TERRA PUBLICA
VOL 14 NO 2 FEBRUARY–MARCH 2014

Oops, Minister

By accepting Lindsay Fox's claim over Portsea beach, Land Victoria dropped their Minister (Matthew Guy) right into the proverbial. They're now burning the midnight oil in a desperate attempt to rescue him.

Together with lawyers from VGSO and DEPI, they're churning out option papers and briefing notes on the subject of the Doctrine of Accretion. That's the ancient, English common law Doctrine of Accretion.

Ancient, and untested. You'll search in vain for any relevant Australian case law. The doctrine appears to be rooted in judgments such as *Attorney-General (of U.K.) v Chambers* (1854), *State of Alabama v State of Georgia* (1859), and *Attorney General (of Nigeria) v John Holt & Co of Liverpool* (1915). Learned judicial pronouncements, no doubt – but hey! in case you hadn't noticed, this is Australia and the year is 2014.

Let's be clear: as far as we know, Land Victoria's decision was entirely correct – within the common law as it stands. Their blunder, it seems, was to fail to recognise that the decision was a political bombshell.

Common law, like the Portsea beach, is not immutable. When it proves ineffectual or counter-productive parliaments can, and should, intervene to rectify it. So it has been with the common law relating to adverse possession, which State Parliament brought under control through a series of amendments to the *Limitation of Actions Act* 1958. So it is with the common law relating to negligence, transformed through the *Road Management Act* 2004 and amendments to the *Wrongs Act.* 1958.

But such reforms simply cannot be made in haste. Negligence was the subject of all the consultation which preceded the Road Management Bill, and Mr Justice Ipp's report commissioned by John Howard. Adverse possession was reformed after extensive consultation with the MAV and Victorian municipalities. Reform of the law relating to easements and covenants was the subject of a lengthy examination (as yet unimplemented) by the Law Reform Commission.

Yet Minister Guy, confronted with Land Victoria's unexpected little surprise, initially committed himself to a knee-jerk response: "legislative changes by the end of June" he told the Sunday Age. Within days, fed no doubt by Land Victoria's apologetic briefings, he conceded "There are a whole range of issues to consider from title boundaries to legal risk … we are confident we will find a good solution."

The boundaries we're talking about here have an extra complication: they divide freehold land from Crown land, and so invoke two sets of values and two bodies of policy. This will assuredly pose problems for the State public service, where Crown land matters sit in Ryan Smith's portfolio, planning matters sit in Matthew Guy's, and legal matters in Robert Clarke's. The inter-departmental liaison officers will indeed be keeping busy.

Here are the options we guess are being put up to Minister Guy:-

1. 'The *Land (Lindsay Fox) Act* 2014. The quick and nasty option. It would retrospectively reverse the Lindsay Fox decision alone, and would in effect invite Fox to mount a challenge in the courts. It would leave unanswered many questions about coastal properties elsewhere.
2. The *Land (High Water Mark) Act* (2016?). This would provide a statutory definition of HWM along the entire Victorian Coast – and set the rules by which surveyors and courts are to interpret littoral boundaries. Still unanswered would be questions about boundaries along all those pesky rivers which have a tendency to change their course.
3. The *Land (Accretion and Diluvion) Act* (2020?). This option would take the longest to implement, and be the most difficult. It would provide a comprehensive set of statutory provisions governing interpretation of both littoral and riparian boundaries.

In any new legislation, one feature of the Doctrine must surely be relegated to the legal scrap-heap: the notion that movements of rivers and coasts may be classified as either 'gradual and imperceptible' or 'catastrophic' or 'artificial.' You'd be hard-pressed to

continued Page 3

The Public Land Consultancy
ABN 69 067 045 520
Principal: David Gabriel-Jones
Email: terrapublica@publicland.com.au
57/151 Fitzroy Street
St Kilda, VIC 3182
phone: (03) 9534 5128
postal: PO Box 225
St Kilda West, VIC 318
mobile: 0412 134 24
www.publicland.com.a

Bringing our Professional Development Courses to You

You need not come into Melbourne… We can present any of our one-day training courses and half-day workshops at your offices.

Recently…

- **Bayside** engaged us to run our Coastal and course at their offices
- **Horsham** engaged us to present our Roads, Rives and Crown Land courses
- **Mornington Peninsula** engaged us to run our Roads course and our Encroachments course
- **Greater Geelong** engaged us to present our Environmental Law course
- **Yarra, Stonnington, Whitehorse, Moreland, Glen Eira, Hume, Wangaratta, Whittlesea,** and **Bayside** all engaged us to run our half-day Encroachments course for them, in-house.

Regionally – How about hosting a course and bringing in colleagues from neighbouring municipalities? Recently…

- **Yarriambiack** engaged us to present our 'Roads' course and hosted neighbours from **Northern Grampians** and **Buloke**
- **Mildura** engaged us to present our 'Crown Land' course and hosted neighbours from **Swan Hill** and **Lower Murray Water**
- **Greater Shepparton** engaged us to present our 'Roads' course, and hosted neighbours from **Strathbogie** and **Benalla.**

Discount rates for host municipalities

Half-Day Workshops

At the Law Institute of Victoria
470 Bourke St Melbourne

9:00 a.m. – 12:30 p.m.

- Friday 7 March **'Off-Shore'** – A look at your coastal strip and its governance, in light of the new Victorian Coastal Strategy
- Friday 30 May – **Council Reserves** – A critical review of the law governing a Council's portfolio of Crown reserves and freehold reserves
- Friday 27 June 2014 **'Off Title'** – A tutorial on authorizing or removing encroachments on to Council-controlled land

Cost - $330 inc GST

Enquiries and enrolments – Jacqui Talbot
jacqui@publicland.com.au
(03) 9534 5128

Council Reserves
A Half-Day Workshop

A critical review of the law governing your Council's portfolio of Crown reserves and freehold reserves

Crown Land Reserves

Their control and management
Their creation and abolition
Purpose c.f. Planning zoning
Council management options
Community management options
Tenures – leases and licences
Regulations and Local Laws

Freehold Reserves

Freehold – Old Law and Torrens
Creation of reserves through subdivision
The legacy of old systems
Vesting in council or utilities
Sec 24A dealings – disposal of reserves
'Council Land' and Adverse possession
Encroachments and Easement by prescription

Opportunities for improvement

Is there a better way? Is the legislation delivering good outcomes? What reforms should we be thinking about?

In the weeks before 30 May we'll be framing a set of questions to be work-shopped on the day… Enroll now and we'll keep you in the loop.

FRIDAY 30 MAY 2014
9:00 am – 12:30 pm
The Law Institute of Victoria

Presenter - Grant Arnold
Associate at The Public Land Consultancy

The common law doctrine of accretion and diluvion may be untested in Australian courts – but it has certainly been discussed. In Ward v The Queen (1980) the High Court of Australia examined its provenance at some length. The case wasn't about the doctrine itself, but the location of the State border – which was found to be at 'the top of the bank' – a point in turn defined by the doctrine.

MURDER
on the Left Bank

One day in 1979 Alexander Joseph Reed was fishing from the southern bank of the River Murray when he had the misfortune to be shot dead by Edward Donald Ward.

The ensuing case went to the High Court – not on the question of whether Ward had murdered Reed, but on the question of whether the offence had been committed in Victoria or in New South Wales.

All parties agreed that the border is not at the centreline of the River, because the *Separation Act* 1850 defines Victoria as the land 'south of the Murray.' Counsel for the State of Victoria argued that the boundary was at the southern edge of the water, wherever that may be from time to time – in other words, the state boundary moves back and forth as the river rises and falls.

The High Court rejected this proposition, and came to the conclusion that the boundary between the two states was the top of the bank on the southern side. Consequently, if water levels are normal, there is a strip of dry land on the southern side of the Murray which is actually in New South Wales. The murder had been in NSW, and Ward was sent from Melbourne for retrial in Sydney.

But that's not the end of the story. Way back in 1881, when Victoria permanently reserved those river frontages which hadn't already been sold off, we didn't have the benefit of the High Court decision. The 'three chain' reserve along the Murray wasn't measured from the top of the bank, but from '*ordinary water level of the river as confined by the said left bank.*' There are thus stretches of the river where the reserve is significantly narrower than three chains. In fact, when you factor in the effects of erosion there may, in places, be no reserve at all.

The two states have already come to agreements for Lakes Mulwala and Hume – so people boating and fishing there aren't governed by invisible serpentine lines on the surface of the water.

That leaves many hundreds of kilometres of frontage often viewed and managed as if they're Victoria, when they're not. As the High Court observed (para 36) , this could be a 'difficulty.'

Time, we suggest, for a more general cross-border agreement. ■

Q & A

Can a council really sell off Public Open Space?

Question asked by a relatively new and somewhat incredulous Councillor

Councils selling off public open space – anathema! But it can happen, and with good reason: the reserve which was thought necessary by a previous generation is now in the wrong place, or serving obsolete purposes.

In 1992 Parliament recognised the occasional need to revoke public open space reserves by inserting section 24A into the *Subdivision Act 1988*. The Minister of the day fully recognised the political sensitivities concerned, and included a proviso, as follows:-

> (8) If a body sells land under this section that was public open space, it must apply the proceeds—
> (a) first, in paying the expenses of or incidental to the sale;
> (b) secondly, for any recreational or cultural purpose referred to in item 5 of Schedule 1 of the **Local Government Act 1989**.

It's a proviso that can be bypassed by any municipal bookkeeper who's done a creative accounting course. You just apply the sale money to some expenditure which you would have undertaken anyway, and thus free up funds elsewhere.

But here's another curiosity: Schedule 1 of the *Local Government Act 1989* doesn't exist. It was repealed in 2003. So what are we to do with the money we've just raised from the sale of a reserve? We might have to abandon the law and apply common sense, instead. ■

Oops, Minister (continued)

find a waterway in Victoria whose hydrological characteristics could be described as natural. Every catchment in the State has been artificially modified, and many beaches are affected by groynes and marine engineering works – often some distance away. And as for movements due to climate change – have they been artificially induced?

Our suggestions for Minister Guy? Firstly – put up to Parliament the Land (Lindsay Fox) Bill 2014 – just in case other remedies don't work. Secondly – make parallel referrals to the Law Reform Commission (LRC) and to Victorian Environmental Assessment Council (VEAC) asking them to frame the Land (Accretion and Diluvion) Bill (2020?). ■

Our Program of One-Day Training Courses

March to June 2014

Leases and Licences of Public Land

Presenter – Karen Hayes,

Tuesday 18 March 2014	Melbourne*
Tuesday 24 June 2014	Melbourne*

Environmental Law for Councils as Land Managers

Presenter –Grant Arnold

Tuesday 25 March 2014	Shepparton
Thursday 1 May 2014	Melbourne*

Building Law – a Strategic Overview

Presenter –Tom Vasilopoulos, Victorian Bar

Tuesday 1 April 2014	Melbourne*

The Law and Subdivisions

Presenter, Dr David Mitchell, RMIT

Friday 28 March 2014	Melbourne*

Native Title and Aboriginal Heritage

Presenter – David Yarrow, Victorian Bar

Tuesday 25 March 2014	Melbourne*
Friday 18 July 2014	Melbourne*

Land Law for Managers of Rivers and Lakes

Presenter – David Gabriel-Jones

Wednesday 16 April 2014	Hamilton
Wednesday 18 June 2014	Melbourne*

Managing Volunteers and Grants

Presenter – Richard O'Byrne

Tuesday 29 April 2014	Melbourne*

Land Law and Coastal Adaptation

Presenter – Richard O'Byrne

Wednesday 12 March 2014	Melbourne*
Monday 14 April 2014	Phillip Island
Friday 20 June 2014	Melbourne*
Wednesday 16 July 2014	Traralgon

Land Law for Managers of Roads, Streets and Lanes

Presenter – Andrew Walker, Victorian Bar

Friday 14 March 2014	Mildura
Friday 9 May 2014	Melbourne
Wednesday 21 May	Traralgon

Crown Land Law

Presenter – David Gabriel-Jones

Thursday 13 March 2014	MIldura*
Wednesday 19 March 2014	Horsham
Thursday 5 June 2014	Melbourne

Land Law for Service Utilities

Presenter – Astrid Di Carlo, Russell Kennedy

Wednesday 26 March 2014	Melbourne*

Easements and Covenants

Presenter – Astrid Di Carlo, Russell Kennedy

Wednesday 19 March 2014	Melbourne*

Planning Law – a Strategic Overview

Presenter – Grant Arnold

Thursday 20 March 2014	Melbourne*
Friday 13 June 2014	Melbourne*

The Law and Risk Management

Presenter – Michael Beasley

Tuesday 6 May 2014	Melbourne*

Land Information Its Sources and Interpretation

Tuesday 3 June 2014	Melbourne*

Re-imagining Urban Public Land For Architects and Urban Planners

Friday 23 May 2014	Melbourne

** Our Melbourne courses are conducted either at the Law Institute of Victoria (470 Bourke Street) or at Graduate House at the University of Melbourne (220 Leicester St, Carlton).*

Enquiries and Registrations:
Jacqui Talbot –
jacqui@publicland.com.au –
phone 9534 5128

Cost:
$495 including GST, course notes and working lunch. Discounts for course hosts.

All Courses are one-day duration; 9:00 a.m. to 4:30 p.m.

Details of all these courses: http://www.publicland.com.au/professional_development.html