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*King Canute abolishes climate change*

*Canute has been sadly defamed. A wise king, his best-known decree was intended as a lesson to his courtiers about the futility of denial politics.*

# Splish Splash…

Land is land, even if it's covered by water. Bass Strait is land, Port Phillip is land: their wetness is immaterial. What's more, they're public land and therefore our territory, here at *Terra Publica*.

Likewise lakes and rivers. And even private swimming pools, when they're built on the wrong side of the title boundary. So, let's splash around in (or near) some water-related issues we visited in the course of 2013…

## Room for a Pool

If there's no room in your backyard for your swimming pool, just build it on the public land next door. Solly Lew may not have succeeded, but we're aware of at least two other cases in which the encroacher got away with it…

In 2005 one landholder claimed adverse possession over a couple of hundred square metres of the ocean beach – which on the cadastre was a freehold road reserve. The Registrar of Titles enquired as to whether it had been proclaimed a public highway (it hadn't) but not whether it had become a public highway by other means (it had). The encroacher's claim to have 15 year's possession was accepted at face value, despite compelling evidence that it was false. End result: a private swimming pool just up from the beach, and an unfortunate precedent we hope will not be followed by a string of neighbours.

In a second case, an outer suburban municipality discovered a large area of reserve enclosed within abutting back yards, and occupied by sheds, decks, gardens and, yes, a large swimming pool. The Council now faces a threefold dilemma:-

1 Are these acceptable encroachments which should now be legalised, and if so on what terms, or are they deplorable thefts of ratepayer assets?

2 Were we, the council, partly responsible through our acquiescence – or worse, through granting building or planning permits?

3 Is Council land really protected against adverse possession, or when put to the test will section 7B of the *Limitation of Actions Act* 1958 fail us?

*For more on this third part of our council's dilemma, see 'we can relax, can't we' on page 3.*

## Q and A, Underwater

**Question:** A lake is partly on freehold land and partly on Crown land. Who owns the fish? Who owns the water? Can recreational fishers throw their lines in without trespassing?

**Answer:** Well, the fish are owned by the Crown – at least until they're caught – so says section 10 of the *Fisheries Act* 1995. The water is also owned by the Crown – at least while it's in a waterway (including a lake) – so says section 7 of the *Water Act* 1989.

*Fisheries Victoria staff release trout into a lake, for the benefit of recreational anglers.*

But, as we said before, land is land, even if it's covered by water. Imagine a vertical column including the bed of the lake, the soil below it, and the bedrock below that. And the water above the bed of the lake, and the surface of the water, and the air and clouds above that[1]. Believe it or not, there have been claims that aeroplanes are trespassing (they're not – see section 30 of the *Wrongs Act* 1958). The legal doctrine is *ad coelum et ad inferos*[2]. *Continued…*

***Page 4 – Our Calendar of Professional Development courses for Jan–April 2014***


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## Splish Splash *continued*...

Now, if our recreational fisher is in a boat floating on the Crown land part of the lake, he or she is not trespassing. Depending what variety of Crown land it is, there may be an assortment of regulations governing activities and behaviours – but the basic presumption is one of consent: you can enter Crown land and go fishing unless some regulation says otherwise. On the freehold part of the lake the presumption is the opposite: you cannot enter the land without the consent of the owner – and that includes entering onto the water's surface in a boat.

*So our fisher-person will be trespassing on one side of an imaginary line on the surface of the lake, but not on the other.*

Now let's imagine a survival strategy for the fish. On one side of the freehold / Crown boundary line (or boundary plane, if we're thinking in 3-D) they can be got at only by the private landholder; on the other side they're fair game for a hundred thousand holders of angling licences.

The solution to this little bit of nonsense? An agreement under section 69 of the *Conservation Forests and Lands Act* 1987 between the Secretary for DEPI and the landholder – so much easier now that fisheries has been brought back within the agency empowered to make such agreements. Until then, the fish will just have to watch their GPS devices.

1 These days many parcels have a defined top and bottom
2 'Up to Heaven and down to Hell'

## *Water's Edge Consultancies*

In 2013 we had the pleasure of relaxing beside various delightful Victorian waterways (well, not exactly relaxing – we were actually working):-

At **Lake Boga**, we reviewed a catalogue of 140 unauthorised structures compiled by Goulburn-Murray Water, and devised a strategic framework for categorising them into the beneficial, the remediable, and the altogether unacceptable.

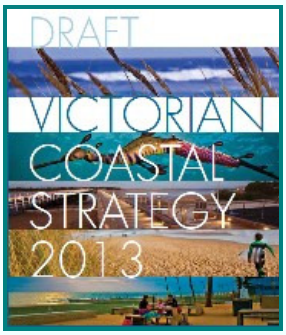
At **Lake Bullen Merri** Fisheries Victoria sought our advice on the Crown land / freehold land interface and how best to facilitate access to the lake by recreational fishers.

At **Half Moon Bay** on Port Phillip, Bayside City Council engaged us to review status and management of the foreshore and to fill the gaps in the governance of a boatramp and associated infrastructure.

On the banks of the **Glenelg River at Balmoral** we represented a private landholder who had fallen victim to some appalling official misinterpretations of riparian land status.

Along the **Murray River at Mildura**, we were engaged by Places Victoria to undertake a comprehensive analysis of an exceedingly complex cadastral legacy – and to develop a set of strategies for reconfiguring the precinct in advance of major redevelopments.

*We're hoping for some similarly pleasant engagements in 2014* ■




A draft of the next Victorian Coastal Strategy has been circulated, and it's interesting to compare it to its 2008 predecessor.

Some policies around climate change and sea level rise – have (predictably) been watered down, but it is also true to say that the Strategy has been strengthened in some areas.

Policies on coastal hazards (p47) provide a sound basis for decision-making, but there is no sense of a strategic approach. The commitment to develop a State Coastal Risk Plan is commendable – but will it result in a strategic framework, or will it just shovel more information at overworked statutory planners?

*What's missing…*

Clients often bring problems to us relating to the water's edge. It's an edge that's sometimes hard to define, let alone ascertain on the ground. What's more, it keeps moving around. But more to the point – in an era when on-shore uses and developments merge with off-shore uses and developments, what boundaries should we adopt for our governance systems?

At the moment, many Crown reserves finish at High Water Mark and most Council boundaries at Low Water. Some Planning Schemes extend out to 600m seawards of HWM, harking back to the old Port Phillip Authority controls. Surely there is a case for lining up these boundaries for greater consistency?

And while we're at it, isn't there a need for some reform around the Coastal Management Act itself? How effective have the Coastal Action Plans been?

We suspect that some have been very good (*e.g.* the Central Coastal Board's Boating Coastal Action Plan) but others have been ineffective. And how about merging the Coastal Management Act consent process into Planning Schemes? That would be more transparent. We would still need to retain the Minister for Environment and Climate Change's landowner consent for Crown land, but that's always been there.

*For more on coastal adaptation, contact Richard O'Byrne at* richard@publicland.com.au

*To enrol in our one-day course 'Land Law and Coastal Adaptation' contact Jacqui Talbot at* jacqui@publicland.com.au

Q & A

# We can relax now, can't we?

## Council land is protected from theft by trespass – isn't it?

*Question arising in one of our 'Encroachments' workshops*

It's thirteen years since the *Monash City Council v Melville* case, which confirmed that the law as it stood at that time allowed a Council reserve to be appropriated by an unauthorised encroacher. That case led to Parliament inserting section 7B into the *Limitation of Actions Act* 1958 to protect council land from adverse possession.

**Problem number one** is widely recognised: 'council land' doesn't include all council land. Old law land is still vulnerable, as are reserves in pre-1988 subdivisions which haven't yet been brought into Council's name. Same with old roads which have never become public highways (see TP, Oct 2013).

What councils need to do here is to convert their old law land to Torrens title, and to bring old reserves into council's name using section 24A of the *Subdivision Act* 1988.

**Problem number two** is less well recognised, having not yet been tested in the courts. This problem arises where the required 15 years possessory rights had already accumulated before November 2004, or before the conversion of title from old law to Torrens, or before the pre-1988 reserve was brought into council's name. In these cases it could be argued that the land had already changed ownership before it gained the protection afforded by section 7B.

A contrary argument could be built around the 12-month window (26 November 2004 to 25 November 2005) during which the Act allowed pre-existing possessory rights to be registered. Parliament intended, or so the argument might go, to disallow any claims made outside this window.

What's needed to clarify the situation is some claimant prepared to take the Registrar of Titles to court. So – please encourage your litigious citizens – we need the case law! ■

Q & A

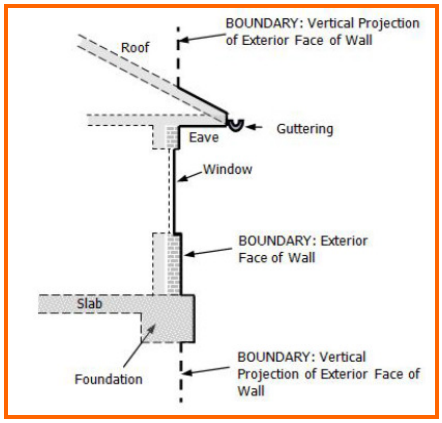
# Can a Plan of Subdivision alter an abutting road?

## (The Subdivision Regulations seem to say so…?)

*Question arising in one of our 'Encroachments' workshops*

Our questioner in this case had been checking out the *Subdivision (Registrar's Requirements) Regulations* 2011.

Clause 10 of these regulations relates to the use of buildings to define boundaries, and provides that 'a boundary may be shown on a plan by reference to a building.' It goes on to specify that a boundary may be defined as being (amongst other possibilities) the external face of a building:-




Well, our questioner asks – isn't this a device for authorizing encroachments? Overhanging eaves, guttering and footings have suddenly become part of the lot itself, haven't they?

**Answer: *No…*** These regulations relate to plans defining a subdivision of some parent land parcel – a parcel which had been laid out and defined prior to the subdivision in question – not *by* the subdivision in question. Neither the *Subdivision Act* 1988 nor regulations made under it can alter the boundaries of that parent parcel.

So when the regulations refer to boundaries, they must mean internal boundaries between lots, or between lots and internal roads or reserves being created on the Plan of Subdivision. ■

## ENCROACHMENT WORKSHOPS

*A dozen metropolitan and provincial councils have now engaged us to present our half-day 'Off-Title' workshop. It's designed to foster inter-disciplinary dialogue between stat planners, road engineers, property managers and building inspectors. For more information contact Jacqui Talbot at* Jacqui@publicland.com.au

## *Our Program of One-Day Training Courses*
# January to April 2014

### Leases and Licences of Public Land
*Presenter – Karen Hayes, Property Coordinator, City of Yarra*

Tuesday 18 March 2014 — Melbourne*

### Land Law and Coastal Adaptation
*Presenter – Richard O'Byrne*

Wednesday 12 March 2014 — Melbourne*
Wednesday 2 April 2014 — Phillip Island

### Native Title and Aboriginal Heritage
*Presenter – David Yarrow, Victorian Bar*

Tuesday 25 March 2014 — Melbourne*

### Land Law for Managers of Rivers and Lakes
*Presenter – David Gabriel-Jones*

Thursday 27 February 2014 — Melbourne*

### Land Law for Managers of Roads, Streets and Lanes
*Presenter – Andrew Walker, Victorian Bar*

Tuesday 18 February 2014 — Shepparton
Wednesday 5 March 2014 — Melbourne*

### Environmental Law for Councils as Land Managers
*Presenter –Grant Arnold*

Thursday 20 February 2014 — Melbourne*
Tuesday 25 March 2014 — Shepparton

### Crown Land Law
*Presenter – David Gabriel-Jones*

Tuesday 25 February 2014 — Melbourne*
Wednesday 19 March 2014 — Horsham

### Managing Volunteers and Grants
*Presenter – Richard O'Byrne*

Wednesday 12 February 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*

Thursday 13 February 2014 — Melbourne*

### Planning Law - a Strategic Overview
*Presenter – Grant Arnold*

Thursday 20 March 2014 — Melbourne*

### The Law and Risk Management
*Presenter – Michael Beasley*

Tuesday 11 February — Melbourne*

### Building Law – a Strategic Overview
*Presenter –Tom Vasilopoulos, Victorian Bar*

Tuesday 4 February — Melbourne*

### The Law and Subdivisions
*Presenter, Dr David Mitchell, RMIT*

Friday 28 March 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.**

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