

## Mabo Day: Three Cheers or Black Armbands?

Sunday 3 June 2012 will be the twentieth anniversary of the High Court's landmark Mabo judgment.

In the immediate aftermath of that decision, Geoffrey Blainey coined the phrases which would serve to label opposing forces in the academics' history wars. Those who saw white colonisation as praiseworthy and inevitable

guaranteed by the doctrine of *Terra Nullius*.

The second cartoon (below) is from the satirical Melbourne magazine 'Punch' in the year 1855 – within living memory (a mere 17 years) of the events being depicted. It's 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 layabouts. The sartorially splendid government 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 2012, let's enter those same Houses of Parliament. Here we will find the apparatus under which the Aboriginal peoples were dispossessed, still on the



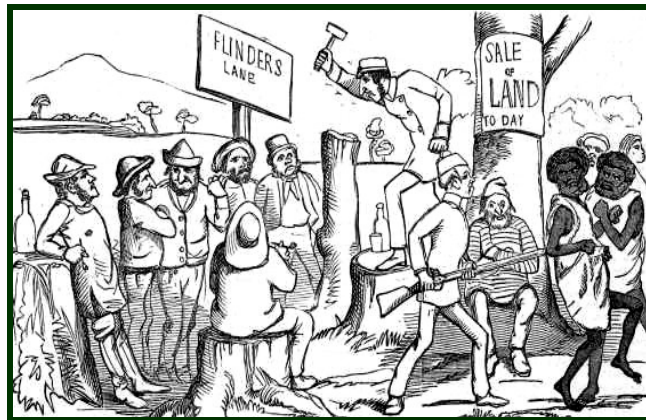
became known as the 'Three Cheers' brigade; those who saw it as a genocidal invasion were represented as wearing the 'Black Armband.'

*But this intellectual battlefield was not a product of the late twentieth century. 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 (above) 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 new monarch, Queen Victoria – their title



statute books. It's the *Land Act 1958*. The 20th anniversary of Mabo is also the 150th anniversary of this Act – the current 1958 version being 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 a standing insult to Aboriginal Australians, a relic of nineteenth century values, a mausoleum of policy and law, and a serious impediment to decent administration of the Crown estate. ■

### Native Title and Aboriginal Heritage

Presenter: David Yarrow of the Victorian Bar

### Crown Land Law, Policy and Practice

Presenter: David Gabriel-Jones of The Public Land Consultancy

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## A Carriageway Easement is just as good as a Road Reserve. Isn't it ?

*Question asked by a Councillor from an outer suburban municipality.*

A

No it's certainly not!

A carriageway easement might look like a road, with a trafficable surface, kerbs and channels, footpaths, and even streetlights – but that won't make it a road.

A carriageway easement is freehold land belonging to one party (the law calls that parcel the 'servient tenement') over which some other parcel or parcels of freehold land (the 'dominant tenements') enjoy rights to pass and repass. Here are some of an easement's deficiencies ...

	<b>A Road Reserve</b>	<b>A Carriageway Easement</b>
<i>Who has rights of usage?</i>	The public at large may use any government road reserves - even if it is declared to be unused.  It's the same with most freehold roads, whether they are on a road register or not, because they are 'public highways.'	A carriageway easement may only ever be used by - <ul style="list-style-type: none"> <li>• Owners and occupiers of the servient tenement</li> <li>• Owners, occupiers, visitors etc of the dominant tenement</li> </ul>
<i>Can there be a Road Management Plan? Can it go on a council's Road Register?</i>	<ul style="list-style-type: none"> <li>• Yes - All government road reserves are subject to the Road Management Act except those declared to be unused under the Land Act</li> <li>• Most freehold road reserves are also subject to the RM Act and may be listed on the road register.</li> </ul>	No - A carriageway easement is not a road for the purpose of the Road Management Act, and can never become so.
<i>Who has control and management ?</i>	<ul style="list-style-type: none"> <li>• Coordinating Road Authority (VicRoads, the Council, or DSE as the case may be)</li> <li>• DSE (subject to Land Act) if declared to be unused.</li> </ul>	Control rests with the owner of the servient tenement. Effective management requires agreement between both (or all) servient and dominant owners.
<i>Can Service Utilities place their infrastructure in it?</i>	Yes - Utilities have rights to use - <ul style="list-style-type: none"> <li>• All Government Roads (Govt Gazette 18 July 2002 p 1704)</li> <li>• Most freehold Roads (sec 12(3B), Subdivision Act 1988)</li> </ul>	No - Utilities have no rights without the creation of further easements in their favour.
<i>Can we prevent conflicts with livestock?</i>	Yes - The Impounding of Livestock Act 1994 and the Fences Act 1968 can cause livestock to be fenced out of a road reserve.	No - Carriageway easements allow concurrent usage therefore there may well be conflicts between livestock and traffic.
<i>Does TAC Accident compensation apply?</i>	Yes - Transport Accident Act 1986 applies – even to unregistered vehicles.	Transport Accident Act 1986 does not apply to unregistered vehicles
<i>Do the Road Rules apply?</i>	Yes - Road Safety Act 1986 (and therefore the Road Rules) applies to all constructed roads open to or used by the public.	Probably No - The Road Rules may be rendered inoperable simply by closing the gate.
<i>Can it serve lots created in future subdivisions?</i>	Yes – In general, lots created on any land abutting a road reserve may rely on that road reserve for access.	No – Lots created on land abutting a carriageway easement (other than the dominant tenement) have no rights over it whatsoever. ■

### **Land Law for Managers of Roads, Streets and Lanes**

*Presenter: Andrew Walker of the Victorian Bar*

### **Easements and Restrictive Covenants**

*Presenter: Astrid Di Carlo of Russell Kennedy, Lawyers*

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The Lord Mayoral Barge

## Thames, Danube, Yangtze, Yarra

Lord Mayor Robert Doyle (why do we think of him as 'Sir Robert'?) wants to see more ferries on the Yarra. They would ply from Docklands, downstream to Williamstown, and then to Werribee South. And why not to Geelong? Sandringham? Frankston?

Great idea, Sir Robert – but like all great ideas there's quite a bit of detail to be filled in: one bunch of detail relating to things maritime, another bunch relating to things commercial, and a third bunch of detail relating to waterway governance. That's why the idea interests us here at *Terra Publica*.

Observation one: land is land even if it's covered by water, so Port Phillip and the lower Yarra are public land, subject to all the complexities of public land law. Observation two: riparian law is complex, and coastal law is complex, and estuarine law (estuaries being simultaneously riparian and coastal) is doubly complex. In fact, the lower Yarra has possibly the most complex governance regime of any area in the State.

It's a mixture of freehold land, reserved and unreserved Crown land, and land vested in the Port of Melbourne. Agencies with powers and functions here include Melbourne Water, Parks Victoria, the Port of Melbourne Authority, Melbourne and Hobsons Bay Councils, VicRoads and TransUrban, and Places Victoria (previously VicUrban). Many of these powers and functions are overlapping – applying to the same area simultaneously.

What about Native title? The Yarra didn't always follow its current course. Major realignment in the 1880s created Coode Canal and Coode Island – place names which seem to be fading into history. Of more relevance to us, public works are deemed to extinguish Native title – although the Wurundjeri people may have regained some recognition through the Traditional Owners Settlement Act.

Then there's the Coastal Management Act. Is the Lower Yarra (or for that matter any estuary) coastal? It's no use measuring salinity or tidal fluctuations – the answer is to be found in the Government Gazette. In this case it's the Gazette of 30 Oct 2003, which (when you work through the double and triple negatives) decrees that bits of it are, and bits of it aren't.

Good Luck Sir Robert – You'll need a Master Mariner's ticket to navigate through this lot! ■

The leading article in last month's *Terra Publica* pointed out that Victoria's councils acting as Crown land committees of management were not covered by Professional Indemnity insurance – as required by the Local Government Act. Seems that the deficiency has now been rectified. Here's the letter from the MAV to all council CEOs...



16 April 2012

### TO THE CHIEF EXECUTIVE

#### Committees of Management on Crown Lands

*Following on from my previous email on this topic dated 9th March 2012, I am pleased to advise that after lengthy discussions and lobbying by the MAV on behalf of local government, the Department of Sustainability and Environment (DSE) have confirmed that their professional indemnity policy with the Victorian Managed Insurance Authority (VMIA) has been amended to now provide cover for council Committees of Management appointed under the Crown Land (Reserves) Act.*

*It has always been the MAV's position in discussions with DSE that the added cost of insuring this risk should not have been borne by local government but rather by the State and so DSE's confirmation of their cover now being extended to include professional indemnity is a pleasing outcome.*

*This outcome means that council Committees of Management over Crown land, acting in that capacity, will be covered for both public liability and professional indemnity under DSE's policy with VMIA.*

*Councils and council officers acting in a local government capacities, as opposed to any Committee of Management function, continue to be covered under their Liability Mutual Insurance policy with MAV Insurance.*

*Yours sincerely*

**Rob Spence**  
Chief Executive Officer  
Municipal Association of Victoria

#### Subdivisions and the Law

*Presenter: Dr David Mitchell  
of RMIT University  
Licensed Surveyor and member of  
Planning Panels Victoria*

#### Building Law and Regulation

*Presenter: Tom Vasilopoulos  
of the Victorian Bar; previously  
counsel for City of Moonee Valley*

#### Risk Management Law on Public Land and Roads

*Presenter: Michael Beasley  
previously of Civic Mutual Plus  
and Jardine Lloyd Thompson*

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June and July 2012

<p><b>Building Law and Regulation</b> <i>Presenter – Tom Vasilopoulos, Victorian Bar</i></p> <ul style="list-style-type: none"> <li>• Fri 22 June Melbourne (LIV)</li> <li>• Fri 24 July Melbourne (LIV)</li> </ul>	<p><b>Rivers and Lakes</b> <i>Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</i></p> <ul style="list-style-type: none"> <li>• Wed 13 June Traralgon</li> <li>• Wed 18 July Melbourne (LIV)</li> </ul>
<p><b>Leases and Licences of Public Land</b> <i>Presenter – Karen Hayes, Property Manager</i></p> <ul style="list-style-type: none"> <li>• Fri 15 June Ballarat</li> <li>• Fri 20 July Melbourne (LIV)</li> </ul>	<p><b>Easements and Restrictive Covenants</b> <i>Presenter – Astrid Di Carlo, Russell Kennedy</i></p> <ul style="list-style-type: none"> <li>• Wed 30 May Geelong</li> <li>• Wed 20 June Melbourne (RK)</li> <li>• Wed 25 July Melbourne (RK)</li> </ul>
<p><b>Roads, Streets and Lanes</b> <i>Presenter – Andrew Walker, Victorian Bar</i></p> <ul style="list-style-type: none"> <li>• Fri 25 May Melbourne (LIV)</li> <li>• Tues 19 June Mildura</li> <li>• Fri 22 June Melbourne (LIV)</li> <li>• Thurs 26 July Wangaratta</li> </ul>	<p><b>Crown Land Law</b> <i>Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</i></p> <ul style="list-style-type: none"> <li>• Mon 25 June Geelong</li> <li>• Tues 24 July Melbourne (LIV)</li> </ul>
<p><b>Native Title &amp; Aboriginal Heritage</b> <i>Presenter – David Yarrow, Victorian Bar</i></p> <ul style="list-style-type: none"> <li>• Fri 8 June Melbourne (LIV)</li> <li>• Mon 25 June Traralgon</li> </ul>	<p><b>Environmental Law</b> <i>Presenter – Brendan Sydes, Principal Solicitor, EDO</i></p> <ul style="list-style-type: none"> <li>• Thurs 12 July Melbourne (Holiday Inn)</li> </ul> <p><b>Vegetation and the Law</b></p> <ul style="list-style-type: none"> <li>• Thurs 28 June Melbourne (Holiday Inn)</li> </ul>
<p><b>Risk Management</b> <i>Presenter – Michael Beasley, Solicitor</i></p> <ul style="list-style-type: none"> <li>• Fri 29 June Melbourne (LIV)</li> </ul>	<p><b>Planning Law</b> <i>Presenter – Andrew Walker, Victorian Bar</i></p> <ul style="list-style-type: none"> <li>• Fri 15 June Melbourne (LIV)</li> <li>• Mon 30 July Melbourne (LIV)</li> </ul>
<p><b>Subdivisions Law</b> <i>Presenter, Dr David Mitchell, RMIT</i></p> <ul style="list-style-type: none"> <li>• Thurs 14 June Melbourne (LIV)</li> <li>• Thurs 26 July Melbourne (LIV)</li> </ul>	<p><b>Coastal Land Law</b> <i>Presenter – David Gabriel-Jones</i></p> <ul style="list-style-type: none"> <li>• Fri 15 June Melbourne (LIV)</li> <li>• Tues 31 July Melbourne (LIV)</li> </ul>
<p><b>Enquiries and Registrations:</b> Margaret Mills – <a href="mailto:margaret@publicland.com.au">margaret@publicland.com.au</a> – phone 9534 5128 <b>Cost:</b> \$495 including GST, course notes and working lunch. Discounts for course hosts. <b>All Courses are one-day duration; 9:00 a.m. to 4:30 p.m.</b></p>	

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