



Now Don't You Worry About That

Michael Forde (Counsel examining):- *What do you understand by the doctrine of the separation of powers under the Westminster system?*

Sir Joh Bjelke Petersen:- *No, I don't quite know what you're driving at... I believe in it very strongly, and despite what you may say... Between the Government and the – Is it? ...Well you tell me! And I'll tell you whether you're right or not. Don't you know?*

After 16 months of deliberations, 23 days of public hearings, 142 witnesses, and \$3 million of taxpayers' funds the Parliamentary Committee into Public Land Development has come up with a report almost as incoherent as Joh's evidence to the Fitzgerald Royal Commission.

The separation of powers between the three arms of government, which so bewildered Joh, was just one of half a dozen fundamental issues on which the Committee could have produced some useful insights, but didn't.

From its inception the Opposition-dominated Committee had its problems. Was it inquiring into public land, or Crown land, or public open space, or green wedges, or the public land planning zones? Taking advantage of the confusion, the Government invoked a narrow definition of public land intended to stifle debate and noble public servants called up to give evidence.

The majority (Opposition) report condemns this Government intervention as 'a serious breach of the

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separation of powers between Parliament and the Executive.' Curious, because a fair swag of the Committee's findings could well be portrayed as attempts by the legislative arm of government to intervene in decisions properly made by the executive arm of government, and open to review by the judicial arm of government.

The minority (Government) report condemns the majority for political grandstanding, wasting taxpayers' resources, making reckless allegations of corruption, and cruelly deceiving the many people who genuinely tried to engage with the substantive issues.

In this context, let's have a look at some of the questions the Committee should have addressed, had it ever got serious...

• An Irrational Taxonomy

The Committee's battles over terminology were really about the scope of its fishing expedition: the wider the net was cast, the greater the chance of hauling in something unsavoury. Instead of bickering, it should have attempted an analysis of the mess – to provide us with a conceptual framework for reform.

We surely know how a National Park differs from a suburban police station; how Caulfield racecourse differs from a railway siding; how Mud Island differs from Federation Square – even though they're all, in some sense, public land. But we need to analyse and codify the differences before we can construct effective instruments for their protection. The Committee didn't even come close. Had it done so, we might have a starting point for considering, for instance, the relative roles of the legislature, the executive and the judiciary.

• A System Out of Balance

Public land has yet to find its proper place within the Australian version of the Westminster system.

Here, the executive and the legislature have never been as distinct as they are, say, in America. Our ministers are simultaneously parliamentarians and *de facto* heads of departments. It is unremarkable that executive government controls the business of the parliament – including, in normal circumstances, its standing and select committees. So where do we turn for independent scrutiny of the executive/parliamentary government?

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To ensure probity we have set a series of semi-independent agencies into the space between the bureaucracy, the parliament and the courts: the Victorian Environment Assessment Committee (VEAC), the Commissioner for Environmental Sustainability, the Auditor General, the Victorian Civil and Administrative Tribunal (VCAT) and so forth.

The Select Committee wanders around within this space, recommending the establishment of 'an independent advisory board' with undisclosed composition and functions. It recommends various *ad hoc* matters be referred to the Ombudsman, and a wider role for the Government Land Monitor (but still limits its role to land *transfers* rather than land *holdings*). It has a bob-each-way on VCAT – accusing it of pro-developer bias, but elsewhere implying that it would have been pro-objector – if only it had not been bypassed by government. Finally, in pursuit of a wider political agenda, it pronounces the whole system to be so shonky that we need an Independent Commission against Corruption.

• **Moribund Legislation**

On private freehold we have, through 60 years' evolution of the planning system, achieved a measure of equilibrium between the three arms of the Westminster system. Parliament has enacted the *Planning and Environment Act* 1989 and the *Subdivision Act* 1988; State and municipal bureaucracies administer these Acts and their corresponding subordinate instruments; VCAT and the Supreme Court keep us all relatively honest.

This has been a shifting equilibrium: it is a living system with functioning feedback loops. The legislature has made extensive refinements since the *Town and Country Planning Act* of 1944; the executive deals with a constant stream of Planning Scheme Amendments; and the judiciary is kept busy as developers and objectors challenge not only individual decisions, but the system itself.

No equivalent balancing principles and systems have ever evolved for public land. Although it's had large

slabs chopped out of it over recent decades, the *Land Act* 1958 is still a product of the nineteenth Century, when the Port Phillip Colony was administered by Vice-Regal decree, and the Surveyor-General was an unelected member of the Executive Council.

The *Crown Land (Reserves) Act* 1978 is not much better – despite layers of patches, it also remains mired in its nineteenth century origins. Under its system of 'temporary' and 'permanent' reservations, parliament is called on to make decisions about inconsequential paddocks, while the executive can dispose of land with state or even national significance. The regulatory system can only be described as Dickensian. There are only haphazard requirements for proposals to be put on exhibition, for public submissions to be considered, for independent review or for judicial appeal.

• **The Feedback Blockage**

The absence of structured feedback loops for public land is at the nub of many of the cases placed before the Committee. The time has surely come to build them – but first, we need some public policy work of the kind the Committee failed to undertake.

What is the public interest which needs to be protected? Where's the balance between democracy (rule by the majority) and justice (rights of the individual)? What weight do we give community stakeholders, lobby groups, and vested interests (or are they the same thing)? Do owners of public land have proprietary interests? What place is there for inter-generational equity and indigenous rights? What penalty regime should apply, with what enforceability?

Had the Committee applied its collective mind to such questions we might now have a policy framework within which to address the future of public land. It didn't, and we don't.

But perhaps we're expecting too much. Sir Joh would have reassured us: 'Goodness gracious. Now don't you worry about that.' ■

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The Good News...

Several submissions to the Government's Biodiversity White Paper have taken up recommendations from our recent work for DSE on riparian land

Victorian National Parks Association

"The very old arrangements for several thousand licences for the use of riparian land (most of which are due to be renewed in 2009) must be reviewed. The task of reviewing each licence is huge, and probably needs something like a *Code of Practice for Riparian Land* to ensure consistency."

Victoria Naturally Alliance

"Current legal requirements for publicly owned stream frontage management lack public interest criteria, with management fragmented and overly complex. The Public Land Consultancy's Review (2008) proposes a range of ways of achieving legislative reform. The suggestion of introducing all the *recommended legislative changes through a single Riparian Land Reform Act which will amend six or eight existing Acts, and can then be repealed* is worth exploring further."

River Basin Management Society

"We commend a review of existing legislation and regulation and again recommend adoption of the recommendations of the Public Land Consultancy for the management of Crown frontages and other riparian lands in Victoria."

...and the Bad News

You have to hand it to Chris Rule, the Weekly Times' cartoonist. His long-suffering man-on-the-land breaks the bad news to his stock: *Sorry guys, the picnic on the river bank is over* (6 Aug 2008).

We have a different sort of admiration, however, for the Weekly Times' leader-writer, who must have spent hours dredging through our 350-page report to find a handful of words to remove from their context, embellish and distort into a 'Shock-Horror' story. What diligence!

The result of these endeavours? "*GRAZING LEASES FACE ASTRONOMICAL FEE HIKES.*" Investigative journalists Woodward and Bernstein would be proud. Well, that's the *Weekly Times* for you. Good cartoons. ■

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