T E R R A   P U B L I C A
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THE LABOURS OF HERCULES

Spare a thought for Hercules, set twelve tasks by his vindictive step-mother – from mucking out the Augean stables to stealing the girdle of the Amazon queen. Each and every task must be completed: if he fails just one it counts for nothing that he's passed all the rest.

So it is with public land development approvals – they are, by and large, each independent and mandatory. There's no point passing the tests set by the Native Title Act unless you've also passed those set by the Aboriginal Heritage Act; and no point getting Coastal Management Act consent if you're going to be brought undone by the EPBC Act. There's no point negotiating a lease if the Crown land status prevents leases from being granted – and there's little point getting the land status changed if competition policy is going to deliver the lease to some rival.

i

Task two: slay the nine-headed hydra

To the small business-person trying to put a kiosk on a river frontage, this multiple-permit regime seems pointlessly bureaucratic; to the old hands contemplating their next multi-million dollar marina it's all in a day's work – albeit Herculean.

Futility: VCAT explores existentialism

The planning system is very much a part of this multi-permit approval morass. Is there any point seeking a planning permit if the project as a whole is futile? It's a question which has been exercising VCAT and the Supreme Court.

In one case[1] a Freeway Service Centre would have impacted on habitat of the growling grass frog. Here VCAT directed that permits issue even though serious doubts were raised about Commonwealth approvals under the EPBC Act. To reject the application as fatally futile, VCAT found, would require a 'degree of hopelessness' which the said doubts did not even approach.

In another case[2] involving a sign intruding into airspace over a road, VCAT directed that Council acting as Responsible Authority must disregard the fact that tenure had been denied by Council acting as land-owner. As the Tribunal noted, policies may change – councils do go through periodic elections and turnover of senior staff.

The Supreme Court has pointed to the benefits of breaking down these approval-silos[3]:-

> *…if the owner of the property refuses to give consent, it would be highly relevant for Council and, subsequently the Tribunal, to know whether there was any realistic prospect of such consent being given. If not, it could be highly relevant to Council and the Tribunal in deciding whether to reject the application as futile… Councils and VCAT ought to be able to deal summarily with futile applications.*

But there may be other benefits of breaking down some of the silos…

Multiple permits, better outcomes?

This is not an academic issue. The government promises to 'streamline' public land legislation within five years. A swag of Acts are to be reviewed, repealed or consolidated – and even though we hope Hercules' twelve labours are not agglomerated into one mega-labour, they should perhaps be re-jigged.

The multiple approval regime is also a multiple protection regime. It conveniently parcels up development approvals into bite-sized units, each with clear objectives, each open to technical analysis and legislative codification. Importantly, individual consents cannot be played off one against the other – which might be the case if they were somehow consolidated. Nonetheless, there's a strong argument for encouraging some cross-approval coordination.

The Thirteenth Task

When you line up all these approval-protections, there may still be no adequate mechanism for meaningful public input and judicial review. It is this gap, big enough for a herd of Cretan bulls, which has caused some of our most damaging public land

continued

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Hercules, continued

controversies – the St Kilda Triangle, Camberwell Station and the Kyneton Bowling Club. Systems which were developed for reviewing private landowners' decisions about their own freehold properties are simply inadequate for reviewing a public sector entity's proposals for public property.

Task seven: capture the Cretan bull

The gap is well illustrated by the statutory process for issuing Crown leases under the Land Act. A notice must appear in the Government Gazette 14 days before the lease is to be signed – but it's a notice that neither invites any response nor sets in train any due process. Often, a Committee of Management about to issue a Crown Land (Reserves) Act lease may avoid public scrutiny altogether. If, by chance, the corresponding use or development happens to require a planning permit, then our Crown landlord may put an ear to the silo wall and so gain some insights into public feeling, but is under no obligation to it into account.

No democracy on Mt Olympus

Poor old Hercules just accepted his workload. There was no point challenging the gods at VCAT, or opposing them at the next election, or stirring up a media campaign. He knew all too well that Olympus was a tyrannical theocracy.

But down here in the real world and the 21st Century, it's time to re-think how justice and democracy should be better factored into public land decision-making. ■

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References:

1 *Carwoode Pty Ltd v Cardinia SC (Red Dot) [2008] VCAT 1334* (23 June 2008)[1]
2 *Octopus Media Pty Ltd v Port Phillip CC (Red Dot) [2008] VCAT 313* (20 February 2008)
3 *Port Phillip City Council v Hickey [2001] VSC 129* (3 May 2001)

OOPS!
Did we just waste a million dollars?

Question asked by a council which bought a discontinued Government road.

Here's a Council re-imagining its Central Activity District: humanizing a run-down railway station precinct, harvesting bleak car parks, consolidating dysfunctional freehold blocks for redevelopment, and reconfiguring a nineteenth century road layout. Very laudable: exactly what the state government wants to promote.

And yet State Treasury didn't hesitate to pick up a $1 million windfall when Council officers failed to appreciate the possibilities of an obscure passage of the *Local Government Act* 1989.

Government roads belong to the Crown. If they're going to be discontinued and sold off then it's simply assumed that the Crown picks up the value of the land – regardless of the merits or the economics of the overall land restructure. The trick is to align the discontinuation of one road with the dedication of another, and to parcel up the two transactions as a road 'deviation.' If you can, then the land in the discontinued government road automatically becomes freehold land owned by the council, without Treasury picking up a brass razoo.

You might imagine that in order to qualify as a deviation, the new road has to more-or-less connect the same points that were connected by the old road, but not so: the Local Government Act in effect allows a deviation to be anything that DSE (as agent of the Minister responsible for the *Land Act* 1958) agrees to be a deviation.

So, in the case in question, was there a real need to create some nearby new road? If not, could the plan have been re-jigged to fabricate a new road? And could Council have packaged up a story to persuade DSE that this qualified as a deviation? Maybe, maybe not – but the officers concerned (being less Machiavellian than we are, here at *Terra Publica*) didn't think along these lines and off went the million bucks to Treasury.

The real question here is, of course, not the one in the heading, but – Who should be regarded as owner of the land in government roads? If the government seriously believes in urban consolidation, and expects councils to implement this vision on its behalf, then there is a compelling case for attributing ownership of all government roads to municipalities. ■

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Who put the tank trap in the middle of a suburban park?

Question asked by the lawyers representing a trail-bike rider who's now a quadraplegic.

In common with most large tracts of open space, this Perth park presents a variety of hazards for users. The dangers arising from the 2-metre deep stormwater drain are readily appreciated in retrospect – but should the park managers have foreseen the trail-bike accident, and rectified the hazard? That was the question before the District Court of Western Australia just a few weeks ago.

Park managers can hardly eliminate every hazard occurring in their park – but they should have in place a formal risk management strategy based on an accepted standard such as AS/NZS 4360: 2004, or the newer ISO 31000:2009.

Several factors tend to suggest that any such formal risk management program would, in fact, have identified this particular drain as a hazard and given a high priority to its remediation.

Those factors included the rapid urbanisation of the surrounding area, the clear recognition of other problems associated with stormwater discharge, and obvious but unexplained discrepancies between the treatment of this drain and its neighbors.

If applied, the methodology in the standards would not only have identified the drain as a hazard, but would surely also have flagged it for early attention. For a few thousand dollars it could have been fenced; for a few more it could have been put underground and the risk totally eliminated. As it turned out, the park's insurers paid out a seven-figure sum: not, one would imagine, a matter of great joy for the victim.

In Victoria, statutory law is a little different from that in Western Australia. Here, the *Wrongs Act* 1958 sets out (in Sec 14B(4) and Part XII) the basis of possible defences against accusations of negligence.

But whether your park is on one side of Australia or the other, it would be unconscionable for its manager knowingly to leave remediable hazards untreated – even if the law provided statutory defences, even if the persons at risk might be contravening regulations, and even if any damages payout might be offset by insurance. ■

Where is it? 31°44' 34.29" S; 115°47' 37.27" E.

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