

Finding solutions to the Commonwealth's regulation gap

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Abstract: The types of activities that can now be carried out on areas of Commonwealth land are beginning to diversify. Surplus lands that were once protected as conservation areas or used exclusively for defence purposes are being decommissioned and 'retuned' to the public. The impacts of corporate liberalism have resulted in the Commonwealth Government seeking out uses for these sites that not only assist in providing public access to these areas but also activities that can produce an income. In the past the Commonwealth Government relished its exemption from State legislation, allowing it to make decisions about land use without the restrictions of State or Local planning requirements. However, many of the new activities that the Commonwealth Government is now approving on its sites require other licences or certificates that are generally only issued by the State. The Commonwealth's exemption from State laws means that the Commonwealth Government is unable to utilise State legislation related to a whole range of management and compliance issues, from occupation certificates to licences for specialised services. A regulation "gap" has appeared in situations where the Commonwealth Government does not have the resources to regulate a particular land use but the State is unable to assist, as the land does not fall within State jurisdiction. This paper proposes a number of possible solutions to this regulation issue.

Introduction

The planning system in Australia is fragmented, with all three tiers of government playing various roles in the determination of Australia's land use. Under Section 51 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) the States hold the residual power to make decisions about the environment, including land use planning. Though the Commonwealth Government is often seen to play a minor role in land use planning, it is generally responsible for the planning and management of many areas of Commonwealth land, as stipulated in the Constitution. When managing areas of Commonwealth land, the Commonwealth Government often has exemption from State laws, including those related to the environment and planning, as well as Local Council planning instruments and processes. This exemption is often criticised as it allows the Commonwealth Government to make decisions about land use, without being subject to the same State or Local planning restrictions that apply to adjacent areas of land. Often the physical boundary indicating where Commonwealth managed land ends and State managed land begins is not clear and the general public cannot distinguish between the two. For example at Middle Head in Sydney, the Sydney Harbour National Park is comprised of adjacent areas of land managed by either the Commonwealth Government or the New South Wales (NSW) State Government. The area is a patchwork of land controlled by different levels of government, with public roads and paths running through a number of jurisdictions. This situation makes even simple capital works projects such as the resurfacing of roads a difficult task, as a number of agencies are involved, each with their own development assessment processes. Though this situation occurs in a variety of contexts across the country, the focus of this paper will be examples from New South Wales. Case studies from other states (and countries, such as the United States) will be the focus of future research.

Commonwealth exemption from State laws

In the past, the majority of areas of Commonwealth land were used for specific defence purposes or managed as conservation areas to protect natural heritage features. Commonwealth bodies that managed land use were given exemption from State laws to allow the Federal Government to manage unique land requirements without the restrictions of State legislation. For example, the land uses of the Department of Defence are unique to the requirements of the armed forces and would generally not comply with or come within the scope of the legislative requirements of State laws.

However, uses on Commonwealth land are now changing as former defence sites are decommissioned and areas of land are being 'returned' to the public. The Commonwealth is free to choose land uses that it feels are suitable for each individual site, exempt from State and Local planning legislation and regulations. However, in recent years, the Commonwealth Government has approved a range of land uses that had not existed on Commonwealth land before, including childcare centres, cafes and restaurants, as well as leasing buildings to general tenants for office space and other commercial businesses. For some land uses, legislative requirements continue beyond the development approval and construction process. Land uses such as restaurants, cafes and childcare centres often require further approvals and licences before they can operate and it is generally the State Government that oversees these regulatory matters. Additional approval requirements are generally put in place where there are specific safety measures that must be maintained at all times,

such as food safety standards, or to protect the rights of people who work or visit these sites, including the welfare of children. A new issue related to the management of Commonwealth land has surfaced: land uses that are being approved by the Commonwealth would benefit from these further approvals that are granted by the States to help guide the nature and delivery of these uses. Often the Commonwealth Government has not passed equivalent legislation in these areas, and so bodies that manage Commonwealth land do not have the support of Commonwealth laws to guide their activities. In addition, the Commonwealth Government has no legal access to the departments and agencies that assist the State Government in ensuring that certain uses are properly managed and regulated. Some Commonwealth agencies that manage land in NSW have been developing methods to 'mirror' NSW legislation, to help align their operation with State requirements.

Issues arising for Commonwealth exemption from State laws

Smith (1998 p1) argues that the exemption of "Commonwealth activities on Commonwealth land" from State or Local legislation is one of the main areas of conflict between the States and the Commonwealth. Creswell (1998 p1) agrees with Smith's argument and suggests that as a result of this legislative exemption, "activities conducted by federal agencies on these lands can give rise to conflicts between a federal government agency seeking to implement a national program and a local government attempting to protect a uniquely local concern". A number of issues have emerged as a result of the Commonwealth Government's exemption from state laws:

- Commonwealth Government seen to 'do as it pleases'
- Areas of adjacent land are subject to different sets of legislation
- Establishment of more land management authorities
- Commonwealth law prevails over State law
- Land use choices and access to legislation

Each of these issues is considered in more detail below.

Commonwealth Government seen to 'do as it pleases'

Whilst this exemption provides the Commonwealth Government with the freedom to plan for unique land uses in specific parts of Australia, there has been much criticism that this exemption allows the Commonwealth Government to 'do as it pleases' without any regard to the laws that apply to adjacent land areas. Smith (1998 p1) argues that this exemption means that Commonwealth bodies can in effect "do as they please in relation to their land and their use of that land", without being regulated by existing State legislation and restrictions that apply to areas of adjacent land. In addition, relevant Local and State Government bodies have "no legal right to intervene or participate in the planning and development process for that piece of Commonwealth land" (Smith 1998 p2). This is particularly problematic in areas where land regulated by the Commonwealth and areas of land regulated by the States are in close proximity to one another.

This exemption from legislation also means that the Commonwealth Government is not required to lodge development applications with State or Local planning authorities when works are proposed on areas of Commonwealth Land. This allows Commonwealth bodies to carry out works without consulting with other planning authorities that many operate in close proximity to Commonwealth land. For example, Freestone et al (2006 p492) note that in relation to the development of airports in Australia, local and state planning authorities are excluded from any "effective determining involvement in the process", despite the "local and metropolitan context in which they sit" due to the Federal exemption from State laws.

Areas of adjacent land are subject to different sets of legislation

Areas of Commonwealth land vary greatly in size and are most often bounded by areas of land subject to State laws. Therefore, situations can occur where Commonwealth and State managed areas of land are in close proximity to one another, and for members of the public it is difficult to distinguish where one jurisdiction ends and another begins. Foss (1987 p xvii) notes that one of the chronic problems in land management has been the "continuing presence of intermingled federal, state and privately owned lands". He argues that when federal, state and private lands are intermingled "a high degree of cooperation is necessary if management is to be at all effective" (Foss 1987 p xviii), though this is rarely the case. In addition, "State and Local Government will have no say over any of the planning and management of the land" (Martyn 2000 p1) that is under Commonwealth control. To effectively manage areas of land under their control, Commonwealth Governments not only pass legislation to guide development on their sites, but special authorities are also established to oversee land use administration.

Establishment of more land management authorities

In order to manage areas of Commonwealth land, the Commonwealth Government has had to establish special authorities and agencies to oversee the planning of such sites. The establishment of the Sydney Harbour Federation Trust (the Trust) was met with criticism from the Sydney Harbour Foreshore Authority (SHFA), a NSW State agency, who commented that the creation of another land management authority “does not assist in the integration of good urban design and planning decisions for the Harbour, but continues the ad-hoc management of neighbouring pieces of land” (Martyn 2000 p1). SHFA stated that the creation of the Trust would only “contradict the positive steps taken recently by the NSW State Government to provide greater coordination in the planning and management of Sydney’s harbour foreshores, including a decrease in the number of authorities” (Martyn 2000 p1). Martyn (2000 p1) notes that there were already “a number of government bodies responsible for Sydney Harbour foreshore land”, who had similar land areas to those proposed to be handed to the Trust and the establishment of another land management authority was “not in the best interests of the people of NSW”. Ironically, in 2008 the NSW State Government announced the establishment of the Barangaroo Delivery Authority, a new land management authority with the responsibility to “manage the city waterfront development at Barangaroo” (Barangaroo Delivery Authority 2009).

Commonwealth law prevails over State law

Under Section 109 of the Constitution, “when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”. Therefore Commonwealth legislation will always prevail over State made law if there is inconsistency (Smith 1998 p2), regardless of the merits of each set of legislation. Smith (1998 p2) states that this over-riding power of the Commonwealth has only further fuelled friction between the Commonwealth Government and State and Local planning authorities. Farrier and Stein (2006 p112) note that there is no requirement that the Commonwealth Government must pass legislation for the matters it is responsible under Section 51 of the Constitution, and thus, where the Commonwealth does not pass laws related to these areas, State law “continues to operate if the state parliament has legislated on the matter in questions”.

The Commonwealth Government is also not obligated to make laws in regards to environmental matters for areas of Commonwealth land. Farrier and Stein (2006 p13) note that in the past the Commonwealth Government had chosen “not to legislate generally in relation to matters of land use and pollution control” but instead focused on “specific land-use issues”, such as World Heritage protection. Lyster et al (2007 p 13) note that whilst “most environmental legislation is enacted by the States” the “Commonwealth is playing an increasingly important role” as highlighted by the creation of the Environmental Protection and Biodiversity Conservation Act 1999.

However there are still many matters related to land use management issues that the Commonwealth government has not legislated for. This has become problematic for Commonwealth agencies that manage areas of Commonwealth land: there is no Commonwealth legislation to guide and protect their actions and they are unable to access equivalent State legislation due to their exemption from State laws. Commonwealth land management agencies do not have access to legislation to support their role the administration of land use.

Land use choices and access to legislation

For some land uses, legislative requirements continue beyond the development approval and construction process. Land uses such as restaurants, cafes and childcare centres often require further licensing before they can operate and it is generally the State Government that oversees these regulatory matters. Additional licensing requirements are generally put in place where there are specific safety measures that must be maintained at all times, such as food safety standards, or to protect the rights of people who work or visit these sites, including the welfare of children. At present the Commonwealth Government has not passed legislation that deals with these issues, and as the Commonwealth is exempt from State legislation, it means that the Commonwealth Government is unable to rely on State legislation related to these management and compliance issues. It has emerged that when it comes to the more practical management of uses and tenants on Commonwealth land, there may in fact be a number of areas of State legislation that the Commonwealth would find useful and beneficial. In addition, the Commonwealth Government is not required to access departments and agencies that assist the State Government in ensuring that certain uses are properly managed and regulated. These additional licensing requirements help to ensure that people’s rights are protected in certain situations and that there are certain standards for a

particular use. This has become an increasingly important issue for Commonwealth agencies that have uses on their sites that are similar to uses that are generally regulated by the States.

Legally, Commonwealth agencies that manage areas of Commonwealth land are required to rely on Commonwealth legislation to support and guide their actions. However, as mentioned previously there are many instances where the Commonwealth Government has not passed laws for issues related to land management and thus Commonwealth agencies have no laws to direct their actions. At present, the Commonwealth Government has not indicated whether it will pass legislation in these areas. For these agencies, a gap has been created – land use management issues that are generally legislated by the States are not applicable and the Commonwealth Government has no equivalent legislation on that matter. These issues tend to be related to the delivery of human services, such as licensing requirements for bars, restaurants and childcare centres, as well as the issuing of occupation certificates. Commonwealth agencies that have relished this exemption are now realising that in fact, for some land uses, it might actually be easier to be subject to State legislation, so that they do not have to come up with alternative ways to ensure compliance with State laws, to ensure that the level of protection on Commonwealth land is consistent with State controlled land.

Mirroring the States

As it would be impractical and irresponsible for a Commonwealth agency to operate without meeting some legislative requirements, Commonwealth agencies have had to develop solutions to help them address the legislative gap that has emerged. Generally, where no Commonwealth legislation exists on a matter, Commonwealth bodies look to the State system for guidelines and regulations to control land use. For some agencies, a system of contracts and Commonwealth-issued licences has been established to 'mirror' the State system, in an attempt to meet the commonly recognised standard set by the State and retain consistency within the State that the area of Commonwealth land in question is located. However, as there is no legislative basis for the Commonwealth to issue licences and occupation certificates, it is impossible to enforce the acquisition of these further approvals. In addition, the requirement by the Commonwealth Government for tenants on areas of Commonwealth land to acquire such approvals could be subject to legal challenge.

On the surface, the mirroring of State legislation may appear to be an appropriate solution to assist Commonwealth agencies to meet State standards. However, as the Commonwealth Government is not required to comply with State legislation, there is no obligation that the Commonwealth agency 'mirrors' all areas of State legislation. The Commonwealth may choose which areas of legislation they wish to comply with, resulting in an incomplete application of State legislation and when State laws change, there is no requirement that the Commonwealth Government update their practices. In addition, without access to State auditing and evaluation systems, the Commonwealth is unable to ensure that they are meeting the standards set by the States, without the use of external auditors and consultants. An important aim of State legislation that licences and regulates certain land uses is to ensure that the rights of people who occupy or visit these sites are protected. Without the obligation to follow State legislative requirements completely and with no access to resources to enforce these requirements it is impossible to be certain that the desired regulatory outcomes are achieved on Commonwealth land.

Solutions to the problem

As the Commonwealth Government continues to increase its role in land use planning and approves uses that require further levels of approval from the States, the problems associated with current methods employed to assist Commonwealth agencies in aligning themselves with State requirements need to be resolved. Whilst agencies like the Sydney Harbour Federation Trust are able to manage the contracts and licenses of the small number of uses on its sites that require further levels of approval, once the number of operators reaches a certain level, this approach will no longer be feasible. A number of methods to assist Commonwealth agencies meet the relevant state standards are discussed below. However, if the Commonwealth Government was to pass legislation in these 'gap' areas, there would no longer be the need for the Commonwealth Government to try to 'mirror' State legislation.

Development of Commonwealth Legislation and relevant Commonwealth Departments

The development of legislation that gives the Commonwealth Government the power to issue licences and approvals for special land uses would eliminate the need for Commonwealth agencies to develop methods to mirror State legislation. No longer would the Commonwealth Government have to look to the standards set by the States to address issues such as childcare licensing and occupation certificates. There is however, a lack of political will for the Commonwealth Government to pass laws that will only apply to small number of sites. At present, there are only a handful of Commonwealth

agencies that have land uses on their sites that would require legislation related to the licensing of childcare centres or food businesses and the Commonwealth Government has not indicated that it will pass legislation to support these uses. However, as the Commonwealth Government continues to increase its role in land use management, and the uses chosen for areas of Commonwealth land require further levels of approvals and licenses, this situation will need to be addressed.

Though the Constitution states that the Commonwealth Government may pass legislation for areas of Commonwealth land, if the Commonwealth was to legislate in areas such as childcare licensing, there might be criticism that the Commonwealth Government was legislating in areas it had no experience. The new Commonwealth legislation would be compared to the legislation of every State and may appear to be much stricter or more lenient than the equivalent State standards, as these vary from State to State. Whilst the development of Commonwealth legislation would help to achieve consistency between areas of Commonwealth land, it would be difficult to ensure that this one piece of Commonwealth legislation ensured consistency with all individual State systems.

Land use choices

On the surface it may appear the most simple solution to avoid situations where Commonwealth agencies have to develop methods to mirror State legislation for special uses, is for the Commonwealth Government to restrict the types of land uses that they approve. When making decisions about land use, planners working for Commonwealth agencies should take into account the possible licensing requirements that a land use may require and be more aware that there is not an automatic process to obtain further levels of approval needed for certain land uses. Planners who plan for areas of land under State control often have the luxury of knowing that other government departments are responsible for the later management of these uses, including the issuing of licenses and the carrying out of any routine inspections related to that license. However, the restriction of land uses approved on Commonwealth land will not prevent the need for Commonwealth Agencies to mirror State legislation, as the Commonwealth Government does not have access to legislation that allows it to issue occupation certificates, which are required for all types of use, regardless of any additional licensing requirements that may be associated with a special use.

Development of a Land Management Support Unit

The Commonwealth Government could establish a Land Management Support Unit to provide assistance to Commonwealth agencies who manage areas of Commonwealth land. This unit would have access to licensing officers, inspectors and consultants that could assist in ensuring that a range of uses on Commonwealth land met State standards. A legal team, forming part of the unit, could work on standardising contracts between tenants on Commonwealth land and Commonwealth agencies and developing more concrete ways of 'mirroring' state legislation. The inspection and evaluation of services on Commonwealth land could be monitored by a team that is separate from the planning authority, helping to provide an independent auditor for activities on Commonwealth sites. Whilst there would be little political will to set up this unit for the benefit of only a small number of Commonwealth agencies who need support in this areas, this solution would be much more feasible in terms of resource efficiency than the development of individual Commonwealth Departments. As the number of uses on Commonwealth land that require some form of contract or Commonwealth issued licence to help them achieve State standards increase, there will be more need for a centralised assistance group, such as a Land Management Support Unit.

Land could be subject to State legislation

Areas of land that require not only additional approvals from State legislation, but also rely heavily on the support of State Departments, could become subject to State legislation. In some situations, this would require areas of Commonwealth land to be transferred to the State, to ensure that State departments had jurisdiction to manage these sites and their relevant uses. However, as childcare centres and food outlets may only occupy one building on a large ex-Defence site, it would be difficult to transfer single dwellings to State control. In addition, these uses may be subject to short-term leases and thus the specific use that initiated the land transfer is not permanent and may change. Whilst this solution would ensure that land uses that required further State issued approvals and licences would validly be within State jurisdiction, it is difficult to imagine that the Commonwealth Government would want to give up or sell any of its land to the States to simply ensure compliance with State legislation. Furthermore, the sale of Commonwealth land is a highly contentious issue, there would be strong public outcry if the States gained control over areas of Commonwealth land.

It is possible for certain uses on Commonwealth land to be subject to State legislation, without land having to be transferred from the Commonwealth to the States. Farrier and Stein (2006 p13) outline the case of *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 60 LGRA 68, where the operator of a

commercial broadcasting station argued that they did not need development consent as required under NSW legislation as their operations were covered by the Broadcasting and Television Act 1942 (Cth). The High Court dismissed this claim, as the Commonwealth legislation “did not purport to state exclusivity or exhaustively the law that commercial broadcasting station operators must comply with...it concentrated on the technical efficiency and quality of broadcasting services and left room for the operation of other laws, such as planning and environmental legislation”. Using this case as a precedent, legislation regulating the planning and environmental issues exists without claiming to be responsible for the issuing of operational licences and approvals. Therefore, the Commonwealth Government is able to submit to State laws in areas where the Commonwealth government has not legislated.

However, before State agencies can begin to take on certain responsibilities on areas of Commonwealth land, the issue of the States not having jurisdictional power to act on Commonwealth land needs to be resolved. The signing of a bilateral agreement between the Commonwealth and the State Governments would permit certain activities on Commonwealth land to be subject to State legislation, without the need for land to be transferred from the Commonwealth to the States. Bilateral agreements “allow the Commonwealth to ‘accredit’ particular state/territory assessment processes and, in some cases, state/territory approval decisions” (DEWHA 2009). Under the agreement, relevant State departments would be required to oversee any approvals that were necessary for uses on Commonwealth land, to the same standard similar uses on State land. The agreement could make specific reference to the areas where state legislation would be used, such as Part 4A of the NSW Environmental Planning and Assessment Act 1979 and the NSW Children and Young Person (Care and Protection) Act 1998.

DEWHA (2009) note that a “key function of bilateral agreements is to reduce duplication of environmental assessment and regulation between the Commonwealth and states/territories”. Therefore, the signing of a bilateral agreement between the States and the Commonwealth will reduce the pressure on the Commonwealth Government to pass laws in areas that are already legislated by the States. In the future, if the Commonwealth Government were to pass legislation in areas that the State had already passed laws for, Section 109 of the Constitution would come into play.

In addition to the signing of the bilateral agreement, a small amendment recognising the existence of the agreement would need to be made either to the EPBC Act or to the specific establishing Act for each Commonwealth agency.

Remain with the current system

Commonwealth agencies could continue with the current program of licences and contracts to help mirror State legislation for uses such as childcare centres and food businesses. However, a more streamlined approach needs to be taken, in the form of standard contracts or licenses, to avoid the need to micro-manage each individual situation. However, the issue of occupation certificates needs to be resolved, as compliance with the BCA is a fundamental requirement for any new building or new use of an existing building. Without some form of legislative backing, there are no penalties for an applicant who commences use of a building on Commonwealth land before a final compliance report with the BCA is obtained. The current arrangement relies heavily on the close management of the relationships between tenant and Commonwealth agency, which is a very time consuming process for staff members. The current system also relies greatly on the work of external consultants, who are able to provide support to Commonwealth agencies, but only to the extent that the agency dictates – thus there is no assurance that all aspects of an area of legislation are being met. The cost of consultants is another factor to be considered and each time a new use is approved, additional consultants must be paid to manage new compliance issues. The current system does not support growth in the area of Commonwealth land management and restricts the number of new uses that could successfully occur on Commonwealth sites.

Conclusion

This paper has highlighted a number of possible solutions to help assist in aligning Commonwealth practices with State legislation to ensure consistency across areas of adjacent land. However, there are a number of advantages and disadvantages associated with each solution. A lack of political will from the Commonwealth Government will hinder the implementation of any of these solutions. However, initial scoping interviews with relevant Commonwealth agencies have indicated that the current situation is becoming an ‘administrative nightmare’ and thus the issues associated with the Commonwealth exemption from State laws need to be resolved before the Commonwealth can expand its role in land use management.

References

Barangaroo Delivery Authority. (2009) 'Barangaroo Delivery Authority.' Sydney: Australia: BDA.

Available at: <http://www.barangaroo.com/bda.cfm>

Creswell, L.L. (1988) 'Federal agency-local government land use negotiations: vulnerabilities of the Federal bargaining position'. *Washington University Journal of Urban & Contemporary Law*, 6(1): 3-72.

Department of Environment, Water, Heritage and the Arts. (2009) 'Bilateral agreements.' Canberra, Australia: DEWHA. Available at:

<http://www.environment.gov.au/epbc/assessments/bilateral/index.html>

Farrier, D. and P. Stein. (2006) *The Environmental Law Handbook (4th Edition)*. Sydney, Australia: Redfern Legal Centre Publishing.

Foss, P. (1987) 'Introduction: Public Land Policy', in P. Foss (ed.), *Federal Lands Policy*, Greenwood Press, Connecticut USW, pp xi-xxiii.

Freestone, R., P. Williams and A. Bowden (2006) 'Fly Buy Cities: Some Planning Aspects of Airport Privatisation in Australia'. *Urban Policy and Research* 24 (4): 491-508.

Lyster, R., Lipman, Z. and N. Franklin. (2007) *Environmental and Planning Law in New South Wales*. Sydney: Australia: The Federation Press.

Martyn, A. (2000) '*Bills Digest No. 138 1999-2000 Sydney Harbour Federation Trust Bill 1999*'. Australia: Department of the Parliamentary Library./

Smith, S. (1998) *Urban Planning in New South Wales: Current Issues. Briefing Paper No 13/98*. NSW Preliminary Library Research Service, Sydney.