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Surfers Paradise in Gippsland

The brochures, illustrated by pictures of glamorous women in bathing costumes on the golden sands, promised a well planned resort, with shopping centres and civic amenities.

This was the 1960s, the 'paradise' was the 90-mile beach, the estate agents were Willmore & Randell, and the land being flogged was largely flood-prone sand dunes. Highly valuable in environmental terms, but utterly unsuitable for residential development.

For 60 years the purchasers of these lots (some 12,000 of them) have wondered why they bought the land, what they're going to do with it, and why they're paying rates – questions addressed in August 2019 by the Victorian Ombudsman, Deborah Glass.

In an extensive report she reviews the sorry history of the place since 1954. She recommends that some lots be consolidated into parcels of developable size but that others, the undevelopable, be brought into public ownership through compulsory acquisition.

Sorry Ms Glass – you should have started your timeline a century earlier! It was in the 1850s that the land was first freeholded by the Crown. Willmore & Randall merely continued the work of the old Lands Department, as recorded on the Booran, Dulungalong and Wulla Wullock parish plans.

Which brings us to a couple of questions. First, who should remediate the mess? If there is to be acquisition (compulsory or otherwise) the acquiring agency could be the Council, or DELWP. And second: what should become of the land, once it is back in public ownership? Seems to us there's a good case for adding it into the Gippsland Lakes Coastal Park.

And that brings us to the next question: how should such matters be decided? Well one possible answer is a revamped Victorian Environmental Assessment Council, or VEAC. This agency has already had three incarnations – as the Land Conservation Council (LCC) the Environment Conservation Council (ECC) and now the VEAC. But until now it's had a serious omission from its charter: it cannot even look at freehold land.

We could suggest quite a few tracts or types of freehold land ripe for re-acquisition by the Crown – or perhaps by some Crown-supported agency. Let's start with those bushfire-prone inliers surrounded on all sides by National Park or reserved forest. The coastline and river frontages are supposedly public land – but in far too many spots they're not. And how about those glorious scoria cones and escarpments that dominate and define the State's rural landscape… Yes, there would be plenty of work for VEAC, incarnation number four. ■

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Portsea Land Act 2021

If you want to sort out certain public land issues, there's nothing better than a good court case.

It required the death of a road worker to prompt the Supreme Court of Victoria Court of Appeal to determine that roads are indeed workplaces

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Portsea Land Act 2021 – continued

for the purposes of the OH&S Act. It required a murder to prompt the High Court of Australia to clarify the location of the border between Victoria and NSW.

So we look forward to a judicial examination of the beach at Portsea, in front of a property owned by Mr Lindsay Fox. Such a case would throw light on a matter of increasing importance – *ambulatory boundaries*.

Back in 2013 Lindsay Fox claimed ownership of a slab of Portsea beach. The Surveyor-General concurred, and accordingly the Registrar of Titles adjusted Fox's boundary. We waited in vain for the matter to be challenged in the courts.

But now Lindsay Fox has two actions on foot: in the Supreme Court he's challenging a planning matter associated with his 2013 claim, and within DELWP he's pursuing a second boundary claim, over a further slab of Portsea beach.

The first matter is heading for Court, at Fox's initiative. He's challenging a 2014 planning scheme amendment (VC115) which was premised on the assumption that when the property boundary moved, the planning zones did not move with it. We look forward to the Supreme Court's analysis.

The second matter is not yet heading into court, but we hope it will. Perhaps the officials within DELWP will reject Fox's claim, prompting him to initiate action. Perhaps they will grant his claim (as they did in 2013) in which case his neighbours at Portsea will commence action. Either way, we will finally get some definitive explanation of ambulatory boundaries, and interpretation of the common law governing them, known as the *doctrine of accretion*.

Unlike most cadastral boundaries, Fox's beach boundary is not geometrically fixed, but defined by topography, and therefore *ambulatory*. Yes, it can move back and forth, depending on whether the coastline is eroding away or building up.

Where do we go to find how this works? No good looking in Acts of Parliament, because the 'doctrine of accretion' is common law.

In any attempt to understand it, the courts would need to examine such learned precedents 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)*. That's right, Victoria in the 21st Century would be guided by (even dictated to?) by 19th Century Britain, America and Nigeria.

Along the way this hypothetical litigation might illuminate a few more issues. Was the build up of the Portsea beach *natural*, *gradual and imperceptible*, *artificial* or *catastrophic* (those being the terms floated around in the literature. Are such terms meaningful in an era of artificially induced climate change?

The courts can only go so far. They apply and interpret the law; very seldom do they make the law. That's the job of parliaments. And in the case of Lindsay Fox's beach-front boundary, there would seem to be a distinct possibility of parliamentary intervention.

> *…it would be desirable to codify the law relating to coastal boundaries in legislation.*

Back to the Victorian Environmental Assessment Council (VEAC). In March this year, in its Final Report on *Assessment of Victoria's Coastal Reserves*, VEAC stated:

> *To avoid case by case determination of ambulatory boundary issues in the courts that would lead to confusion and ambiguity, it would be desirable to codify the law relating to coastal boundaries in legislation. The current reform of land legislation provides an opportunity for this.*

VEAC's formal recommendation was:

> ***R4*** *Consideration be given in the current reform of land legislation to codifying the law relating to ambulatory boundaries.*

A step in the right direction! The '*current reform of land legislation'* is tortoise-slow and thoroughly opaque; and '*consideration be given'* is a formula for procrastination, but at least it's a start.

But here's nasty little consequence of ambulatory accretion. Normally, we recognise that Crown land may be subject to Native Title. If Crown land is to be alienated as freehold, then somebody – the purchaser or the State Government as vendor – must satisfy the *valid future act provisions* of the *Commonwealth Native Title Act 1993*. Good!

Which brings us to section **24IB** of the Commonwealth Act, relating to things called '***pre-existing right-based acts'***. Never been even thought about in Victoria, never been even mentioned in any Victorian Court.

It could be argued that, where the common law doctrine serves to extend an ambulatory boundary onto Crown land, **24IB** causes the corresponding Native title to be automatically extinguished. Bad!

We would argue that the time has come for government intervention. Take the matter out of the hands of the lawyers! Policy makers should take charge of policy issues.

A relatively simple piece of legislation would do the trick. It happened back in 1981 when parliament sorted out ambulatory boundaries further up the Bay, through the *Chelsea Lands Act 1981*.

Normally, we wouldn't advocate site-specific Acts – but this is not normal… Let's have the *Portsea Foreshore Land Act 2021*. ■

Question: Do I own my own driveway?

Question arising in half a dozen recent consultancy jobs.

Answer at Footscray:

Yes and No, in equal shares.

Here we find two houses built in the 1920s, and between them a shared driveway-easement-*thing*. Each owner drives along it, in and out of their separate backyards. The *thing* looks like a single item of property, but on title it's divided down the middle: this half belongs to owner A, encumbered by an easement in favour of B; the other half belongs to B, with an easement in favour of A. All was well, until B announced she intended to build a fence on the boundary line. Oh dear! Things were getting a little acrimonious, with threats of injunctions – until Maribyrnong Council bought into the argument (they didn't really have to: they could have left it to A and B to sort out between themselves) and resolved it with some common-sense clear talking.

Answer at Westgarth:

Yes, despite the title

Here we had a 1930s subdivision which created four lots all with access to a shared driveway-laneway-*thing*. On title the *thing* was still in the name of the original subdivider, with carriageway easements in favour of the four lots. It opened onto a public road through a locked gate, with keys held by the four lot owners. Along came a fifth abutting owner, claiming the *thing* to be a road to which he had access rights. In the end we persuaded Darebin Council that it was not a public highway, but meanwhile the owners of one of the four lots had pursued another tactic: they had tracked down the descendants of the subdivider. and had the title transferred into their own names We're not sure that was really needed, but it would have paved the way for a further re-subdivision, had that proved necessary.

Answer at Horsham:

Yes, but you really shouldn't.

Here our *thing* looked and functioned like a suburban road, carrying through traffic, containing various utilities, and giving access to some twenty abutting properties. Curiously, the 1990 subdivision had designated it *common property* rather than a road. As such, it was the responsibility of the Owners' Corporation, not Horsham Council. As such, it didn't enjoy the statutory protections provided by the *Road Management Act 2004*. Everybody involved – the council, the twenty owners and (eventually) their mortgagees – agreed that it should be a road. After several months of working through half a dozen Acts, we were able to deliver what they wanted.

Answer at Toorak:

Not yet, but you will.

Here's a 1960s subdivision, creating two lots and a pocket-handkerchief driveway-patch-*thing* marked 'R1-Road.' The *thing* was clearly intended to serve as a driveway, never as a road. These days it would probably be designated common property. A new owner wants to re-consolidate the block, including the *thing*. Worst case scenario (for the new owner): Stonnington Council discontinues it as a road, and then sells it to him at full market value – plus legal costs. The alternative: Council confirms that it's not really a road, past owners confirm that what they sold was not only the two lots, but also their possessory rights in the *thing*. The new owner then gains title through adverse possession.

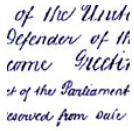
Answer at Moorooduc:

Yes, but not enough of it...

In this case we have a 1998 subdivision which created a battleaxe block. That's a familiar concept: the body of the block is remote from the nearest road, but connected to it by a sliver-driveway-battleaxe handle-*thing*. So far so good – but the handle was discontinuous, being broken by an intersecting Crown land drain. The owner feared (quite reasonably) that his use of the handle-thing could be curtailed by some unanticipated change to the status of the Crown land. We were rather surprised that the subdivision had ever been approved. Possible solutions: purchase the drain from the Crown, seek retrospective approval from DELWP under section 6 of the *Subdivision Act 1988*, or (this is what ended up happening) acquire a second battleaxe-handle-thing elsewhere. ■

Our scheduled training courses for August and September 2020

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

	**Property Law for Planners**	Wed 29 July, 10am to 12pm Wed 5 August, 10am to 12pm Wed 12 August, 10am to 12pm
	**Roads Governance**	Tues 11 August, 2pm to 4pm Wed 12 August, 2pm to 4pm Thurs 13 August, 2pm to 4pm
	**Referral Authorities and the Victorian Planning System**	Tues 18 August, 10am to 12pm Wed 19 August, 10am to 12pm Thurs 20 August, 10am to 12pm
	**Restrictions on Title**	Mon 31 August, 10am to 12pm Mon 7 September, 10am to 12pm Mon 14 September, 10am to 12pm
	**Crown Land Governance**	Tues 1 September, 10am to 12pm Wed 2 September, 10am to 12pm Thurs 3 September, 10am to 12pm
	**Coastal Land Governance**	Tues 8 September, 10am to 12pm Wed 9 September, 10am to 12pm Thurs 10 September, 10am to 12pm
	**Leases and Licences of Public Land**	Tues 15 September, 10am to 12pm Wed 16 September, 10am to 12pm Thurs 17 September, 10am to 12pm
	**Working with Owners Corporations**	Wed 16 September, 1pm to 3pm Thurs 17 September, 1pm to 3pm Fri 18 September, 1pm to 3pm
	**The Law relating to Works on Roads**	Mon 5 October, 10am to 12pm Mon 12 October, 10am to 12pm Mon 19 October, 10am to 12pm

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.

	**Roadsides and the Law**	Tues 6 October, 10am to 12pm Wed 7 October, 10am to 12pm Thurs 8 October, 10am to 12pm

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

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

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