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Australia Day or Mabo Day ?

Should our commemoration of nationhood celebrate Governor Phillip's landing (26 January 1788) or the High Court's Mabo decision (3 June 1992)? The ideological debate is reflected in fundamental land law.

In the immediate aftermath of the Mabo decision, historian Geoffrey Blainey coined the phrases which would serve to label opposing forces in the ideological debates. Those who saw white colonisation as praiseworthy and inevitable became known as the 'Three Cheers' brigade; those who saw it as a genocidal invasion were represented as wearing the 'Black Armband.'

But this intellectual battlefield was not a product of recent years. The two conflicting interpretations were well established when the Port Phillip District was still part of New South Wales.

In putting together our course on Native title and Aboriginal heritage, we came across two very different depictions of the same event: the sale of newly-surveyed Crown allotments.

The first is the official view. It's captioned "A Modern Land Sale." Respectable citizens bid for the opportunity of bringing civilization to the wilderness – of helping turn the bush into some antipodean Devon or Yorkshire. The tail-coated auctioneer and the clerk in the bowler hat represent an orderly, benign and authoritative government.

Successful bidders will shortly receive a Crown grant signed by Governor Bourke in the name of the monarch, Queen Victoria – their title guaranteed by the doctrine of *Terra Nullius.*

The second illustration is from the satirical Melbourne magazine 'Punch' in the year 1855 – within living memory of the events being depicted. It was captioned "Fresco for the new Houses of Parliament."

This cartoon contains a few elements not found in the official depictions of such events. The bidders, far from being respectable citizens, are a mob of ne'er-do-wells and lay-abouts. The sartorially splendid auctioneer has become a rapacious spruiker. The gentleman in the striped outfit is presumably a convicted felon.

And here are the Wurundjeri people, being dispossessed of their own lands at the point of a gun.

The cartoon's caption is, of course, satire. What civic architect is going to commemorate the faulty foundation on which the edifice rests?

But returning to 2021, let's enter those same Houses of Parliament. Here we will find the apparatus under which the Aboriginal peoples were dispossessed, still on the statute books. It's the *Land Act 1958* – which is little more than a regurgitation of the 1862 original.

Despite all the good work that's gone into the *Aboriginal Heritage Act 2004* and the *Traditional Owners Settlement Act 2010*, the *Land Act 1958* remains virtually untouched.

In 2017 VEAC recommended that the Land Act be thrown out. Government accepted VEAC's recommendation, but nothing has happened – not even a discussion paper.

Let's think about reconciliation. Perhaps it leads to Australia Day being replaced by Mabo Day. It most certainly leads to killing off that standing insult to Aboriginal Australians: the *Land Act 1958*. ■

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On the subject of Churches

A fundamental principle of post Mabo law has been that Native title cannot be arbitrarily extinguished. If Crown land is to be sold off as freehold, then the Native title holders must consent – possibly through an Indigenous Land Use Agreement (ILUA) which may provide for compensation.

Crown land used for churches can be sold off by the church in question, thereby extinguishing Native title.

But hidden away in the *Native Title Act 1993* we find section 24IB, which relates to legally enforceable rights which were already in place pre-Mabo. If the exercise of such a right involves the grant of freehold, then it can occur anyway, so extinguishing Native title

Now, in 2021, few if any yet-to-be implemented contracts relating to Crown land will be dated prior to the 1990s. But then we come to the Victorian 'Disestablishment Act' of 1871.

The *State Aid to Religion Abolition Act 1871* (the 'Disestablishment Act') is one of the oldest pieces of legislation still on Victoria's statute books. Its purpose back in 1871 was to sever the relationship between church and state. In its own words, from 1875 'no moneys shall be set apart for the advancement of the Christian religion in Victoria…'

There was a curious aspect to this legislation. Even though its intention was to dissociate the secular from the religious, it set in place an ongoing stream of benefits from State to church. Wherever Crown land had already been reserved for religious purposes, the relevant religious institution could be granted freehold title over that land. The provision remains on the books to this day: congregations dwindle, parishes amalgamate, and property becomes surplus.

The head of the relevant denomination makes application to the Department of Treasury and Finance, and the land is granted as freehold – without any payment to anybody.

Indigenous owners rightfully expect that if their lands are to be sold off, then their consent is required. They will be compensated. This expectation is in conflict with a 150-year old Act of the Colony of Victoria, backed up an obscure section of the Native Title Act.

Is our analysis correct? If so, what's to be done? These are not questions for lawyers, we would argue, but for policy makers. ■

On the subject of Cemeteries

There was a time when one parcel of public land served one purpose. This parcel is a road, this parcel is a school, and that parcel is a sports field. All such certainty is disappearing – particularly in urban areas.

The change corresponds to our evolving perception of urban form and function. The concept of the 20-minute neighbourhood requires a shift to cycling and walking. And if we want facilities to be nearby, they must either be of a smaller scale, or multi-purpose, or both.

Roads are turning into pocket parks and coffee-shop forecourts. Urban waterways are turning from bleak drains to green corridors. Golf courses are facing cut-backs – either to the number of holes or the hours of operation. The battle over the Northcote course – which repeatedly had its fence cut open during lockdown until Darebin Council conceded defeat and left it open permanently – has been particularly hard-fought.

The Multi-Use Cemetery

One idea starting to get traction in Melbourne is the multi-use cemetery. It's a concept being floated by the Greater Metropolitan Cemetery Trust (GMCT) and the Future Cemeteries project at Melbourne University.

GMCT has undertaken consultation with people coming to its cemeteries to identify the types of activities they think would be suitable for a cemetery space. A wide spectrum of activities was explored, from live opera to food stalls and ball games.

Given the challenges facing our cities with increased density, urban sprawl and a lack of sufficient open space to service that growth, single-use public realm land is becoming less feasible. Reinterpreting the role of cemeteries as open space has value in addressing this challenge more broadly. Changing attitudes to cemetery tone and activities allows for this transformation. ■

Thanks to our Clients!

These articles have been informed by certain recent engagements…

The Department of Justice and Community Safety (DJCS) has engaged us to audit agency compliance with a Land Use Activity Agreement (LUAA) relating to the Dja Dja Wurrung country in central Victoria.

The Greater Metropolitan Cemeteries Trust (GMCT) engaged us to provide professional development training for a wide range of planning, management and operational staff

The Public Land Consultancy acknowledges that Victoria's public lands are country of Victoria's Traditional Owners. We promote recognition of Indigenous rights through study, policy and the law

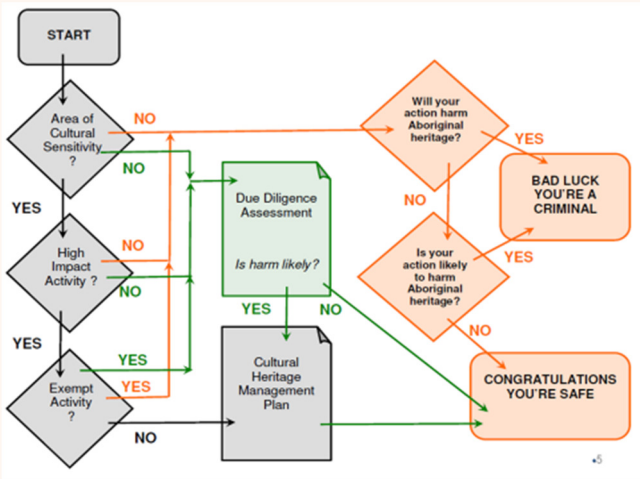
What's a PAHT, and do I need one?

Question asked by a rural municipality

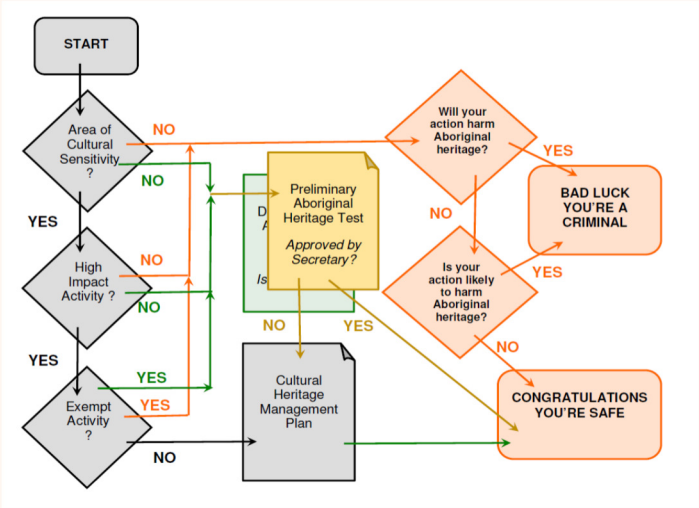
It's s **Preliminary Aboriginal Heritage Test**. If you're developing a site where there has not already been significant ground disturbance, you will need to consider potential impact on Aboriginal Heritage. This applies to any land, whether it's Crown land or freehold.

Working through the *Aboriginal Heritage Act 2006*, you will come to one of four conclusions:

1. A Cultural Heritage Management Plan (CHMP) is mandatory.
2. A CHMP is not mandatory, but you choose to get one anyway. Why? Because you don't want to destroy heritage (it may be a criminal offence) so you play it safe.
3. A CHMP is not mandatory, and (after some due diligence checking) you decide to proceed without one. This option entails certain risks. If it turns out that there is Aboriginal heritage on site and you damage it, then you are in trouble…



4. A CHMP is not mandatory, you don't want to get one voluntarily, but at the same time you don't want the risk associated with proceeding without one. In this case you seek certification from Aboriginal Affairs (AV) in the Department of Premier and Cabinet, through a Preliminary Aboriginal Heritage Test (PAHT)…

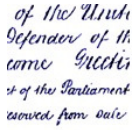


Our professional development course 'Aboriginal Heritage and Native Title' will be running again shortly, in a three-session on-line format.

To register your interest in attending, contact Fiona Sellars
(03)9534 5128
fiona@publicland.com.au

Our scheduled training courses through to mid 2021

Each course is comprised of three sessions, each of 2 hours duration.

	**Working with Owners Corporations**	Wed 24 Feb, 1pm to 3pm Thurs 25 Feb, 1pm to 3pm Fri 26 Feb, 1pm to 3pm
	**Referral Authorities and the Victorian Planning System**	Tues 2 March, 10am to 12pm Wed 3 March, 10am to 12pm Thurs 4 March, 10am to 12pm
	**Restrictions on Title**	Mon 9 March, 10am to 12pm Mon 10 March, 10am to 12pm Mon 11 March, 10am to 12pm
	**Land Law and Subdivisions**	Tues 16 March, 1pm to 3pm Wed 17 March, 1pm to 3pm Thurs 18 March, 1pm to 3pm
	**The Law relating to Works on Roads**	Mon 23 March, 10am to 12pm Mon 24 March, 10am to 12pm Mon 25 March, 10am to 12pm
	**Crown Land Governance**	Tues 20 April, 10am to 12pm Wed 21 April, 10am to 12pm Thurs 22 April, 10am to 12pm
	**Leases and Licences of Public Land**	Tues 27 April, 10am to 12pm Wed 28 April, 10am to 12pm Thurs 29 April, 10am to 12pm
	**Roads Governance**	Tues 4 May, 10am-12pm Wed 5 May, 10am-12pm Thurs 6 May, 10am-12pm
	**Property Law for Planners**	Wed 18 May, 1pm to 3pm Wed 19 May, 1pm to 3pm Wed 20 May, 1pm to 3pm

From a lawyer in a regional city law practice:
You presented a terrific session today. It's invaluable going over this stuff, especially with the input of surveyors, council workers etc. I find the Public Land Consultancy CPD's some of the best ones as it's in-depth and complex stuff.

	**Coastal Land Governance**	Tues 7 Sept, 10am to 12pm Wed 8 Sept, 10am to 12pm Thurs 9 Sept, 10am to 12pm

Cost: $440 per three-session course, including GST, course notes and certificate of attendance

Accreditation:
These courses are eligible for CPD points for lawyers and FPET points for surveyors

Enquiries and Registrations:
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