

CATCH 22

If you're a member of the Parliamentary Committee into Public Land, we have some advice for you. First – read Joseph Heller's *Catch 22* – you'll discover where Rob Hulls gets his inspiration from (short-cut: read the box below). Next – Google the word 'subsidiarity' you might just figure out what you should actually be recommending.

Wikipedia will tell you that subsidiarity is the principle that in a hierarchical system, governance ought to be handled by the lowest-level competent authority. In Europe they've discovered it relatively recently – there your traditional Nation-State is passing matters of international significance upwards to the EU, and devolving matters of local significance downwards to regional assemblies. In Australia, we have known about this stuff since 1901, and we call it Federalism.

Whatever it's called, the principle is not always applied to public land, but perhaps it should be. Arguably, public land of national importance should be under the federal government; public land of state importance should be under state governments; and public land of local importance should be under the control of municipalities. Straightforward?

Things headed off in another direction at federation, when the States handed certain powers to the Commonwealth – but not power over land. Using its constitutional powers, the Commonwealth has assumed certain controls over land – including sites of international significance (like Melbourne's Exhibition Buildings) and issues of national or international significance (like those listed under the EP&BC Act). So, should National Parks be handed over to Canberra? There might be some logic to the idea, but there's no pressing demand for such a change – as there is, one could argue, for water in the Murray Darling basin.

In relation to public land, a more compelling case exists for a realignment of responsibility between state and local government. If the Parliamentary

Committee was actually interested in policy reform (rather than childish political point-scoring) there would be no better place to start than this.

The problem here stems back to well before federation – to a sequence of events in the murky depths of the nineteenth century. In the days before town planners, towns were nevertheless planned – but by surveyors. They decided what land was to be set aside for the recreation reserve, the ornamental gardens, the town market and the public hall. Then, at a later date, sometime after the area was settled, it was 'incorporated' into a municipality. In other words, the public land remained owned by the Crown simply because it predated the local government which was to become its manager.

This resulted in an illogical pattern of governance, which survives to this day – a pattern which virtually guarantees distorted decision making, sub-optimal land use arrangements, gross inefficiencies, confused accountabilities, and unnecessary disputes. The land is used and managed by councils, which can't make rational decisions about it because they don't own it. As Crown land it is controlled by the state, which doesn't really need it, isn't directly responsible for the functions which it supports, and is in no position to make informed decisions about its future.

Treasury almost wins the Joseph Heller award, but they're out-classed by Rob Hulls. Their entry goes like this: the recreation reserve and town market and public hall and road reserves aren't real assets. Sure, they produce community benefits, but not an actual revenue stream for us. Therefore we don't mind you (the local community) using the land free of charge for some 19th Century purpose, or even allowing it to lie idle – but as soon as it's turned from a non-monetary asset into a monetary asset, we will move in and pocket the proceeds. Even if you want to recycle the land for some government-sponsored program, like Melbourne 2030, we'll do what we can to make your proposal financially unviable. Catch 22.

So what's the recommendation the Parliamentary Committee should be making? *Give (don't sell) Crown land of local significance to Councils.* ■



Heller

And the Joseph Heller award for Catch-22-Think goes to Rob Hulls!

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could therefore be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions.

"Some catch, that Catch-22," Yossarian observed.

"It's the best there is," Doc Daneeka agreed.

- Joseph Heller

If there's to be an Opposition-dominated Parliamentary Inquiry into the disposal of Public Land, then they'll need a definition of Public Land.

Let's adopt the definition set down in Administrative Order No 58 of 1988, which defines 'Public Land' as land which won't be disposed of, and 'Government Land' as land which can be disposed of.

Now, if you want to inquire into the disposal of public land, you can't – because, by definition, it just doesn't happen.

- Rob Hulls

Do You Have a Criminal Record?

If you don't have one already, you probably don't want to get one – so that's the basis on which we approach the *Aboriginal Heritage Regulations 2007*.

There's another good basis for approaching this issue – that you don't want to harm Aboriginal heritage – but for the moment let's concentrate on the not-becoming-a-criminal motivation.

The *Aboriginal Heritage Act 2005* makes it a criminal offence to harm Aboriginal heritage –

- *knowingly* max fine \$1.0 m
- *recklessly* max fine \$600,000
- *negligently* max fine \$300,000

Then there's a further offence, namely doing something *likely* to harm Aboriginal heritage, for which the fine is up to \$600,000.

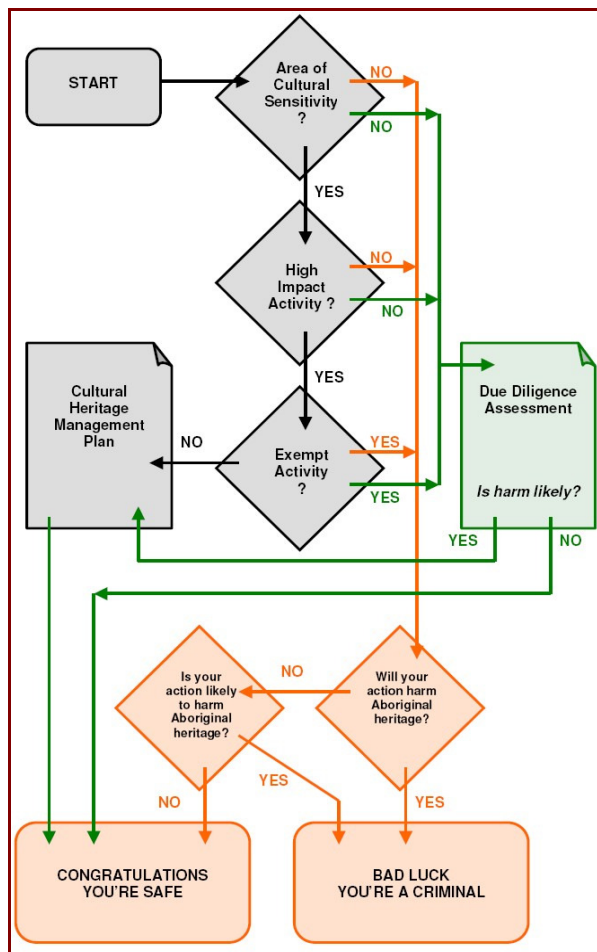
And as well as a fine, you can get yourself a criminal record.

There are numerous analyses of the Act and the Regulations in circulation, but some don't get around to making this point.

These analyses work through those Regulations which specify whether a Cultural Heritage Management Plan (CHMP) is mandatory. It's the part of the flow chart shown here in black.

What's missing is an account of what happens when a CHMP is not mandatory. This is the bit shown in orange on the flow chart. Work it through: you'll see that it can lead you straight into the dock.

Making (and abiding by) a CHMP is one defence against criminal charges (and there are a couple more statutory defences in the Act). It's starting to look as if making a CHMP in *any* circumstances is an attractive option – whether mandated or not.



But there's another approach – and that's *due diligence* – as shown in green on the flow-chart.

Due diligence isn't defined in the Act or the Regulations – but it may involve desktop and/or field assessments, consultations with Registered Aboriginal Parties (RAPs), training for on-ground personnel, and protocols for dealing with the unexpected discovery.

And hopefully, no handcuffs. ■



Professional Development: *Native Title and Aboriginal Heritage*

Course dates and Venues – see Page 4

Course content: www.publicland.com.au/professional_development

Our Presenter: Megan Goulding

Interim CEO, Wurundjeri Tribe Land Council

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| <p>Need assistance with Road Transactions?</p> <p><i>We can help you with road closures, discontinuations, encroachments, proclamations and deviations</i></p> <p>Our consultant: Toula Kotsabouikis Phone 9534 5128 toula@publicland.com.au</p> | <p>Need assistance with Land Status?</p> <p><i>We can help with determining land status, parcel definition, and design and implementation of status-change processes</i></p> <p>Our consultant: John Macey, Licensed Surveyor Phone 9534 5128 john@publicland.com.au</p> | <p>Need assistance with Leases and Licences?</p> <p><i>We can help you with Crown Land (Reserves) Act or Local Government Act leases, licences, and permits</i></p> <p>Our Consultant: Marg Hibberd Phone 9534 5128 margaret@publicland.com.au</p> |
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Can we build our new Information Centre in the middle of the Road Reserve?

Question asked by a council faced with impossibly high rentals for retail premises in its own Main Street

Sounds like a good idea. It's a wide street, where the landscaped median already contains a taxi rank, a toilet block and plenty of indented parking. So let's put the new Information Centre there – and why not throw in a tourist accommodation booking agency? And maybe a car-hire company?

It's possible to do all these things. Perhaps Council should just go ahead and build it – as they did with the toilet block, and the bus shelter. This could be a low-risk strategy: Council controls the road under the Road Management Act, and if Council were to build and operate the facility who would complain? – although some smart aleck could argue that the land is still a *public highway*, and therefore they have a right to walk through the middle of it at any time they wish...

The risk arises if we envisage the new facility being funded and/or operated privately. In these circumstances the builder or operator is going to want tenure, in the form of freehold title, or a long-term leasehold, or at least some contractual assurance that they can use the premises on some agreed terms and conditions. It's virtually impossible to put such an arrangement in place while the land is still a road reserve.

That leads us into road discontinuations. There are at least five different (and inconsistent) methods of doing this. Once the road is no longer a road, what has it become? Who now owns it?

If it's a Government Road, then Treasury and Finance will want full dollar value for it – even though for the past hundred years it has produced no revenue stream for them. (There may be a way around this, via the road *deviation* provisions of the Local Government Act). If it's a freehold road, Council now owns it – but will the Registrar of Titles actually give you a title document?

It's also worth thinking about process design here. There are up to three points at which the proposal may have to go on public exhibition:-

- in the course of the road discontinuation (if it's happening under the LG Act)
- in the course of obtaining a Planning Permit (if one is needed)
- prior to issuing a lease (if required by section 190, LG Act)

It may be worthwhile exploring a concurrent rather than sequential exhibition process. We haven't tried it yet, but we think it can be done. Probably. ■

Training Course Schedule March and April 2008

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| The Aboriginal Heritage Act 2006 and Regulations (half day course) | Tuesday 18 March Wednesday 16 April | DSE Benalla DSE Benalla |
| The Land, its Traditional Owners and the Law | Tuesday 1 April | Melbourne |
| Vegetation and the Law | Thursday 24 April Tuesday 29 April | Melbourne Melbourne |
| Land Law for Coastal Authorities | Thursday 6 March Thursday 24 April Tuesday 29 April | Parks Victoria # Geelong Sale |
| Land Law for Managers of Roads, Streets and Lanes | Tuesday 4 March Tuesday 8 April | Benalla Preston |
| Crown Land Law, Policy & Practice | Thursday 3 April Tuesday 22 April | Camperdown Preston |
| Land Law for Managers of Rivers and Streams | Thursday 20 March Tuesday 25 March Thursday 10 April Thursday 17 April Thursday 24 April | North Central CMA # Preston Parks Victoria # Bendigo Benalla |
| Land Law for Service Utilities | Thursday 27 March | Melbourne |
| Land Law for Managers of Parks, Gardens and Reserves | Thursday 8 May | Parks Victoria # |
| Public Land for Strategic Planners | Tuesday 15 April | Melbourne |

No more than 10 students per course ■ Cost \$495 including course notes ■ Discounts for host organisations

To register, contact Dorothy Jenkins on (03) 9579 2635 or email dorothy@publicland.com.au

For details of all courses go to: www.publicland.com.au/professional_development.html

All courses are full day duration (9.00 a.m. to 4.30 p.m.) with the exception of the Aboriginal Heritage Act course, which is half-day duration (9.00 a.m. – 12.30 p.m.)

fully-booked in-house courses.

Tailor-Made Courses

In addition to our standard courses, we can put together tailor-made courses for specific audiences or on specific areas of land-related law...

- **City of Hume; City of Bayside...** *The Aboriginal Heritage Act: What it means for your Municipality...*
- **Department of Infrastructure:** *A One-day introduction to Crown land law for the DoI Executive and Legal team*
- **Department of Planning & Community Development:** *(As part of the 'Planet' program) Public Land, Structure Planning and Melbourne 2030*
- **Parks Victoria:** *A series of four one-day courses covering Crown land, Coasts, Rivers, Reserves and Roads.*

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