

## Dear Mr Hulls

Congratulations on your appointment as Minister for Planning. Up there on the top floors of 8 Nicholson Street you are no doubt getting a crash course on Planning Schemes, and Melbourne 2030. But have they told you anything about Crown Land?

By and large, the State's Crown land portfolio is a haphazard legacy of the century-before-last – as is the legislation governing it. But since the Planning Minister is also the Lands Minister, you are in a unique position to fix it.

The Crown land portfolio is a mess partly because it consists of various disparate segments. Firstly there's land of state significance, like the Fitzroy Gardens, the bed of Port Phillip Bay, Werribee Park Mansion, the Murray River frontages and (we are told you're a Geelong supporter) Kardinia Park. Secondly there's land of purely local importance, including hundreds of kids' playgrounds, ornamental gardens, public halls and tennis courts. And thirdly there's operational land, like roads, police stations, and the original 19th century bits of hospital complexes.

The legislation governing this hotchpotch is also a remnant of the 19th century – although part of it was rebadged in 1978 and called the *Crown Land (Reserves) Act*. It is built around the now meaningless distinction between unreserved, temporarily reserved and permanently reserved Crown land. It reflects an era when Crown land was synonymous with public land, and freehold was synonymous with private land – an increasingly false dichotomy, but one which was reflected until very recently within state Cabinet itself.

Until 2002 government separated its role as Land-Owner from its role as Land-Planner. The former role traditionally fell to the Minister for Lands, who protected the Public Interest on Crown Land through the Land Acts. The latter role fell to the Minister for Planning, who protected the Public Interest on freehold land through the *Planning and Environment Act*.

In the 1990s, Planning Schemes were extended to cover Crown land. Now, instead of the 20th century freehold land controls standing alongside the 19th century Crown land controls, they sat on top of them. The *Coastal Management Act* added new controls over coastal Crown land. Further State and Commonwealth Acts addressed native title, flora and fauna, and heritage values. For



Why is this Man Smiling?  
He's just become Crown Land  
Supremo.

Crown land, a series of layers had been added to the legislative lasagne.

In December 2002, Premier Bracks re-jigged Cabinet and ran the Land-Owner and the Land-Planner roles together. For the first time, the Crown land Acts were to be controlled by the Planning Minister. If the Premier intended to foster a corresponding re-jig of Crown land administration, it didn't happen.

**The challenge facing a 21st Century Planning Minister is to find governance regimes appropriate to each of the various Crown Land segments. Here's our suggestions (a bit provocative perhaps, but why not?)**

*Land of State or Regional significance should be kept as Crown land and managed by DSE / Parks Victoria. Land of local significance should be given (not sold, given) in freehold to municipalities. Operational Crown land should be given in freehold to the agency which manages it.*

Then, have a go at the lasagne. The retained Crown land (of state significance) should be governed by the State under state-administered legislation. In other words, remove the 'planning' layer. National Parks are surely fully protected by the *National Parks Act* and Management Plans made under it. The same for foreshores, protected by the *Coastal Management Act* and Coastal Action Plans. Little if anything has been gained by slapping some planning scheme zone over them.

Get rid of the nonsense about Crown land being unreserved, temporarily reserved or permanently reserved – if it's worth keeping, it should be protected by a statutory Management Plan against which its managing agency will be held accountable. (While we're at it, let's have Business Plans setting out the financial contribution the government is going to make towards its upkeep.)

...continued

Dear Mr Hulls - *continued*

*If it's of local importance, Crown land should be handed over to municipalities – not just to manage, but to own.*

*The local kids' playground, tennis courts and public hall need not be burdened by the dead hand of the Crown Land (Reserves) Act, and the dead hand of Treasury accounting systems.*

The first dead hand means that any change of use, tenure or configuration may (at worst) need a site-specific Act of Parliament. The second prevents the council from dealing with such land as normal municipal assets. This is a regime which actively works against good outcomes – either in a planning sense or a capital asset management sense.

Such land would be more than adequately protected by the accountability mechanisms of the *Local Government Act* and the processes of the *Planning & Environment Act*. Planning schemes do a couple of things far better than the Land Acts: they identify and document the values of locally significant land which might otherwise go unacknowledged, and they represent the Public Interest in circumstances where it may diverge from the interests of land-owners – including councils.

**How about kicking off the hand-over with non-arterial government roads in designated Activity Centres?**

Shift the notional value of the land in these roads from the Government's books to councils' books (Treasury & Finance won't notice, because roads aren't revenue-producing). Councils, which already have power to discontinue these roads, will suddenly have both the incentive and the resources to undertake precinct reconfiguration and site consolidation. This action alone would strike a massive blow for Melbourne 2030.

It's the same for operational Crown land – just hand the title over to the Government Department or the Water Board or VicTrack or whoever. Imagine how past land use decisions have been distorted because the controlling agency doesn't have responsibility for the value of its own land...

*We think it's a reasonable agenda – but if they're a bit timid up there on the top floors of 8 Nicholson Street, how about starting off with a reference to the Parliamentary Environment and Natural Resources Committee? ■*

## Do Local Laws Apply to the Crown?

Melanie Olynyck, Partner, Maddocks

In the last issue of Terra Publica, we considered the question of whether or not council local laws apply to Crown land. The answer was 'yes', unless the particular control was inconsistent with other legislation (including regulations made under the *Crown Land (Reserves) Act 1978*).

**This article addresses a related question – do council local laws apply to the Crown?**

This question often gets raised when a public body undertakes an activity that would be in breach of a local law but contends that it is not bound by the local law. For example, an electricity company may cut down a tree on Crown land without obtaining the necessary permit under the local law.

In short, there are two situations in which public bodies will not have to comply with a local law:

The first is where they form part of the Crown and attract the 'shield' of the Crown. The general principle is that the Crown is not bound by legislation except by express words or necessary implication (see *Province of Bombay v Municipal Corporation of Bombay [1847] A.C 58*), although it is always a question of statutory interpretation (see *Bropho v State of Western Australia (1990) 171 CLR 1*).

Part 5 of the *Local Government Act 1989*, which concerns the making of local laws, does not deal expressly with this issue. Further, there is a tendency to find that local government legislation (see *Randwick MC v Commissioner for Government Transport (1966) 13 LGRA 126*) and legislation imposing a criminal sanction for non-compliance (see *Cain v Doyle (1946) 72 CLR 409*) contain no necessary implication that the Crown is bound. This suggests that local laws are unlikely to apply to the Crown, including those who form part of the Crown and attract the 'shield' of the Crown.

The question of who represents the Crown is answered by considering the Act constituting, or circumstances of, the public body. Sometimes an Act will expressly address whether a body represents the Crown; where it does not, the functions of the body, and the extent of Executive control, may indicate Parliament's intention in this regard.

The second situation is where the public body is authorised to act under another Act in conflict with the local law. Public bodies are invariably creatures of statute, and so their powers and duties are usually set out in their enabling Acts. Where these Acts confer powers that conflict with a local law, then the local law controls are likely to be inoperative, in light of section 111 of the *Local Government Act*.

However, there are limits to the exercise of these powers; for example, they must not be exercised negligently or in a way that is beyond power (eg where the action is unreasonable or there is a failure to take into account relevant considerations). The enabling Acts themselves may also contain express limits or confer rights on those that have suffered damage. ■



## Q & A

### Can you please explain “Act 391”?

(Question asked by a firm of solicitors in a provincial city)

*Disestablishmentarianism* is one of the longest words in the English language\*. It means the philosophy of separating church and state. It got a bit of a run when Archbishop Hollingworth was G-G, but its heyday was in the 1860s, when it took up space on newspaper front pages in both England and Australia.

Until then, it had been seen as quite proper for the state to make hand-outs to the church. In a typical Victorian town, Crown land was set aside for churches – just as it was for town halls, court houses and army drill-halls. We colonials were more liberal than the English (for whom the C-of-E was the one ‘established’ church), so we set aside Crown land for Roman Catholics, Presbyterians, ‘Primitive Wesleyans’ (that’s Methodists) and even for Hebrew Synagogues.

But that all came to an end in 1871, when the Victorian Parliament passed Act Number 391 – the *State Aid to Religion Abolition Act*. There were to be no more hand-outs. However, the Act provided that Crown land already reserved for church purposes could be disposed of by the relevant church, which could keep the proceeds.

The Act is still on the statute books, and is still in use. Every year, as congregations dwindle and churches are disbanded, Crown reserves are handed over in fee simple, free of charge, for the relevant archbishopric to dispose of as it sees fit. The land is invariably sold off, and the title records the fact that it derived not from a Crown Grant, but from the provisions of ‘Act 391.’

It’s a hundred and thirty-six years after the statutory separation of church and state, but taxpayers’ assets are still being handed over to support sectarian causes – particularly those denominations which are contracting rather than expanding. We’d normally have doubts about the ethics of the whole thing, but God’s behind it, so it must be all right. ■

\* *But anti-disestablishmentarianism is longer.*

## Weed Policy Seminar

*The Weed Society of Victoria Inc. will host a seminar on 17 February at Monash University Clayton on the topic “Policies for Weed Management – Who Has Responsibility?”*

*The seminar will explore such questions as: ‘How well known or understood are weed policies?’ and ‘Are they realistic or idealistic and are they enacted successfully by the agencies that should be in charge of them?’ Speakers include: WWF Australia, DSE & DPI, Port Phillip & Westernport CMA, VicRoads, Municipal Association of Victoria, Surfcoast Shire Council, and Pinkerton Landcare & Environment Group.*



*For further information please contact Ros Shepherd, Weed Society of Victoria Inc. ph. (03) 9576 2949 or [secwssv@surf.net.au](mailto:secwssv@surf.net.au)*



*Readers of Terra Publica should not act on the basis of its contents which are of a general nature, capable of misinterpretation and not applicable in inappropriate cases. They do not, nor are they intended to, constitute legal or specific advice. The Public Land Consultancy is available to provide advice on public land matters and will, on request, arrange legal advice for clients from its associate Maddocks, of 140 William Street, Melbourne.*



# Public Land and Activity Centres

## *A One-day Professional Development Course*

Many Activity Centres designated in Melbourne 2030 include a large proportion of public land – roads, reserves and railway land – often under-utilised or poorly configured. This course aims to provide Strategic Planners and other Council Officers with a tool-kit for the rationalisation or adaptive re-use of these spaces.

### Course Content

#### Land Status and Control in Victoria

- Status – freehold and the various forms of Crown land
- Control – ownership, delegated management and vestings
- Roles and responsibilities: who's who in Public Land
- Municipalities – their land-related powers

#### The Use and Development of Roads

- Types of road: Subdivisional, Government, Arterial...
- Ownership and control of roads and lanes
- 'How roads can be created, deviated, and discontinued
- How roads can be developed and put to commercial use – both at the surface and at other strata

#### The Use and Development of Railway Land

- Ownership and control – VicTrack, Connex, Pacific National
- How railway land can be used and developed at the surface and at other strata
- Case studies: Camberwell station; Footscray station

#### The Use and Development of Public Spaces

- Ownership and control of Crown reserves, freehold reserves, creeks and foreshores
- How these spaces can be created, regulated, altered, used for commercial purposes, and disposed of
- Commercial use of reserves and public spaces: leases licences, and permits
- Car parks – their funding, acquisition and management

### Looking beyond the Planning & Environment Act...

- The *Land Act* 1958 governs the creation and closure of Government Roads, and leases and licences of strata above and below them
- The *Crown Land (Reserves) Act* 1978 governs the use, management and tenure of many parks, gardens, recreation reserves and municipal facilities
- The *Local Government Act* 1989 sets out councils' powers to acquire, exchange, sell and lease land; and to control public land through local laws
- The *Subdivision Act* 1988 governs the creation of roads, reserves and other public spaces on freehold land
- The *Transport Act* 1983 empowers VicTrack to sell or lease Railway land, at the surface and at strata
- The *Road Management Act* 2004 is the latest in a series of Acts governing the creation, ownership, control, and disposal of land in roads and lanes
- The *Road Safety Act* 1986 is one of several Acts under which councils may plan, acquire and control car parks

Cost: \$440  
including GST,  
course-notes, and  
working lunch

Course Format – One Day duration (9:00 am to 4:30 pm) - Maximum 10 persons

- We can run the course for your staff, either in your offices or off-site
- You may prefer to 'host' the course and invite staff from other agencies
- You may enroll staff in one of our Melbourne-based courses

### Inquiries and Registrations

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