catchment and Land Protection Act (section 13) lists the functions of CMAs. Most of the listed functions are narrowly defined, but at the bottom of the list we find that a CMA may “carry out any other functions conferred on (it) by or under this Act or any other Act.” (This is the function which allows CMAs to accept appointment under the Water Act as Waterway Managers.) So the answer is... Yes. ■

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## Professional Development – July-September 2007



### THE ABORIGINAL HERITAGE ACT 2006 (HALF-DAY COURSE)

Tues 3 July	Shepparton
Wed 4 July	Hepburn Shire
Tues 14 August	Hamilton
Wed 15 August	Camperdown
Tues 28 August	Preston
Tues 18 September	Fitzroy



### LAND LAW FOR MANAGERS OF ROADS AND LANES

Thurs 9 August	Bayside Council
Tues 28 August	Melbourne
Thurs 27 September	Preston



### THE LAND, ITS TRADITIONAL OWNERS AND THE LAW (FULL DAY COURSE)

Wed 18 July	Melbourne
Tues 11 September	Melbourne



### LAND LAW FOR MANAGERS OF RIVERS AND LAKES

Thurs 13 September	Melbourne
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### CROWN LAND LAW, POLICY AND PRACTICE

Thurs 23 August	Melbourne
Tues 25 September	Preston

### Tailor-Made Courses

In addition to our standard courses, we put together courses on specific areas of land-related law and policy. Here are two examples

- **Bayside City Council:** *The Essentials of Aboriginal Heritage Law – A two-hour intensive session for Councillors and Executive Directors*
- **Merri Creek Management Committee:** *Land Law and the Merri Creek – An introduction to the law on land, vegetation, and aboriginal heritage along Melbourne's rivers and creeks*

### Enquiries and Registrations

To book into one of our courses, or arrange a course at your offices, please contact -

#### Dorothy Jenkins

Training Course Co-ordinator

[dorothy@publicland.com.au](mailto:dorothy@publicland.com.au)

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