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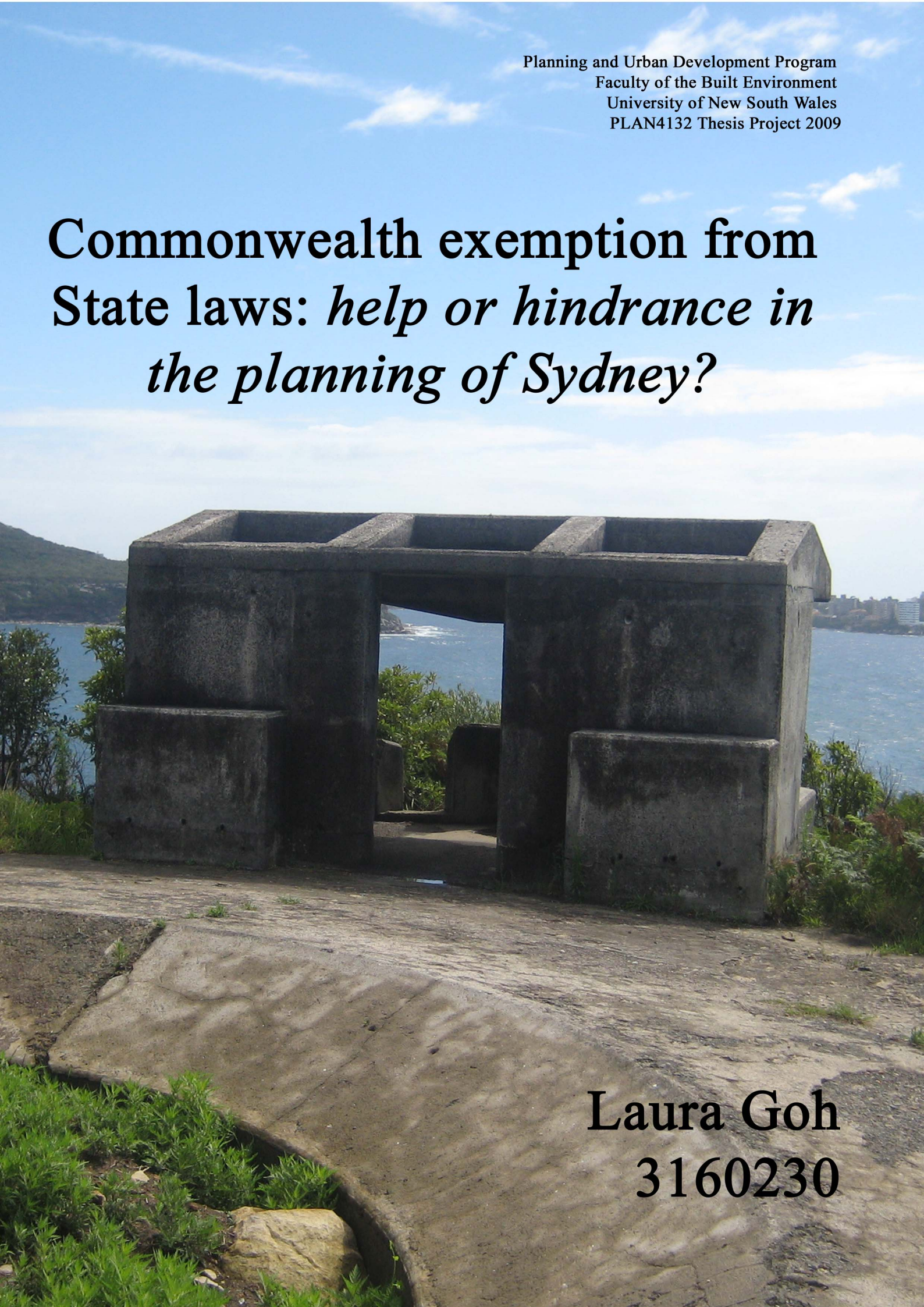
Commonwealth exemption from State laws: *help or hindrance in the planning of Sydney?*



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Abstract

The planning system in Australia is fragmented, with all three tiers of government playing various roles in the determination of land use. The power to pass laws relating to planning falls to the States as residual powers under the Constitution. Although 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. In these situations the Commonwealth Government often has exemption from State legislation, including planning laws, which allows it to make decisions about land use without the same State or Local planning restrictions applying to adjacent land areas. This exemption also means that the Commonwealth is unable to utilise State legislation related to a whole range of management and compliance issues from occupation certificates to the licensing of childcare centres. A central question pursued is whether the rights of Sydneysiders are protected on Commonwealth land? This thesis will explore the problems that arise with Commonwealth exemption from State laws in terms of ensuring that final delivery of human services across areas of State and Commonwealth land is consistent. A number of possible solutions to remedy these inconsistencies are discussed.

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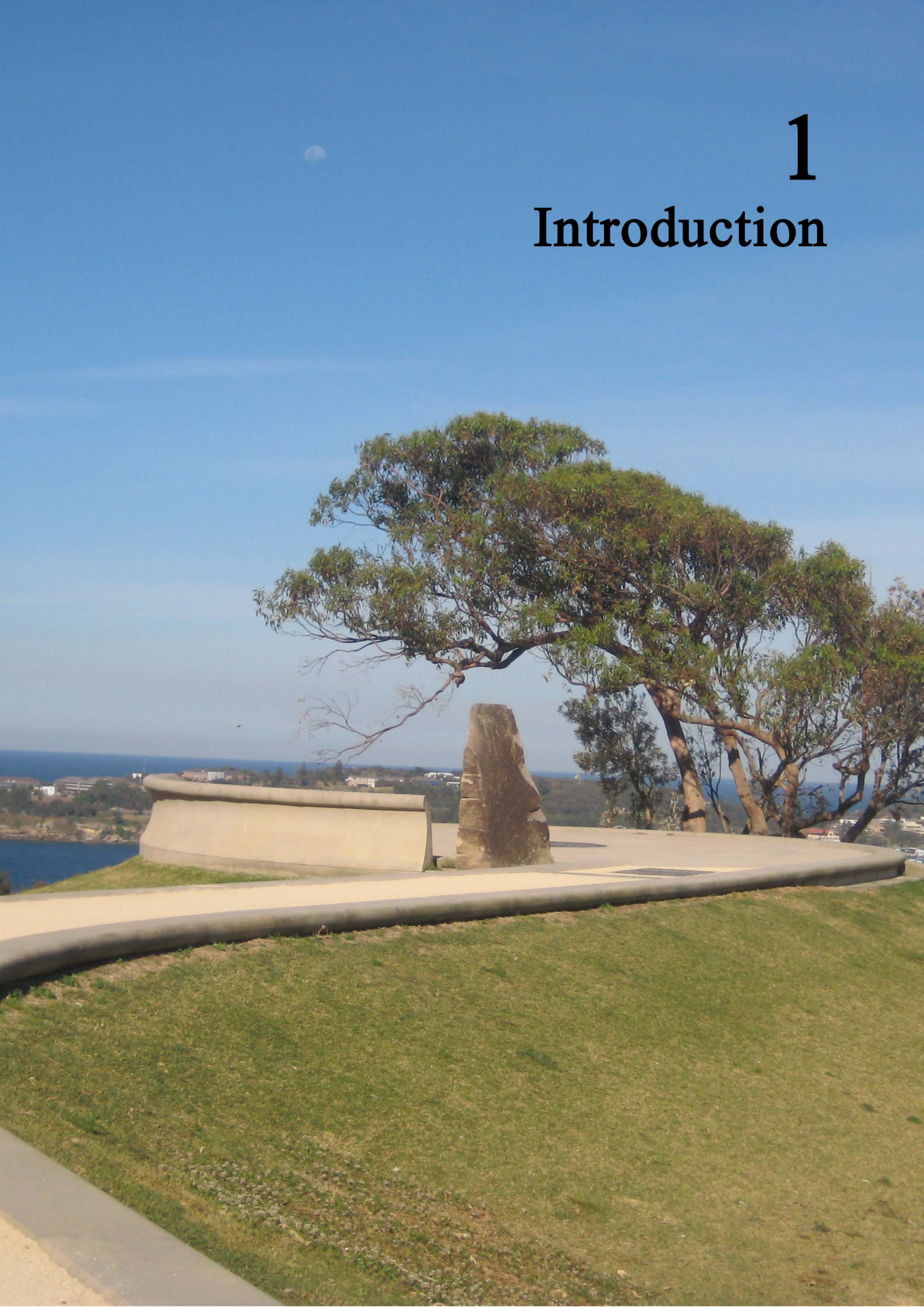


1 Introduction

1.1 Background

The planning system in Australia is fragmented, with all three tiers of government playing various roles in the determination of Australia's land use. The division of powers between the States and the Commonwealth are outlined in the *Commonwealth of Australia Constitution Act 1900* (the Constitution). Under 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.

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. 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, without having to comply with the State Government or Local Council planning instruments that apply within the area.

1.2 Problem Setting

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.

However, as the Commonwealth is exempt from State legislation, it is unable to utilise State legislation related to a whole range of management and regulatory compliance issues, including occupation certificates and the licensing of childcare centres. 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.

1.3 Research Question and Objectives

The research question for this thesis is:

Do the methods developed by Commonwealth land management agencies in NSW to help align their operations with State practices ensure that Sydneysiders have access to the same levels of protection on Commonwealth land as exists on State controlled land?

The objectives of this thesis, which must be addressed in order to answer the research question posed, are as follows:

- *To examine the powers available to the Commonwealth Government to make decisions related to land use planning*
- *To document the reasons behind the continuing involvement of the Commonwealth Government in relation to land use planning*
- *To investigate the exemption that the Commonwealth often has from State legislation, highlighting the benefits of the exemption, as well as discussing criticisms of the exemption*
- *To investigate the methods developed by a Commonwealth agency to help align its operations with State legislation through a case study of the Sydney Harbour Federation Trust*
- *To develop solutions that could be utilised by Commonwealth agencies to assist them to more closely align their operations with State practices for uses that benefit from further licensing and approval requirements.*

1.4 Significance

This topic is a new area of research that has not been investigated before. The topic area is becoming increasingly important as the Commonwealth Government has become more involved in environmental protection and land use management, as demonstrated by the creation of the *Environmental Protection and Biodiversity Conservation Act 1999*. In addition, land uses that are being approved on Commonwealth land are moving away from specific uses such as defence sites and conservation areas, to more common land uses such as cafes, restaurants and childcare

centres that would normally be subject to State laws and regulation if they operated on non-Commonwealth land. The current methods that have been developed by the Commonwealth Government to help ensure that their practices are consistent with State legislation do not provide satisfactory protection of people's rights on Commonwealth land. New methods to ensure consistency across areas of State and Commonwealth land are needed.

This thesis project will investigate the current situation and suggest innovative solutions to the current problems, providing not only a significant contribution to the knowledge of the topic but also presenting possible remedies to an issue that is set to grow as the Commonwealth Government continues to diversify and asserts its position in land use planning.

1.5 Research Methodology

The methodology for this research utilises the following research techniques:

1.5.1 Literature review

The first stage of the research process was to review existing literature on the topic area. The literature related to this topic is generally restricted to the critique of the Commonwealth exemption from State laws and the conflicts that arise between the different levels of government involved in land management. No literature exists that critiques the methods that Commonwealth agencies have developed to help them ensure that their practices comply with relevant State legislation – in fact no literature exists that documents exactly what these methods are. This topic has not yet been investigated by any academics. The literature review presented provides a background study into the topic areas, outlining the range of powers available to the Commonwealth Government to control and influence planning decisions, and highlights the practical and social reasons behind the Commonwealth Government's involvement in land use administration.

1.5.2 Qualitative Research

To help support the researcher's investigation into the case study of the Sydney Harbour Federation Trust, an in-depth interview was undertaken with Andrew Woodmansey, Director of the Property Marketing and Management department of the Sydney Harbour Federation Trust on 30 September 2009. The purpose of this interview was to gain further insight into the process undertaken by a Commonwealth agency to develop methods to help align their activities with State legislation. This thesis received approval to conduct the in-depth interview and fieldwork from the UNSW Faculty of the Built Environment Human Research Ethics Advisory Panel (HREAP) on 14 September 2009 (Approval number 95087). Further documentation relating to the HREAP approval is provided in Appendix A of this thesis.

1.6 Limitations

1.6.1 Literature available

As noted above, there is a lack of literature available on this thesis topic. As a result, the researcher has not been able to compare the findings of this research with the results of another study. Investigations into the practices of various Commonwealth agencies within Australia, and worldwide, would have provided an interesting platform from which comparisons between issues and solutions could have been made.

1.6.2 Timing and Scope

The topic related to the investigation of the Commonwealth's exemption from State laws is broad and has many specific areas for investigation. To keep within the scope and time constraints of this thesis, it was necessary for the researcher to narrow the focus of this thesis and therefore some related aspects of the thesis were not included. For example, these constraints did not allow for the researcher to present solutions that were developed to assist Commonwealth agencies to meet State requirements for comment or even implementation. The implementation and evaluation of the success or failure of a specific solution would provide valuable knowledge to the topic area, however the process would require a considerable number of years to complete.

1.6.3 Department of Defence

The Department of Defence is an example of a Commonwealth government agency that plays a large role in land use planning that has exemption from State planning laws. The operations of the Infrastructure Division, which forms part of Department's Defence Support Group, would have provided an interesting additional case study to support this thesis. However, the vast majority of information prepared by Defence is classified and is unavailable to persons outside of the Department. As a result, the Department of Defence could not be used as a case study.

1.7 Structure of Thesis

The structure of thesis consists of six individual chapters, which are outlined below:

Chapter 1 provides a background to the topic, states the research question and related thesis objectives and outlines the structure of the thesis. This chapter also highlights the research methodology utilised and notes the limitations of the research.

Chapter 2 explores the current role of the Commonwealth Government in land use planning and outlines the range of powers available to the Commonwealth Government to control and influence land use. The reasons behind the continuing involvement of the Commonwealth Government in relation to land use planning is also discussed.

Chapter 3 investigates the exemption that the Commonwealth often has from State laws when undertaking activities on Commonwealth land. The benefits of the exemption for the Commonwealth are detailed and the criticisms of the Commonwealth Government's freedom from State legislation also discussed.

Chapter 4, using a case study of the Sydney Harbour Federation Trust, explores the ways in which a Commonwealth agency exempt from State laws, works to deliver human services to meet the legislative requirements for the State in which it operates.

Chapter 5 outlines a number of solutions that could be utilised by Commonwealth agencies to assist them more closely align their operations with State requirements for uses that benefit from further licensing and approval requirements.

Chapter 6 presents a summary of the research findings and answers each research objective. The chapter also identifies the implications of this research on planning practices, as well as outlining possible future areas of research related to this topic.

1.8 Conclusion

This chapter has provided a background to the topic to be investigated and outlined the research question and related thesis objectives. The significance of this thesis as an important and practical contribution to the knowledge of the chosen topic area was also established. Chapter 2 will begin to present the initial stage of the research process, a review of literature related to the topic.

2

The current role of the Commonwealth Government in land use planning

2 The current role of the Commonwealth Government in land use planning

This chapter explores the current role of the Commonwealth Government in land use planning. Though the States hold the residual power under the Constitution to make laws relating to the environment and planning, the Commonwealth Government still has a range of powers available to it to make decisions regarding land use, which are outlined in this chapter. This chapter also explores the reasons behind the continued involvement of the Commonwealth Government in land use planning, highlighting the ongoing public support for the Commonwealth's role in land management.

2.1 Constitutional Division of Powers

The legislative powers of Australia's Commonwealth Government are outlined in the *Commonwealth of Australia Constitution Act 1900* (the Constitution). Lyster et al (2007 p13) state that the legislative powers of the Commonwealth Government are limited to those matters specified in Section 51: *Legislative powers of the Parliament* of the Constitution and the residual powers rest with the States. Lyster et al (2007 p13) note that no reference to 'the environment' is made in the Constitution, as environmental issues "were not contemplated when the Constitution was enacted" and thus the residual powers of the States include the authority to make decision about the environment and land use in Australia. The States therefore have "traditionally considered to have primary responsibility for environmental matters" (Lyster et al 2007 p13) including decisions regarding land use. Lyster et al (2007 p14) note "in the environmental context, statutes have been enacted by State Governments to cover a wide range of environmental issues including biodiversity, biotechnology, chemicals, energy, environmental planning and assessment, heritage, native vegetation, natural resource management, pollution, waste and water".

For example, in NSW, as the Commonwealth has no direct power to legislate on environmental matters, the "NSW Parliament is left to legislate in this area" (Farrier and Stein 2006 p12). Lyster et al (2007 p14) note that in recent times, the NSW government "has made deliberate attempts to integrate as far as possible the consent provisions of the environment planning and assessment regime and also the management of natural resources".

2.2 Powers of the Commonwealth Government in relation to land use

Though States hold the residual power to legislate on environmental matters, including land use planning, the Commonwealth Government has the power to pass legislation for land under the control of the Commonwealth Government. The Commonwealth Government is also able to use its fiscal power to influence land use planning decisions. In addition the Commonwealth Government can "use its powers in other fields to achieve environmental goals" (Farrier and Stein 2006 p12) and in the past the Commonwealth Government has passed laws under the trade and commerce power (Section 51[i]), the external affairs power (Section 51[xxix]) and powers relating to corporations (Section 51[xx]) to heavily influence land use decisions.

2.2.1 Exclusive Powers of the Commonwealth Government

The Commonwealth Government has exclusive powers to pass legislation that applies to areas of Commonwealth land. Section 52 *(Exclusive Powers of the Parliament)* of the Constitution states:

> *The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
>
> *(i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;*

(ii) matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;

(iii) other matters declared by this Constitution to be within the exclusive power of the Parliament.

Clarke (2005 p62) states that Commonwealth land includes:

- *Land owned by the Commonwealth (or a Commonwealth agency) and airspace over the land*
- *Any area of land held under lease by the Commonwealth (or a Commonwealth agency) and airspace over the land*
- *Land in an external Territory or the Jervis Bay Territory, and airspace over that land; and*
- *Any other area of land that is included in a Commonwealth reserve*

Clarke (2005 p63) notes that a Commonwealth agency is defined to include:

- *A Commonwealth Minister*
- *A Commonwealth Department*
- *A company owned or controlled by the Commonwealth*
- *An organisation established under Commonwealth law or by a Commonwealth Minister*
- *A person holding an office under Commonwealth law*

2.2.2 Fiscal Powers of the Commonwealth Government

Farrier and Stein (2006 p13) argue that the "Commonwealth can use its fiscal powers to exert influence in the environmental area". For example, under Section 96 of the Constitution - *Financial assistance to States* – the Commonwealth Government can make tied grants to the States: *"*During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit*"*.

The Commonwealth is able stipulate how the grant must be used and apply conditions to the use of the funding. Farrier and Stein (2006 p13) state that this "allows the Commonwealth to make grants specifically for environmental purposes and also attach environmental protection conditions to grants for other purposes". The Commonwealth Government is able to prioritise environmental issues that the States must address by linking them to grants. The Commonwealth can also dictate the standards that must be met and timeframes for projects as conditions of the grants, allowing the Commonwealth to control the way in which the project is carried out. Bunker and Searle (2007 p619) note that the State's "wide range of powers and responsibilities to bear on co-ordinated action in metropolitan growth and change" has been eroded by "increasing centralisation of power" (Bunker and Searle 2007 p638) of the Commonwealth Government brought about by the influence of Federal financial resources.

2.3 Reasons for the Commonwealth Government's continued role in the administration of land use

Though the Commonwealth Government's role in managing land has caused many areas of conflict, there are both practical and social reasons behind the need for Commonwealth Government involvement in land use administration.

2.3.1 Historical support

Francis (1987 p65) notes that conservation and environmental groups have historically supported Federal Governments as the appropriate forum to own and administer the public lands. Francis (1987 p65) suggests that these groups are "concerned that sub-national governments are often dominated by resource developers and/or lack the bureaucratic competence to manage the lands".

2.3.2 Places for everyone in the nation

The administration of land by the Federal Government is seen as the creation of places for all the people in the nation, as opposed to the States creating places for the people of one particular city. Hamilton (1987 p141) suggests that federal land

management "entails regulation by the national government of the use of natural resources" for all people. For example, the Sydney Harbour Federation Trust was established to plan for the "future of former Defence and special Commonwealth lands around Sydney Harbour… for the benefit of present and future generations of Australians" (SHFT 2009).

2.3.3 Controversy over sale of 'public lands'

Smith (1998 p2) notes that the sale of surplus Government land is often a contentious issue, particularly if the land is "considered to be important in either a local, regional, State or indeed a national context". Bell (2006 p5) expands on this idea and argues that the Federal Government has been "passing functions to local government with inadequate or no off-setting revenue source", when disposing of Commonwealth land. He uses the transferral of responsibility of a large number of regional airports from Federal Government to local government in the early 1990s as an example of inadequate levels of funding. Bell goes on to state that it is the duty of the Commonwealth Government to share Australian Taxation Revenue with State and local Governments to ensure that they are able to meet their "service and infrastructure obligations" (Bell 2006 p5) to communities.

Whilst community attitudes do change over time, Smith (1998 p2) states that it is "conceivable that what is considered 'surplus' to one generation may become 'invaluable' to another" and that once public lands are sold "it is very difficult to buy them back into the public domain". Conflict arises when the State and Federal government have different ideas of how 'invaluable' a piece of land might be. The attitudes of the community can also influence the sale and development of areas of Commonwealth land. When plans for the former HMAS Platypus defence site at Neutral Bay to be sold and developed was announced, there was vigorous community opposition. As a result, the Government established the Sydney Harbour Federation Trust "to devise a long-term plan to return the vacated land to the People of Australia" (SHFT 2003 p12).

2.3.4 Access to the best resources and a uniformed approach to land use policy

There is the potential for a nation wide approach to an issue when the Federal Government is in charge of administering land use. Smith (1998 p1) cites the 1991 Commonwealth Government's 'Better Cities Program' as an example of a national approach to "reforming urban management processes". Behan (1987 p177) discusses the perceived greater level of access that the federal government has to "better research, better professional education, better information systems and information processing capabilities than ever before". He states that because of this access to better resources than the States, land under Federal control "seems to be generally well and conservatively managed by increasingly capable managers" (Behan 1987 p177). Green (1998 p72) argues that the Federal Government "is in the best position to establish workable land use policy because of its ready mechanisms for gathering data on population, market and employment trends".

2.3.5 Influence of international agreements

The Federal Government has the authority to sign international agreements and the power (or in the case of Australia – the requirement) to enact these agreements into the legislation of their own nation state. Bunker and Searle (2007 p638) note that now and into the future issues such as climate change, transport, and energy and water management will "inescapably draw the Commonwealth Government into national and international agreements which will affect the capital cities in which most Australians live". The Federal government provides the link between international agreements and the land use policies of a Nation state. Smith (1995 p9) states that in some cases much of a Nation State's policy on a particular issue may actually have "been written in terms of international agreements" and then enacted into domestic legislation, as the international agreement is seen as the benchmark standard for the particular issue.

2.4 Current commentary on the Commonwealth's role in land use planning

Smith (1998 p1) acknowledges that all three levels of government in Australia play a role in administrating land use but argues that the Commonwealth Government is "possibly the least important level of government in the administration of land use". Smith (1998 p1) states that the Commonwealth Government, due to its sheer size, could "have a significant role to play in the development of both cities and regional areas" if it wishes. McKinnell (1993 p1) agrees with Smith's statement and notes that whilst the States have "constitutional responsibility for land management activities within their borders", the Commonwealth government could be "responsible for coordinating a rational approach to both environmental and industrial development issues". However, Bunker and Searle (2007 p619) argue "although Commonwealth government policies such as immigration impact substantially on urban conditions, there is no present desire for any engagement in the cities by the Commonwealth Government". Though the Commonwealth government could use its "fiscal might to influence land use" (Smith 1998 p1), at present there is no "national view of the urban system and how it might be guided in the national interest" (Bunker and Searle 2007 p619).

Debate continues to surround the division of powers between the Federal and State Governments and Bell (2006 p1) argues that there needs to be a "relocation of responsibilities between different spheres of government". Francis (1987 p61) raises the question "should the ownership of the public lands be transferred to the states in which they are located?", which would in effect ensure that all areas of land within one State were controlled by the same legislation. Yet there continues to be public support for the Commonwealth to manage areas of Commonwealth land for the reasons stated above, especially where land uses are related to the protection of Australia in the form of defence bases or are for the enjoyment of the public, such as foreshore parks.

2.5 Conclusion

This chapter has outlined the range of powers available to the Commonwealth Government to control and influence planning decisions. Practical and social reasons behind the Commonwealth Government's involvement in land use administration have been considered and the ongoing public support for the Commonwealth's role in land management has been highlighted. Contemporary opinions on the Commonwealth Government role in land use planning have also been discussed. Chapter 3 will investigate the exemption that the Commonwealth Government often has from State laws when undertaking activities on areas of Commonwealth land.

3 Commonwealth exemption from State legislation

3 Commonwealth exemption from State legislation

This chapter investigates the exemption that the Commonwealth often has from State laws when undertaking activities on Commonwealth land. The benefits of the exemption for the Commonwealth are detailed and the criticisms of the Federal Government's freedom from State legislation are discussed.

3.1 Commonwealth exemption from State laws

As discussed in the previous chapter, the Commonwealth Government has the power to pass legislation to control the management of areas of Commonwealth land. In addition, when carrying out activities, including development, on Commonwealth land, the Commonwealth Government is generally exempt from State and Local planning legislation and regulations. In the past, 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.

3.2 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.

3.2.1 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 19998 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.

3.2.2 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.

3.2.3 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).

3.2.4 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-ridding 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.

3.2.5 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. No longer are all the land uses on Commonwealth land so unique that they require their own legislation. Uses such as restaurants, cafes and childcare centres that are regulated by the States are becoming more common on Commonwealth land, as ex-Defence lands are being 'handed-back' to the people of Australia through the creation of parklands and areas for community use.

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.

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.

3.3 Conclusion

This chapter outlined the benefits and criticisms of the Commonwealth exemption from State laws. This exemption provides a means for the Commonwealth Government to undertake specialist activities on areas of Commonwealth land without the restrictions that come with State planning regulations. However, as areas of Commonwealth land are being used less for specialist uses, such as defence sites, this exemption has created an new set of issues for Commonwealth agencies who are managing Commonwealth land. One of the biggest issues that has emerged relates to the need for additional licensing requirements for certain land uses, such as childcare centres. 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 utilise State legislation related to these management and compliance issues. Commonwealth agencies are developing methods to help them bridge this 'gap'. Chapter 4 investigates the

methods adopted by the Sydney Harbour Federation Trust, a Commonwealth Agency, to assist them in licensing certain land uses on its sites.

4

Case Study: Sydney Harbour Federation Trust

4 Case Study: Sydney Harbour Federation Trust

This chapter investigates the methods adopted by the Sydney Harbour Federation Trust to assist it in licensing certain land uses on its sites. Using the Trust as a case study, this chapter explores the ways in which a Commonwealth agency exempt from State Laws, works to deliver human services that are consistent with the legislative requirements of NSW. The Sydney Harbour Federation Trust was chosen as a case study for this thesis because has a large number of new uses on its sites. The researcher interviewed Andrew Woodmansey, Director of the Trust's Property Marketing and Management Department on 30 September 2003 to gain an understanding of the methods that the Trust has developed to assist it in meeting NSW licensing requirements.

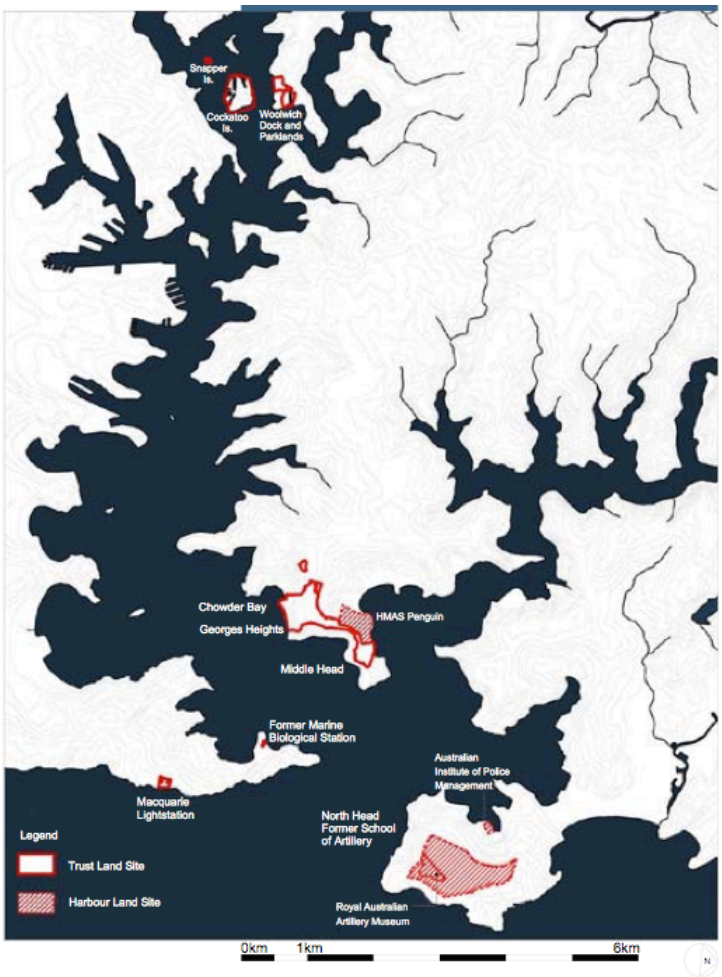
4.1 Sydney Harbour Federation Trust

The Sydney Harbour Federation Trust (the Trust) was established under the *Sydney Harbour Federation Trust Act 2001* (SHFT Act) as a statutory body "to manage surplus Defence lands on Sydney Harbour foreshores" (SHFT 2003 p11) "with the objectives of maximising public access to the sites, cleaning up contaminated areas and preserving the heritage and environmental values of the sites" (SHFT 2003 p12). As with many Commonwealth agencies, the main purpose of the Trust is to provide public areas for all Australians, which is reflected in the Trust's vision to "to provide a lasting legacy for the people of Australia by helping to create one of the finest foreshore parks in the world and provide places that will greatly enrich the cultural life of the city and the nation" (SHFT 2003 p12). The importance of establishing the Trust was outlined by the Prime Minister of the time, John Howard MP, who stated "the establishment of the Trust will prevent any ad-hoc treatment of the return of the land to the people and it will ensure that there is maximum weight given to the desire

of all Australians that the maximum advantage be derived in open space and recreational purposes in relation to the land" (SHFT 2003 p12).

The areas of land managed by the Trust are shown in Figure 4.1. The Trust has the power to make plans for both 'Trust Land Sites' and 'Harbour Land'. The Trust defines a 'Trust Land Site' as "land that is either in the ownership of the Trust or land that has been formally identified for transfer to the Trust" (SHFT 2003 p13). 'Harbour Land' is defined as "any land in the Sydney Harbour region irrespective of its ownership" (SHFT 2003 p14). Plans created by the Trust are not legally binding on 'Harbour Land' but provide a strategic vision for that area. The Trust states that the "the inclusion of Harbour Land Sites in the Trust's Plan allows the Trust to take a holistic approach to its planning" (SHFT 2009 p14).

Figure 4.1 Plan showing areas of land managed by the Trust (Source: SHFT 2003)



4.2 Exemption from State legislation

When the initial discussions about the establishment of the Trust took place, there was debate as to whether the Trust should be subject to NSW legislation. It was felt that "because these sites were so unique…particularly the heritage nature of the buildings" (Woodmansey 2009) and the sites included a "great deal of parkland and special features" (Woodmansey 2009) the Trust should not be subject to any State laws. This exemption is outlined in Section 71 of the *Sydney Harbour Federation Trust Act 2001*, which states:

> *"An excluded state law does not apply and is taken never to have applied in relation to:*
>
> *(a) the Trust; or*
>
> *(b) the property (including Trust land) or transactions of the Trust; or*
>
> *(c) anything done by or on behalf of the Trust.*

Under the Act, an excluded State law is defined as "a law of a State, including a law of a State that is applied to a Commonwealth place by virtue of the Commonwealth Places (Application of Laws) Act 1970" that relates to any of the following matters:

> *(a) town planning;*
>
> *(b) the use of land;*
>
> *(c) tenancy;*
>
> *(d) powers and functions of local councils;*
>
> *(e) standards applicable to the design, or manner of construction, of a building, structure or facility;*
>
> *(f) approval of the construction, occupancy, use of or provision of services to, a building, structure or facility;*
>
> *(g) alteration or demolition of a building, structure or facility;*
>
> *(h) the protection of the environment or of the natural and cultural heritage;*
>
> *(i) dangerous goods;*
>
> *(j) licensing in relation to:*
>
> > *(i) carrying on a particular kind of business or undertaking; or*
> >
> > *(ii) conducting a particular kind of operation.*

There was some criticism surrounding the Trust's exemption from State laws, mainly from existing NSW departments involved in land use planning. Martyn (2000 p1) states that the Sydney Harbour Foreshore Authority (SHFA) was concerned that "the lack of compliance with NSW laws will have a major impact on the ability of the State to control future use and management, access, public alienation, built form and site development" and that "there are inherent problems in setting up alternative planning systems to the NSW system and in excluding NSW laws from applying to the sites". Furthermore, SHFA was concerned that the exclusion of the Trust from State laws had the "potential to create conflict where opposing management of community values may apply for adjoining areas. It may also create difficulties and inconsistencies due to the differing functions and roles of the various government bodies and the application of their relevant legislation". Martyn (2000 p1) notes that the following explanation was given for the Trust's proposed exemption from State laws: "it is not the intention to circumvent State laws, but in accepting its responsibility to secure the future of the sites, the Commonwealth believes that the Trust must be able to operate with a certain degree of autonomy. The Trust is expected to work in close cooperation with the New South Wales government, and is fully empowered to do so through its objectives and powers. There is also a strong commitment to public consultation in the development of management plans for each site and management plans will be enforced through Regulations".

4.3 Trust Planning Policies

Though all of the Trust sites are located within NSW, the agency's exemption from state planning laws has meant that the Trust has had to produce its own planning policies to help guide development on its sites. Section 6 of Part 2 of the SHFT Act 2001 requires the Trust to prepare a 'plan' within two years of the proclamation of the Act and Section 28 of the Act states that this plan must contain the following items:

- *objectives for the conservation and management of the area;*
- *policies in respect of the conservation and management of the area;*
- *an identification of proposed land uses in the area or parts of the area;*

The Trust published its Comprehensive Plan in 2003, which provides general objectives and outcomes for each site. Individual Management Plans for each site have also been produced, which outline in more detail the aims and constraints of each site, as well as providing more comprehensive planning guidelines and restrictions for each site. The Comprehensive Plan and the individual Management Plans form the legal documentation that outlines the way planning may occur on the Trust's sites. Planning Applications of Actions that are received by the Trust are assessed in accordance with the Trust's Comprehensive Plan and the Management Plan for the site in questions, as well as the requirements of the SHFT Act 2001 and the *Environmental Protection and Biodiversity Conservation Act 1999*.

The NSW Department of Urban Affairs and Planning (now Department of Planning) expressed concerned that the Trust's planning policies were poor "substitutes for known and accepted instruments under NSW system" (Martyn 2000 p1). However the Trust defends its position, stating "in many planning initiatives, there is an underlying intent, to redevelop or facilitate development for a pre-conceived purpose. In such circumstances, planning seeks to make the new development fit in, minimise the negative impacts, ameliorate unavoidable adverse effects and provide trade offs to compensate" (SHFT 2003 p12).

Many of the land uses that have been proposed under the Management Plans for each of the Trust sites are new uses that have never existed on these areas of Commonwealth land. As discussed above, the Trust's main purpose is to create a foreshore park for Australians to enjoy and thus the land uses that the Trust has chosen for its sites are uses that support recreational purposes, such as cafes and restaurants. In addition, these sites contain a large number of ex-Defence buildings, which are being restored by the Trust to be leased out as office spaces and for use by other commercial businesses. For a number of these uses that relate to service provision there are usually additional approvals related to legislation governing how these uses are to be delivered and outlining the standards that must be met. Generally matters such as childcare licensing, food safety standards and occupation certificates are regulated by the State. The Commonwealth Government has not legislated in

these areas and so the Trust has had to develop its own methods to help it align its practices with NSW State law. Whilst there is no Commonwealth legislation that requires an applicant to meet these additional levels of approval, the Trust is able to require an applicant to obtain a particular licence or approval as a condition of their lease with the Trust.

Three different types of additional approval that the Trust requires for uses on its sites are examined in more detail here:

- Occupation Certificates
- Childcare Licensing
- Food Safety Standards

4.4 Occupation Certificates

In New South Wales, under Part 4A of the *Environmental Planning and Assessment Act 1979*, before a person is authorised to "commence occupation or use of a new building, or to commence a new use of a building resulting from a change of building use for an existing building" (EP&A Act 1979), they must be issued with an occupation certificate by the relevant consent authority, council or an accredited certifier. An occupation certificate "verifies that the principal certifying authority is satisfied that the building is suitable to occupy or use in terms of the requirements of the Building Code of Australia (BCA)" (DIPNR 2005 p1).

As a condition of approval for works and new uses on Trust sites, the Trust has begun to require applicants to obtain an occupation certificate before a building may be occupied for its approved use. To obtain an occupation certificate, the applicant must submit to the Trust documentation that shows that the works carried out to a building are complaint with the BCA and other relevant standards. The Trust is attempting to mirror the NSW system, whereby the occupation certificate is issued to indicate that a particular building complies with the BCA standards for its proposed use. A building that is compliant with the BCA meets the "required standards for the design and construction of various classes of building to protect health, safety and amenity"

(DIPNR 2005 p1) of the people who use the building. As the Trust is not subject to NSW planning legislation, this occupation certificate is not issued under the EP&A Act. The Commonwealth Government has not passed legislation that outlines the provision for a Commonwealth agency to issue an occupation certificate. This means that the occupation certificates that are issued by the Trust have no legal standing and Trust is requiring applicants to comply with this requirement without having any legal force behind its request.

As the requirement for an applicant to obtain an occupation certificate does not come from any formal legislation, there are no legal penalties for an applicant who does not obtain an occupation certificate before they commence using a building on Trust land. In NSW, under the EP&A Act 1979 any person who commences occupation of the whole or any part of a new building, or changes the use of an existing building without an occupation certificate will be subject to criminal enforcement proceedings carrying penalty units (monetary fines). On Trust land, applicants are not subject to being issued with penalty units if they do not comply with the Trust's request to obtain an occupation certificate. This has the flow-on effect, whereby the applicant does not feel obliged to obtain a report indicating that their building meets BCA standards before commencing use of the building. The Trust itself has no legal power to force applicants to obtain an occupation certificate before they commence using the building and there is no Commonwealth legislation that provides penalties, such as fines, to encourage applicants to comply with the Trust's approval conditions.

Conversely, applicants on Trust land do not have the provisions of a formal piece of legislation to protect their rights in relation to occupation certificates. Without a legal framework to adhere to, the Trust is not obliged to issue an occupation certificate within a designated time frame. For buildings covered by NSW State legislation, under Section 109K *Appeals against failure or refusal to issue Part 4A certificates* of the Environmental Planning and Assessment Act 1979, the applicant has the right to appeal to the Land and Environment Court "against a consent authority's decision to refuse to issue such a certificate or to issue a construction certificate subject to conditions" (EP & A Act 1979). Applicants on Trust land have no avenue of appeal if

the Trust does not issue them with an occupation certificate within a reasonable timeframe. However, it can be argued, that the non-legal status of the Trust's occupation certificates makes it impossible for provisions to protect the interest of applicants to be formally legislated.

4.5 Childcare Licensing

Buildings located in the George Head and Georges Heights areas of Mosman have been refurbished by the Trust for use as office space and other small commercial businesses. As a result, the 2005 Management Plan for the Georges Head area identified that a childcare centre in the area would help to support the needs of working parents in the area. The Management Plan identifies that the 1913 Barracks buildings (Nos. 131 and 132 Barrack Road) would be suitable for conversion into a childcare centre (cited SHFT 2005 p34):

> *This group of buildings was built in 1913 as Barracks and a detached kitchen. In its current configuration, the building could continue to be used for residential purposes, however the design of the building also makes it particularly well-suited for adaptive reuse as a childcare centre. This proposed use would provide a significant benefit to the community and would make the building more generally accessible than continued private residential use would allow. Conversion of the building to a childcare centre will result in the removal of intrusive additions and internal partitioning which will allow the large open spaces of the barracks to be revealed.*

In NSW, childcare centres are required to be licensed before they begin operations to make sure that certain standards are met to ensure the protection and safety of children in care. The Department of Community Service (DoCS) regulates these services. As the Commonwealth Government does not have legislation in place that oversees the operation of childcare centres on Commonwealth land, the Outcomes section of the George's Head Management Plan stated that for the 1913 Barracks (Nos. 131 and 132 Barrack Road) "the number of children able to be accommodated

will be determined by the capacity of the existing building and the standards specified in the relevant NSW childcare regulations*" (*SHFT 2005 p35).

In 2006 a private childcare provider lodged an application for the fitout and use of the 1919 Barracks building as a childcare centre. The application complied with the outcomes of the Trust's Comprehensive Plan and the George's Heights Management Plan and the application was approved. However, the process for ensuring that the childcare centre met the requirements of DOCS was much more complex. Initially, the Trust approached DOCS and asked if they would grant a licence for the childcare centre. However, after taking legal advice, DOCS stated "because the Trust is on Commonwealth land and because the childcare centre is on Commonwealth land, that DOCS, as a state agency, has no jurisdiction over the childcare centre and its operators" (Woodmansey 2009) and thus could not issue the centre with a licence. The Trust sought legal advice from the Australian Government Solicitor, who recommended that the Trust should try to "mirror the DOCS licensing regime in the form of a licence and a contract to be issued by the Trust" (Woodmansey 2009).

To assist the Trust in ensuring that the NSW standards for childcare services were being met, the Trust engaged a childcare consultant to carry out pre-operational visits to assess and audit the childcare centre. The centre was found to comply with the *Children's Services Regulation 2004* and the *Occupational Health and Safety Act 2000*. The consultants recommended that the Trust issue a licence to the applicant for the operation of a 48-place childcare centre. The centre is be subject to post-operational inspections and audits by the consultant.

Whilst the interplay of a contract and a Trust issued licence to the private childcare operator has ensured that the set-up and day to day running of the childcare centre is consistent with other childcare centres in the state of NSW, there are a number of other issues that these documents do not cover. In NSW, childcare centres are monitored and inspected by DoCS to ensure services comply with the *Children Services Regulation 2004*. Breaches of the Regulation are investigated and if serious, enforcement and prosecution is taken against the licensee. For example, a service may

be prosecuted for not having the required qualified staff or for not ensuring equipment was safe for children. Complaints from parents are also investigated. The Trust's exemption from State laws prevents it from accessing these services that are part of DOCS and there are no equivalent Commonwealth departments who enforce this licence. Woodmansey (2009) states that the Trust has a "process for registering complaints or concerns by parent", whereby parents may raise issues of concern with the childcare centre operators themselves. In addition, "there is also a provision for them [parents] to come to the Trust as the organisation who is issuing the licence" (Woodmansey 2009). The childcare consultant engaged by the Trust may be called upon to "come in and investigate the case and then recommend the action that the Trust should take" (Woodmansey 2009) if a parent's particular concern could not be resolved directly.

If the childcare operator was found to have breached their licence, the Trust provides the operator with time to rectify the breach. However, if the breach could not be remedied, the Trust has "no basis on which to prosecute the childcare operator because there is no legislation backing up the contract that we issue" (Woodmansey 2009) and so the Trust's only option is to terminate its licence and contract, "which effectively means they have to close down the childcare centre" (Woodmansey 2009). From the childcare operator's point of view, this situation may seem very severe, as the Trust may both terminate the childcare operators licence and its lease contract. Hence a Trust-licensed childcare centre may be forced to close, whereas a State-regulated service may be prosecuted and if found guilty a penalty (fine imposed) and may continue to operate. A similar non-compliance matter may result in two entirely different outcomes. The flow-on effect may be confusing and disruptive of care for children and parents who use the service.

There may also be an issue of a conflict of interest between the Trust as the landowner and regulator. The Trust may be less inclined to take the extreme action of terminating the childcare operator's license, hence allowing a substandard service (which may pose risks to the children in care) to operate or lose the rent from a tenant.

Without a firm legislative base for the licensing and regulatory requirements, it is a problematic area for the Trust.

4.6 Food Safety Standards

In recent years the Trust has approved the development of a number of cafes and restaurants on its sites. In NSW food safety standards are developed by the NSW Food Authority, who work with local government agencies to enforce "all aspects of the Australian and New Zealand Food Standards Code, the NSW Food Act 2003 and the State's food safety programs" (NSW Food Authority 2008). The NSW Food Authority (2009) states that "standards and requirements for all food for sale in NSW" are set out in the following three pieces of legislation:

- National Food Standards Code (FSANZ)
- Food Act 2003 (NSW)
- Food Regulation 2004 (NSW)

The NSW Food Authority "ensures that industry complies with food safety programs by licensing or recording notification of food businesses in NSW, auditing and inspecting their operations regularly and where necessary, penalising non-compliance" (NSW Food Authority 2008). However, on areas of Trust land, the NSW Food Authority has no jurisdiction to issue licences to food businesses or carry out inspections of their operations. The Trust has established a process of 'mirroring' of State legislation to assist it in the regulation of food safety standards on Trust land. Woodmansey (2009) states that the Trust has "consultants to help us on that and give us advice on how frequently to carry out inspections and to do reports for us, and to make a note of any breaches and make sure those breaches are corrected" and require all food businesses to "comply with NSW legislation" (Woodmansey 2009). However, problems similar to the inability of the Trust to prosecute offenders who breach childcare licenses have emerged regarding food business owners. The NSW Food Authority's Compliance and Enforcement Policy states "breaches of the NSW Food Act, 2003 are classified as criminal offences and penalties of up to $550,000 and/or two years imprisonment apply" (NSW Food Authority 2006 p4). However, any

tenant on Trust land who breaches the NSW Food Act 2003, is not liable to be prosecuted under State legislation.

Local Councils play an important role in the management of food safety standards by carrying out inspections of food businesses within their own Local Government Area. Food businesses on Commonwealth land are not subject to these inspections, as they are not regulated by State legislation. Woodmansey (2009) recounts a recent visit made by Mosman Council's inspector to a food business on Trust land. A member of the public, who was not familiar with Trust sites made a complaint to Mosman Council regarding "some biscuits or some muffins just sitting out on top of the counter for sale" (Woodmansey 2009). Mosman Council "sent round their inspector…highlight the confusion that can sometimes happen" (Woodmansey 2009) when a number of land management authorities occupy one area. Woodmansey (2009) notes that the Trust "went down to the restaurant the next week and carried out the inspection ourselves". However, as Trust staff members do not necessarily have the expertise or experience to carry out such inspections, members of the public cannot be assured that the food safety standards achieved by food businesses on Trust land are consistent with the standards required by the NSW Food Authority.

4.7 Future of the Trust

In 2007 the SHFT Act 2001 was amended to extend the life of the Trust till 2033, enabling the Trust to "secure the future of its sites around Sydney Harbour and plan for long-term public accessibility, conservation work and adaptive re-use of buildings and facilities" (SHFT 2008 p4). The Trust plans to continue restoring buildings and leasing them out for various uses, which may involve the need for additional approvals and licences to be issued. Woodmansey (2009) notes that the Trust is hopeful that there will be "quite a few [new] restaurants, cafes and bars" on Trust land and states that the Trust is "now planning a second childcare centre down at Middle Head". Whist the number of restaurants, bars, cafes and childcare centres on the Trust sites is small, the Trust has the staffing resources to manage the contacts and licences required by each of these uses but "the administrative burden is going to definitely

increase as these number of facilities increase" (Woodmansey 2009). Woodmansey (2009) admits that if there was to be a great increase in the number of uses that required additional licences "it would be frankly far easier for us to fall under NSW legislation for these licences" but states that at the moment, so long as the number of "restaurants and childcare centres and so on stays within a reasonable number" it is better for the Trust not to be subject to NSW legislation. Woodmansey (2009) notes that if the number of uses requiring licenses started to get "above 12 or 15" then the Trust would "really need to look at changing the Act to try and make sure that these forms of legislation are included".

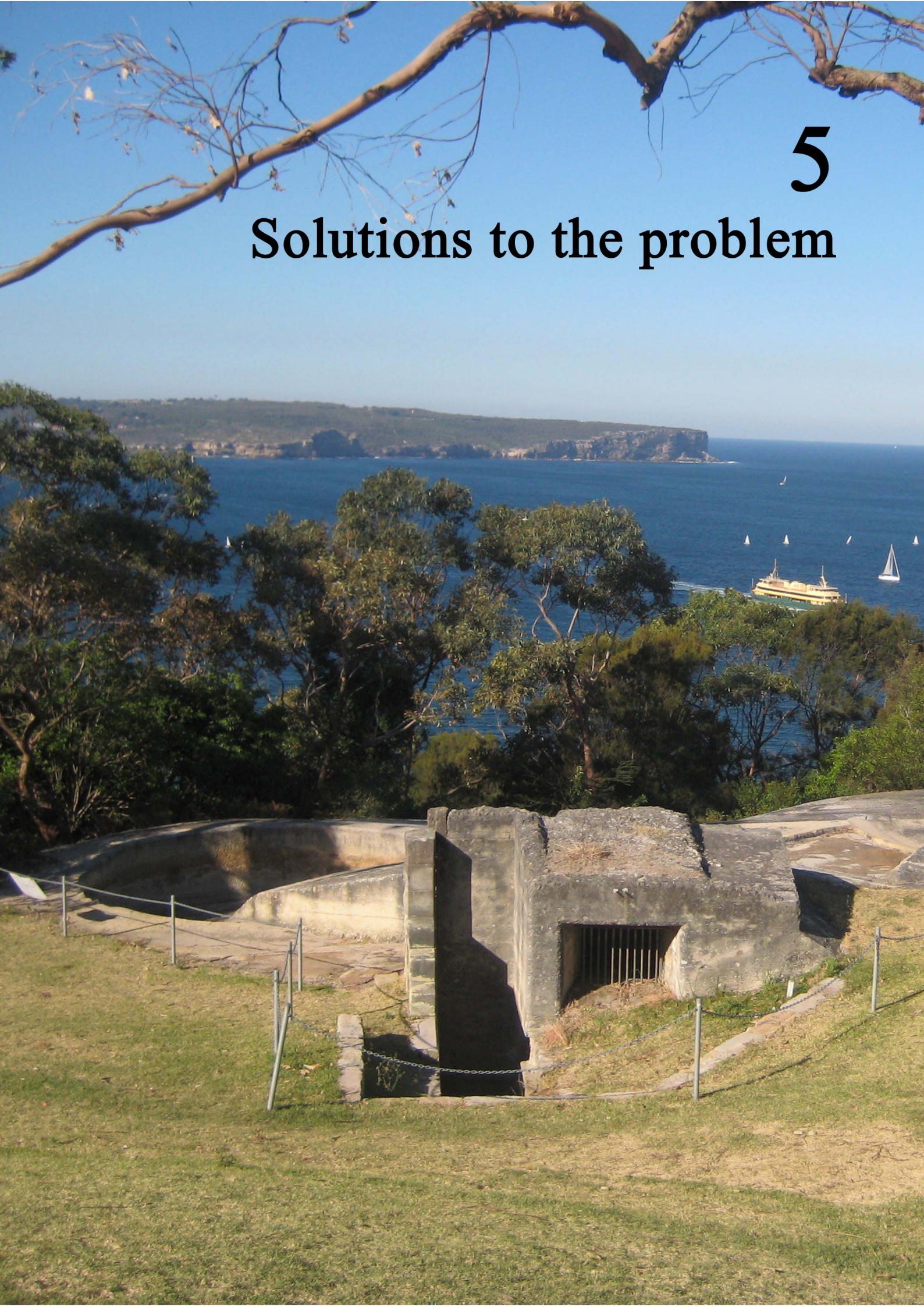
Questions have been raised as to what will happen to areas of land under the Trust's control, post 2033. When the establishment of the Trust was being debated, the NSW Department of Urban Affairs and Planning (now Department of Planning) (Martyn 2000 p1) foreshadowed that the exemption of the Trust from State laws would be a "problem for future users and owners (whether NSW government or lessees or others who may get title) as when land passes from the Trust, NSW planning and provisions laws will and need to apply". If the Trust sites are to be handed over to State departments in the future, the transfer of land control would be made easier if the uses currently on Commonwealth land were already subject to State legislation.

4.8 Conclusion

The Trust has worked hard to develop methods to help it align its practices with NSW State legislation. However, these methods do not provide the same level of protection people who access Trust sites. These 'problems' are not of the Trust's own doing but are caused by a lack of legislative support from the Commonwealth Government. These issues are likely to escalate as the Trust continues to refurbish more buildings, making them available for tenants to lease. Therefore these issues will need to be resolved to help support the Trust expand the number of uses on its sites. Chapter 5 will provide some solutions to assist Commonwealth agencies, like the Sydney Harbour Federation Trust, more closely comply with NSW State legislation.

5

Solutions to the problem



5 Solutions to the problem

The case study of the Sydney Harbour Federation Trust in Chapter 4 revealed that the methods developed by Commonwealth Agencies to assist them in mirroring State legislation are deficient. These agencies are falling short of their aim to provide the same level of protection for people on Commonwealth land that is provided on State regulated land. This chapter outlines a number of solutions that could be utilised by Commonwealth agencies to assist them more closely align their operations with State practices for uses that benefit from further licensing and approval requirements.

5.1 Rationale for problem solving

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.

5.2 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.

In addition, the Commonwealth Government would need to establish Commonwealth Departments that would support the enforcement of the new legislation. As highlighted in the case study of the Sydney Harbour Federation Trust, land uses such as childcare centres rely on the support of government departments to ensure that licences are issued, routine inspections are carried out and prosecution can occur when a licence is breached. Whilst the establishment of Commonwealth Departments to support the management of certain land uses will be highly beneficial to Commonwealth agencies, who will be able to pass on the daily management of these uses to other groups, the existence of only a small number of each type of use would not make the formation of these departments feasible. Some departments might only be responsible for a couple of Commonwealth tenants, which would not be an effective use of resources. There would be a lack of political will to establish such small departments.

In addition, whilst 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.

5.3 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.

5.4 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.

5.5 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, as discussed in Chapter 2, and there would be strong public outcry if the States grained 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.

Woodmansey (2009) notes that in the past DoCS licensed childcare centres on Defence land. Though DoCS stated that this was a historic situation and they would not take on the licensing of any new childcare centres, this situation indicates that there appear to be no legal impediments if a State agency were to take on the responsibility of licensing certain uses on Commonwealth land. If this situation were to occur it might appear that the Commonwealth Government was "picking and choosing which state laws it wanted to apply to… and which state laws it didn't want to be subject to" (Woodmansey 20009) and that the Commonwealth Government was getting the 'best of both worlds'. However, the application of certain State laws on Commonwealth land does not mean that the Commonwealth Government gets to "pick and choose" the laws that apply to Commonwealth land. Generally the default position should be that in areas where the Commonwealth Government has not passed legislation, State law applies. Section 109 of the Constitution does not apply in this situation, as there is no inconsistency between Commonwealth and State laws but a gap in the legislation.

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 *Environmental Planning and Assessment Act 1979* and the *Children and Young Person (Care and Protection) Act 1998*.

One benefit of a bilateral agreement may the removal of the landlord cum regulator conflict of interest experienced by the Trust, discussed previously, as such an agreement may serve to transfer the regulatory roles and responsibility to the State.

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, as 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, such as the SHFT Act 2001. For example, Section 71 of the SHFT Act 2001 (see section 4.3 of this thesis) could be amended to read:

Section 71 Exemption from State laws

i) Unless otherwise prescribed in Section 71ii of this Act, no State laws apply and are taken to never have applied in relation to the:

a. The Trust; or

b. The property (including Trust land) or transactions of the Trust; or

c. Anything done on behalf of the Trust

ii) The State laws that apply to a, b and c of Section 71i of this Act are listed in Schedule 3 of this Act.

iii) State laws will be governed by any relevant bilateral agreements

Listing the State laws that apply to the Trust in a schedule of the Act will make future amendments less complicated.

5.6 Supports from Local Councils for Food Safety Enforcement

To help address the issue of food safety enforcement specifically, Commonwealth Agencies could approach Local Councils, who have food safety enforcement officers on staff, to undertake inspections of food businesses on Commonwealth land on each agency's behalf, to establish if the food businesses practices meet State regulations. The Council could charge the Commonwealth Agency a fee for carrying out this service, in a similar manner to the Civic Services Department of Bankstown Council, who is paid by other Councils to undertake a range of services on their behalf.

The use of an external group to undertake the inspections provides a separation between the agency who have approved the use and inspectors who check compliance. This solution would help to ensure food safety consistency within a local area and provide local residents with assurance that similar levels of protection were being offered. The general public will most likely be satisfied with this outcome, as it ensures that the same body is regulating all cafes, restaurants and bars within the one Local Government area.

The engagement of Council's food safety enforcement officers provides a solution to providing an independent body to monitor food outlets that operate on Commonwealth land and ensure that their practices meet State legislation. However,

this solution does not provide a legal requirement for Commonwealth agencies to comply with State food regulations and any penalties outlined in State legislation that are generally imposed on food outlet operators who do not comply with regulations, may not apply to operators on Commonwealth land.

5. 7 Remain with the current system

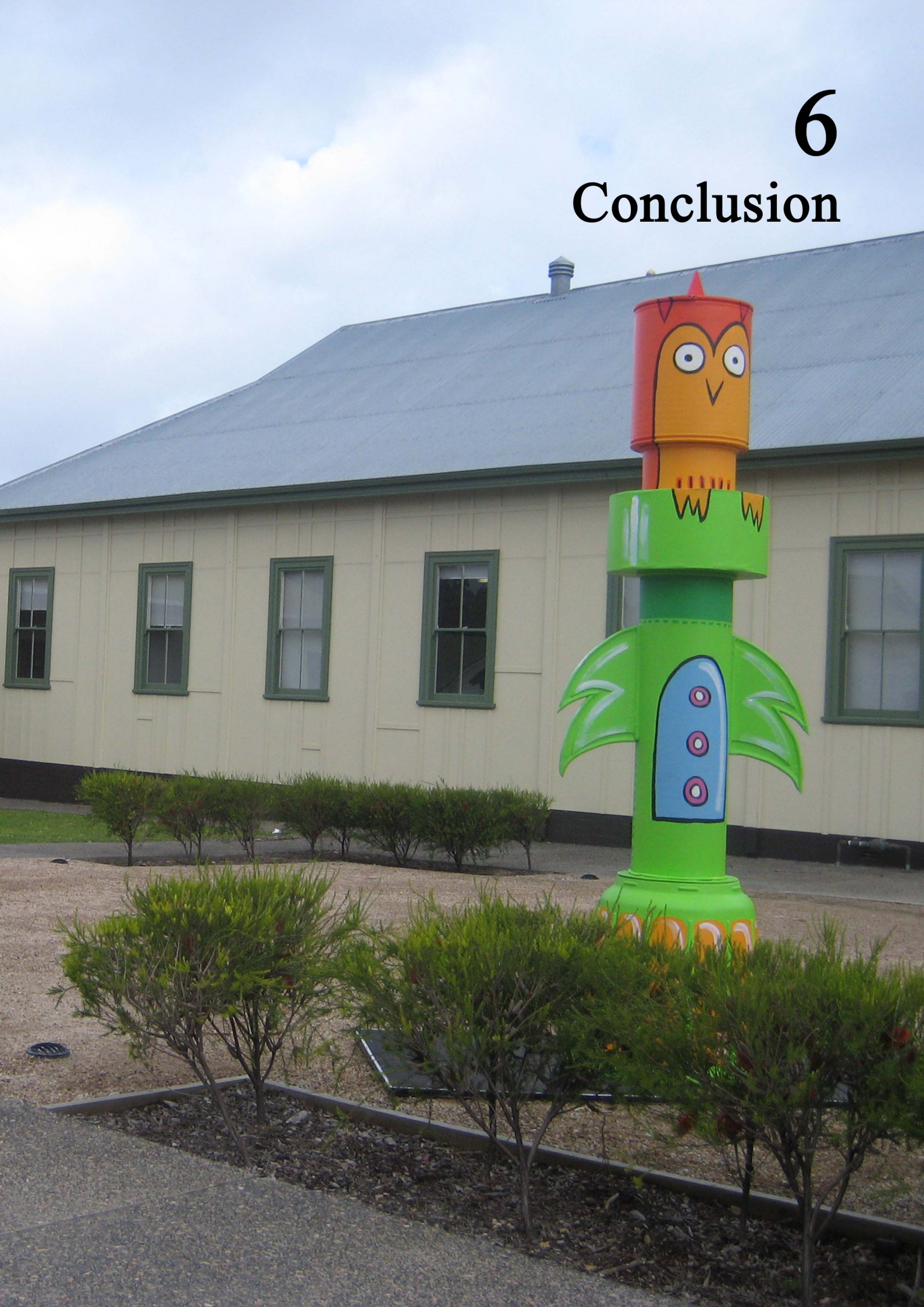
Commonwealth agencies could continue with the current program of licences and contracts to help mirror State legislation for uses such as childcare centres and food businesses. However, a more streamlined approach needs to be taken, in the form of standard contracts or licenses, to avoid the need to 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.

5.8 Conclusion

This chapter 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, the Commonwealth Government must realise that if it wishes to keep expanding its role in land use management, the issues associated with the Commonwealth exemption from State laws need to resolved. Chapter 6 will present a summary of the research findings of this thesis.

6
Conclusion



6 Conclusion

This chapter presents a summary of the research findings, answering each research objective. The chapter also identifies the implications of this research on planning practices, as well as outlining possible future areas of research related to this topic.

6.1 Key Findings

As outlined in Chapter 1, the research question to be answered for this thesis was:

Do the methods developed by Commonwealth land management agencies in NSW to help align their operations with State practices ensure that Sydneysiders have access to the same levels of protection on Commonwealth land as exists on State controlled land?

In order to answer the above research question, it was necessary to address the following research objectives:

6.1.1 To examine the powers available to the Commonwealth Government to make decisions related to land use planning

Examination of the Constitution revealed that the States hold the residual power to pass legislation related to environmental and planning matters and the Commonwealth Government has the power to pass laws for areas of Commonwealth land. Past and contemporary literature highlighted the Commonwealth Government's use of its fiscal powers to influence land use decisions through the provision of tied grants to the States. Additionally, research revealed that the Commonwealth Government is also able to use its powers in other fields to achieve environmental goals.

6.1.2 To document the reasons behind the continuing involvement of the Commonwealth Government in relation to land use planning

The research identified a number of reasons behind the Commonwealth's continued role in the administration of land use. Historically, environmental groups have supported the Commonwealth Government's role in land use matters as this level of government is seen to have the level of expertise required to engage in such issues, as well as access to the best resources and the influence of international agreements. In addition, places that are managed by the Commonwealth Government are seen to be places for 'everyone in the nation', which is reinforced by the controversy that often surrounds the sale of public lands.

6.1.3 To investigate the exemption that the Commonwealth often has from State legislation, highlighting the benefits of the exemption, as well as discussing criticisms of the exemption

The Commonwealth exemption from State laws is one of the main areas of conflict between the States and the Commonwealth. Research revealed that there are a number of issues surrounding this exemption. Contemporary literature reveals that whilst the exemption provides freedom for the Commonwealth Government to manage unique land sites, the Commonwealth is often seen to 'do as it pleases' on areas of Commonwealth land. The exemption has resulted in adjacent areas of land being managed by different levels of government, causing further conflict between the Commonwealth and the States. This thesis revealed that a new issue related to the management of Commonwealth land has surfaced in recent years: land uses that are being approved by the Commonwealth are uses that would benefit from these further approvals that are granted by the States. However, as the Commonwealth is exempt from State legislation, it is unable to utilise State legislation related to these issues and often the Commonwealth Government has not passed equivalent legislation in these areas. A legislative gap has been created and so Commonwealth agencies that manage areas of Commonwealth land have had to develop methods to help align their operations with State requirements.

6.1.4 To investigate the methods developed by a Commonwealth Agency to help align its operations with State legislation through a case study of the Sydney Harbour Federation Trust

The Sydney Harbour Federation Trust has developed a system of contracts and licences that it issues to try to 'mirror' the NSW system for a range of areas including occupation certificates and childcare licensing. Research reveals that these methods are falling short of the Trust's expectations as they do not provide a complete 'mirroring' of State requirements and are unable to provide the same level of protection for people's rights on areas of Commonwealth land managed by the Trust. In addition, the process to establish these contracts and licenses involves the engagement of expensive consultants and the management of these contracts is a time consuming job, which relies heavily on the close management of tenant and Commonwealth agency relations. These current methods to assist the agency meet State requirements are not sustainable and new solutions need to be found to address the problems with these methods before any additional uses on the site can be approved.

6.1.5 To develop a number of solutions that could be utilised by Commonwealth agencies to assist them more closely align their operations with State practices

A range of solutions was developed by the researcher that could be used by Commonwealth agencies to help assist them more closely align their operations with State practices. If the Commonwealth government was to pass legislation to guide the issues of occupation certificates, childcare licensing and food safety standards, there would be no need for other solutions to be developed to help the Commonwealth Government meet State standards. However, the Commonwealth Government had not indicated that legislation in these areas would be passed anytime in the near future. In addition, government funds would need to be used to create departments that would help to ensure that licences are issued, routine inspections are carried out and prosecution can occur when a licence is breached.

The most effective and feasible solution outlined in the thesis is the signing of a bilateral agreement between the Commonwealth and State Governments. Under this agreement the Commonwealth Government would 'accredit' particular state/territory practices in particular areas, such as occupation certificates and childcare licensing, and the State would be responsible for managing these issues on Commonwealth land. This solution would, in addition to the signing of the agreement, involve small changes to either the EPBC Act or to the establishing Act of each Commonwealth agency involved in land use management.

6.2 Implications for planning practice

In response to the research question posed, the methods developed by Commonwealth land management agencies in NSW to help align their operations with State practices do not ensure that Sydneysiders have access to the same levels of protection across areas of Commonwealth and State land. People's rights are much better protected on State land, where legislation outlines how these rights are protected and State departments, through a series of licences and routine inspections, ensure that these rights are being protected. In addition, when licences are breached, processes for prosecution of offenders have already been developed and sections of the State departments are able to assist in these situations.

The methods developed by Commonwealth agencies to manage the gap in legislation that has emerged seek to 'mirror' the State system. However, without access to State departments who, as discussed above, provide additional support and assistance to ensure that practices are being carried out to the required standard, it is very difficult for the Commonwealth Government to completely mirror the State system. The licences and contracts issued by Commonwealth agencies, such as the Sydney Harbour Federation Trust aim to ensure that all practices comply with State standards for special uses such as childcare centres. However, without the support of additional Commonwealth departments to assist in these matters, it is impossible for an agency to ensure that all aspects of State legislation are being met. In addition, 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. Furthermore, the requirement by the Commonwealth Government for tenants on areas of Commonwealth land to acquire such approvals could be subject to legal challenge.

The Commonwealth Government needs to consider its land use decisions beyond the approvals process. The needs of the approved use must be placed as a key factor when a planning application is received. Planners working on areas of Commonwealth land need to be aware that there is not always an automatic process for obtaining further levels of approval needed for certain uses. The extent to which the Commonwealth Government can simply 'mirror' State legislation through contracts and leases is limited, as the Commonwealth Government does not have access to the departmental support that the States do.

The results of this thesis have revealed that there are some flaws with the methods developed by Commonwealth agencies to help them align their operations with State laws. The issues of most concern are the Commonwealth-issued occupation certificates which are issued without any formal legislative backing and the lack of provisions for the prosecution of offenders who breach childcare regulations. Whilst there have not yet been any incidents that have caused these practices to be questioned (and one would hope that there never is), these issues need to be resolved to ensure the protection of people's rights on Commonwealth land. In addition, as Commonwealth agencies continue to expand and the types of uses on their land continue to diversify, more issues of this type will need to be resolved and thus a process to address these problems needs to be implemented now.

6.3 Areas of possible further research

The scope and time limitations prevented the researcher from undertaking the following areas of research. This topic, which is a new area research, appeared to be narrow at the beginning of the research process but continued to expand as study went on and the researcher noticed more gaps in existing literature on the issue. The issue of Commonwealth exemption from State laws is a very large topic area that would

need to be the subject of a larger research project. A number of further areas of research are provided below:

6.3.1 Commonwealth exemption from State laws

A more detailed study into the larger range of issues related to the Commonwealth exemption from State legislation should be investigated. Other areas of conflict between these two levels of government should be documented to gain a better understanding of the coordination (or lack of) between differing adjacent landowners.

6.3.2 Impact on Local Governments

In addition to being exempt from State planning legislation, the Commonwealth Government is also exempt from Local Planning requirements. The impacts that exemption has had on the operations of Local Councils should be investigated to gain an understanding of how areas of Commonwealth land operate within specific Local Government areas.

6.3.3 Other Commonwealth Agencies

The practices and operations of other Commonwealth agencies in Australia and overseas should be investigated to see how they utilise their exemption from State laws. Those agencies that have similar issues to the Sydney Harbour Federation Trust in terms on trying to meet State requirements for specific uses, and the methods developed by these agencies to align themselves with State laws, should be studied and an evaluation of their practices made. Commonwealth Agencies could learn from other agencies past failures or successes in this area.

6.3.4 Evaluation of outcomes on site

The land management practices of the States and the Commonwealth should be compared with one another and evaluated to provide a greater understanding of the ways in which each level of government manages land. The exercise should be undertaken to highlight the important role that the Commonwealth Government plays in land use planning.

6.3.5 Feasibility of solutions

A detailed study into the solutions proposed by this thesis should be undertaken to quantify the possible benefits versus the cost of implementing these solutions. These solutions should be presented to Commonwealth agencies for their comment, and possible implementation.

6.3.6 Role of Commonwealth Government

The ever-increasing role of the Commonwealth Government in land use planning should be studied. The Commonwealth Government is taking steps to become a very powerful land manager and its future intentions should be documented. Issues that have been raised in this thesis will need to be resolved before the Commonwealth Government can expand its role in this area.

6.4 Final Remarks

Commonwealth agencies that have been presented with the task of managing areas of Commonwealth land are struggling with a lack of Commonwealth legislation to support their operations. Without access to State legislation to support these uses, Commonwealth agencies have had to develop methods to help align their practices with State requirements. However, these methods fall short of providing the same level of protection for people's rights on areas of Commonwealth land. This is not to say that the Commonwealth Government should not be involved in land use planning matters and this thesis does not advocate the disbandment of such Commonwealth agencies. The Commonwealth Government plays an important and valuable role in the management of special sites, with the unique vision of creating lands for 'everyone in the nation'. These issues need to be resolved before the legality of some of the methods implemented by Commonwealth Agencies to 'mirror' State legislation are questioned. In addition, if the Commonwealth Government is to expand its role in land use management, the issues related to the provision of additional approvals and licenses for certain uses needs to be resolved, so that when new uses that require other approvals that have not been issued on Commonwealth land before are required, a

streamlined and legally watertight process has been established to support Commonwealth agencies.

References

Barangaroo Delivery Authority. (2009) ‘Barangaroo Delivery Authority.’ Sydney: Australia: BDA. Available at: http://www.barangaroo.com/bda.cfm

Behan, R. (1987) 'The polemics and politics of federal land management' , in P. Foss (ed.), *Federal Lands Policy*, Greenwood Press, Connecticut USW, pp 177-192.

Bell, P. (2006) How local government can save Australia’s federal system *National symposium on federalism and regionalism in Australia: New approaches, new institutions?* , Sydney.

Bunker, R. and G. Searle (2007) 'Seeking certainty: Recent planning for Sydney and Melbourne'. *The Town Planning Review* 78 (5):619-42.

Clarke, P. (2005) 'Environmental law toolkit NSW: a community guide to environmental law (5th edition). Sydney, Australia: The Federation Press.

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

Department of Infrastructure, Planning and Natural Resources. (2005) 'DIPNR circular: Occupation certificates and conditions of development consent.' Sydney, Australia: DIPNR.

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.

Francis, J. (1987) 'Public lands institutions and their discontents', in P. Foss (ed.), *Federal Lands Policy,* Greenwood Press, Connecticut USW, pp 61-70.

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.

Green, S. (1998) 'The search for a national land use policy: for the cities' sake'. *Fordham Urban Law Journal* 11(1): 69-120.

Hamilton, M. (1987) 'Deregulation and Federal land management in the 1980s: Inducing Atrophy in Bureaucracy', in P. Foss (ed.), *Federal Lands Policy*, Greenwood Press, Connecticut USW, pp 141-158.

Lyster, R., Lipman, Z. and N. Franklin. (2007) En*vironmental 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.

McKinnell, F. (1993) 'Australia's new National Forest Policy' *Unasylva* 44 (1): 1-5.

NSW Food Authority. (2008) 'How we work.' Sydney, Australia. Available at: http://www.foodauthority.nsw.gov.au/aboutus/about-the-authority/how-we-work/

NSW Food Authority. (2006) 'Compliance and Enforcement Policy.' Sydney, Australia.

Smith, H. (1995) The role of the state in the technical and general management of the oceans. *Ocean & Costal Management* 27 (1-2): 5-14.

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

Sydney Harbour Federation Trust. (2003) *Comprehensive Plan*. Sydney, Australia: Sydney Harbour Federation Trust.

Sydney Harbour Federation Trust. (2005) *Management Plan - Mosman No. 4: Georges Head (Amendment 1).* Sydney, Australia: Sydney Harbour Federation Trust.

Sydney Harbour Federation Trust. (2008) *Annual Report 2007 - 2008*. Sydney, Australia: Sydney Harbour Federation Trust.

Sydney Harbour Federation Trust. (2009) 'About Us'. Sydney, Australia: Available at http://www.harbourtrust.gov.au/about-us/index.html.

Legislation

Children and Young Persons (Care and Protection) Act 1998

Commonwealth of Australia Constitution Act1900

Environmental Planning and Assessment Act 1979

Environmental Protection and Biodiversity Conservation Act 1999

Food Act 2003

Occupational Health and Safety Act 2000

Sydney Harbour Federation Trust Act 2001

Images

All images were taken by the author unless otherwise stated.

Appendix A

FBE HREAP Forms

THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF THE
BUILT ENVIRONMENT

HUMAN RESEARCH
ETHICS ADVISORY
PANEL

14 Sep 2009

Application No: 95087
Project Title: Commonwealth exemptions from State laws: Help or hindrance in the planning of Sydney

Attention: Laura Goh

Dear Laura Goh,

Thank you for your application requesting approval to conduct research involving humans. The Panel has evaluated your application and upon their recommendation, has attached the decision below.

Please be aware that approval is for a period of twelve months from the date of this letter, unless otherwise stated below.

All further information/documentation (if any) is to be submitted to FBE HREAP via Student Centre. Please submit originals plus four copies. Email submission will not be recognised.

Decision

Approved with conditions	Your application is approved; however, there are certain things you must do, before you may conduct your research. Please see below for details, and your responses will assist us in completing your file.

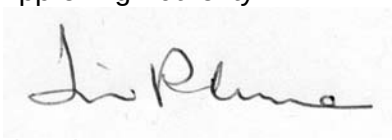
Advisory comments:	
Research	It is unclear who is being surveyed and how they will be selected or approached. Please forward this the HREA Panel to complete your file.
Research	Your application indicates that you may need to obtain one or more Letters of Support before you conduct your research. Letters of Support are required whenever you involve any organisation (other than UNSW) or any individual (other than an employee of UNSW) in your research,

	whereby: (a) you intend to interview, survey or include employees in a focus group; or (b) your research is wholly or partly funded by any organisation (other than UNSW) or individual (other than an employee of UNSW). Please contact your Supervisor for further direction (if applicable). A Letter of Support must conform to one of the formats indicated in **Form 6**. Please forward all Letters of Support to HREAP to complete your file.
Comments	Please provide HREAP with further information about the how and where your data is going to be stored (i.e., type of storage and precise storage address).
Comments	We do not recommend that you use your own personal address or telephone numbers on any documents issued to participants. If possible, you should supply UNSW contact details.
Automatic on all approval letters	Approval is granted to the applicant for a twelve month period from the date of this letter. Any approval to conduct research given to the applicant is done so on the condition that the applicant is at the date of approval: (a) a Student undertaking an approved course of study in the FBE; or (b) a member of Academic Staff in the FBE. If, at any time subsequent to the date of approval and prior to completion of the research project the applicant ceases to be either of (a) and (b) above, then any prior approval given to the applicant to conduct will be deemed to be revoked forthwith. The applicant must inform the FBE HREA Panel immediately upon any change, or possible change, to the applicant's status that may affect any prior approval given by the Panel to the applicant to conduct research.

Evaluation Authority:

Michael Brand (Convener)
FBE HREA Panel

Approving Authority:



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Miss Laura Goh
C/o- The Faculty of the Built Environment
The University of New South Wales
SYDNEY NSW 2052

Dear Miss Goh,

Re: Undergraduate Thesis - Letter of support

Thank you for taking an interest in the Sydney Harbour Federation Trust as part of your undergraduate thesis – *Commonwealth exemption from State laws: help or hindrance in the planning of Sydney?*

I understand that you wish to interview staff members of the Trust as part of your project to gain an understanding of certain operational aspects of the organisation. I also understand that you wish to use documents produced by the Trust, such as Management Plans, that are publicly available on the Trust's website.

The Sydney Harbour Federation Trust is happy to be involved in your research and will support you for the duration of your thesis project.

If you have any questions please contact me on 8969 2100.

Yours sincerely,

Geoff Bailey
Executive Director

27 / 10 / 2009