

W Heath Robinson

If it Ain't Broke, Don't Fix It. If it Is Broke, Do Fix It

A pair of elementary propositions which should be posted on the wall of every government department, council chamber, and Minister's boudoir. They're propositions we've had cause to reflect on in the course of some recent consultancies.

On public land, as elsewhere, the forces of change are hard at work: population growth, climate change, economic development. Can our governance systems cope? If they can, leave them alone; if they can't, fix them. And if you're not authorised to make the repairs yourself, lobby the agency that is. Here's our attempt to put it in a diagram for the benefit of one client.

It's not difficult to find practical applications of this theory. Here are just five areas of public land governance that are seriously broke, failings surely obvious to the policy-twiddlers within government:-

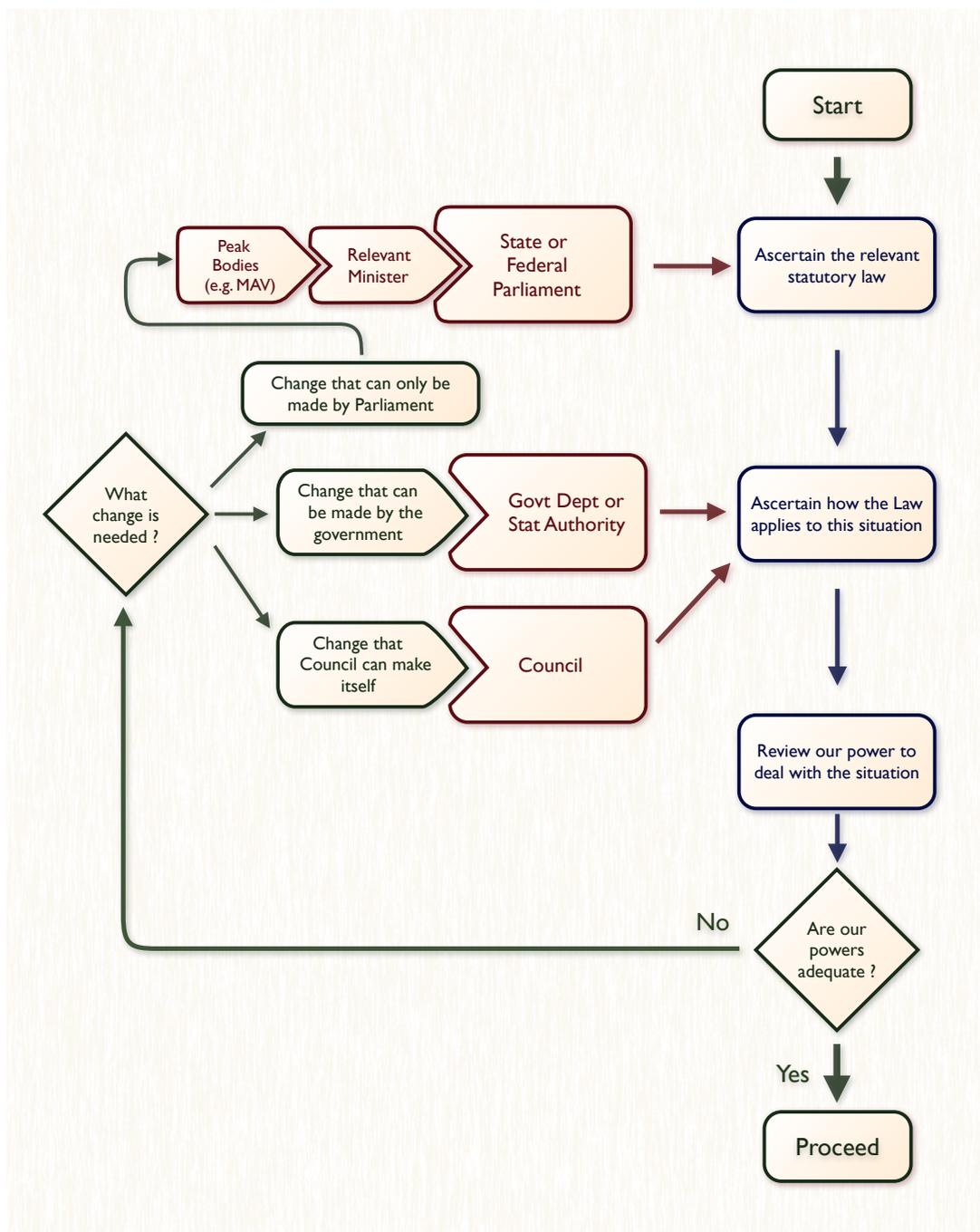
BROKE: The law governing riparian boundaries. Despite all the attention being given to Victoria's waterways, the location of abutting freehold boundaries and the rights of abutting landholders remain confounded

by decisions taken in 1881 and laws made in 1905. See ['Up the Creek' \[1\]](#) in Terra Publica, March-April 2011

BROKE: Section 86 of the Local Government Act 1989. All Victorian municipalities profess to encourage community involvement, but half of them are running away from the very section of the Local Government Act that allows them to delegate functions to community committees. We wrote about it in ['A Caffé Latte and a Vanilla Slice,' \[2\]](#) Terra Publica, Oct-Nov 2008. Since then, we keep hearing about more municipalities abandoning section 86. Clear evidence that something's wrong.

BROKE: The system put in place by Premier Dick Hamer following the Housing Commission land scandals. The Government Land Monitor which he established does not monitor government land, but only monitors government land transactions. Indeed the whole apparatus for optimising authorities' land holdings is a Heath Robinson. See ['Free Land!'](#) in Terra Publica, July 2008.

Fix It; Don't Fix It (cont.)

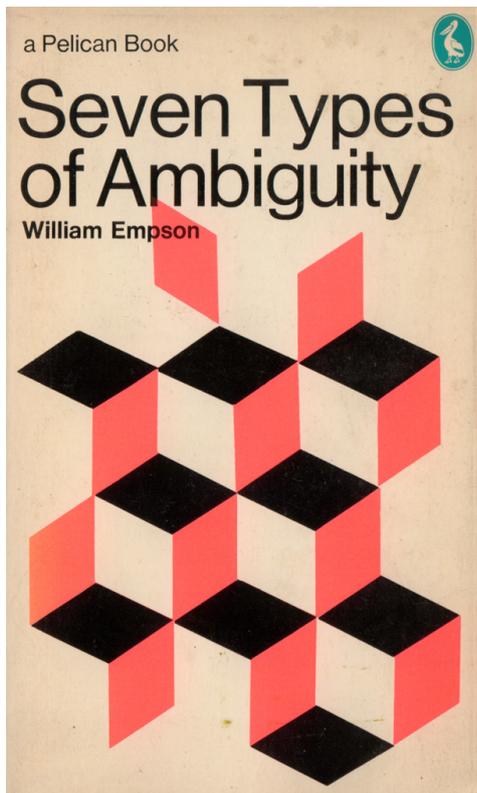


BROKE: The law governing road discontinuations, which has allowed a road in a Wildfire Management Overlay (WMO) area to be discontinued despite the objections of the CFA, the local Fire Chief, and two experts who testified at the Bushfire Royal Commission – simply because certain neighbors didn't like farm traffic going in and out of a working farm. See [‘Briefing for Coalition Backbenchers’ \[3\]](#) on our pro-bono website.

BROKE: The 19th Century paradigm for granting Crown leases, which holds that at the end of the lease term, tenants must walk away with nothing. This failure is the reason for run-down premises on Crown land (it's why the Arthur's Seat Chair-lift fell down,

multiple times), excessively long lease terms, and the corresponding loss of landlord's control. Needed: a new leasing apparatus which recognises tenants' residual interest. See [‘Who's got the Policy Spanner?’ \[4\]](#) in Terra Publica, May 2006

Trouble is, the custodians of these governance systems may be too closely involved to notice their failures. Does the driver of the jalopy even know that the wheels are falling off? Or maybe those custodians have an entrenched vested interest in maintaining failed systems: after all, why should the mechanic who patches up the jalopy advise the driver to buy a new car?



Ambiguities

If William Empson had lived in Victoria, he would have found an eighth type of ambiguity: the type created by parliamentary drafts-persons knocking out public land legislation. Here are some examples we've had to explain to clients recently.

Waterway Manager

If you're a farmer needing a 'works on waterways' permit to put a culvert in a creek, then this is a term referring to an Authority with powers under Part 10 of the *Water Act 1989* – either the local CMA or Melbourne Water. If, on the other hand, you're a recreational boater thinking about towing water-skiers, then it's a term defined by the *Marine Act 1988*. The Who's Who of Waterway Managers for this purpose is the "Vessel Operating and Zoning Rules" published by Transport Safety Victoria.

As ambiguities go, this one's benign. Even if you're a water-skiing farmer, there's little scope for confusion. Not so the next two ambiguities.

Reserve

Oh dear, what's a reserve? Well, it's a parcel of land set apart for some reason, and somehow to be treated differently from its neighbors. The *Crown Land*

(Reserves) Act 1978 deals with a well-defined class of reserves – parcels of Crown land specifically set aside for some nominated public purpose. But there are other types of reserved Crown land – reserved forest under the *Forests Act 1958*, road reserves under the *Land Act 1958*, parks 'reserved' under the *National Parks Act 1975* and so forth. Then there are reserves under the *Subdivision Act 1988*: freehold land set aside for some purpose – often for public open space.

But then we come to the *Planning and Environment Act 1987*. In some places the term 'reserved land' means 'reserved under the *Crown Land (Reserves) Act*,' in other places it means a road reserve, and in yet other places it means a reserve created in a freehold subdivision. A statutory planner might say 'this land is reserved for road widening.' Here the term refers to a Public Acquisition Overlay (PAO) in the relevant planning scheme. The Victorian Planning Provisions (VPPs) describe the purpose of PAOs as being 'to reserve land for a public purpose' – although the PAO does not make the land available for that purpose, but merely flags an intention to use it for that purpose once it has been acquired. Land subject to a POA might be better described as 'prospectively reserved.'

Are these ambiguities a problem? Well, not if you're careful. And frankly it would be fairly difficult to develop a new non-ambiguous lexicon. Which brings us to 'closed roads.'

Road Closure

If your bible is the *Local Government Act 1989*, then the terms 'closed road' and 'discontinued road' are perfectly clear. The former is a road which is physically closed off to traffic, but which is nevertheless still a road on the cadastre. 'Discontinued Road,' on the other hand, is an ex-road – one which has totally ceased to be a road on the cadastre. The *Road Management Act 2004* uses the terms in the same way.

The *Land Act 1958*, however, uses the term 'road closure' to refer to a road ceasing to be a road on the cadastre. So does the Planning and Environment Act 1989 – through the Road Closure Overlay (RXO) in the VPPs. So the term 'road closure' in the Land Act 1958 and the Planning and Environment Act 1987 has the same meaning as the term 'road discontinuation' in the *Local Government Act 1989* and the *Road Management Act 2004*. When the planners talk to the engineers, there's scope for utter confusion. William Empson could write a thesis about it.

Questions with notice...

Q: If something must be done in (say) 28 days, does that include weekends and holidays?

Question asked by a student in our ‘Subdivisions’ training course.

Yes it does – unless the last day of the specified period is a weekend or holiday, in which case the period extends to the next day that is not a weekend or holiday.

Note that the day on which the time period commences is not included.

You can read all about it in section 44 of the *Interpretation of Legislation Act 1984*.

Q: “Where can me and my buddies go shooting?”

Suffering from a long-held aversion to firearms and their users, our answer was: “Not our field of expertise, buddy...”

Seems a similar question was asked of Hedley Thomson, Executive Officer of the Ballarat Environment Network – who gave his caller a rather more useful answer than we did. Hedley writes:

[A gentleman] rang me last week about permission to shoot vermin in Bannockburn

Bush... In general I don't mind if people are shooting vermin in the reserves for the obvious reason of assisting with vermin destruction and I'm aware that people shoot at both Haddon Racecourse and Winter Swamp reserve... My concern is the general public use – for good and ill – of the reserve and the potential for bad outcomes; i.e. someone being accidentally hit.

Cheers

Hedley Thomson

Executive Officer – Ballarat Environment Network

For a more complete answer go to the [Victorian Hunting Guide: Where You Can Hunt \[5\]](#) on the DPI website.

It warns:

If you intend to use a firearm to hunt, consider the [Firearms Safety Code \[6\]](#) and remember that even though an area may be open to hunting, the use of firearms may be prohibited under the Firearms Act 1996 for safety reasons.

If in doubt don't shoot... Department of Primary Industries [Firearms Safety Guide \[7\]](#)

Link URLs

- 1 http://www.publicland.com.au/pdf/Terra_Public_%20Easter_2011.pdf
- 2 http://www.publicland.com.au/pdf/Terra_Publica_Oct-Nov_2008.pdf
- 3 http://www.publicland.com.au/pdf/Briefing_for_Coalition_backbenchers.pdf
- 4 http://www.publicland.com.au/pdf/Terra_Publica_May_2006.pdf
- 5 <http://www.dpi.vic.gov.au/game-hunting/about-game-hunting/publications/hunting-guide/where-you-can-hunt>
- 6 <http://www.dpi.vic.gov.au/game-hunting/about-game-hunting/publications/hunting-guide/firearms-safety>
- 7 http://www.dpi.vic.gov.au/__data/assets/image/0019/145351/FirearmsSafetyCode.gif