

AMENDED POINTS OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Administrative law
Registry	Law Courts building, Queens Square, Sydney
Case number	30041 of 2009

TITLE OF PROCEEDINGS

Applicants	Lyall Munro and Wayne Nean
Respondent	Minister for Lands

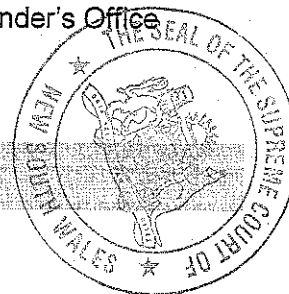
FILING DETAILS

Filed By	Environmental Defenders Office
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THE APPLICANT CLAIMS THAT:

The Parties

- 1 The Applicants are both respected Elders of the Aboriginal community in Moree. They are also individual members of the Moree Murri Taskforce ("the Taskforce"), which was established in May 2008 from Traditional Owners and Aboriginal community representatives. Lyall Munro has been involved in Aboriginal issues in Moree in a number of different capacities over the past 50 years. Wayne Nean has been involved in Aboriginal issues in Moree for the past 35 years.
- 2 The Taskforce was formed for the purpose of co-ordinating the response of the Aboriginal community in Moree to the proposal to develop a commercial retail store on Taylor Oval.
- 3 The Applicants are bringing these proceedings in the public interest as representatives of a proportion of the Aboriginal community in Moree who are concerned about the future of Taylor Oval. They are also bringing these proceedings in their capacity as Elders of the Gomeroi nation. The Gomeroi nation are the Traditional Owners of the greater Moree area, encompassing an area of North Western NSW from the area between Tamworth and Goondiwindi, and west to Narrabri, Walgett, Bogabilla and Lightning Ridge, in northern New South



Wales to Inverell. In the south-west, their country extends to Coonabarabran and the eastern foothills of the Warrumbungle Ranges and down to Muswellbrook.

4 As Elders, both Applicants are of the view that it is their duty to protect and conserve the cultural heritage of the Gomeroi nation, and they have a personal responsibility to do all they can do to protect that heritage.

5 The Applicants believe that Taylor Oval is a burial site and of significance to the Gomeroi nation and other Aboriginal people in the area.

6 In August 1903, while excavations were occurring around the cricket ground now known at Taylor Oval, two bodies covered with possum rug and bark were exhumed, described as a "blackfellow and his gin" who were buried there 40 years before.

7 On or about June 2007, Taylor Oval was listed on the Department of Environment and Climate Change's Aboriginal Heritage Information System as an Aboriginal burial site (AHIMS #10-3-0067).

8 The Applicants as representatives of the Aboriginal community of Moree also regard Taylor Oval as a significant place for reconciliation in Moree and for the sporting history of Moree, as well as of historical significance.

9 The Applicants as members of the Taskforce and custodians of the cultural heritage of the Gomeroi nation have been involved in discussions and submissions about the future of Taylor Oval since 2005.

10 The Applicants for the reasons set out in paragraphs 1-9 are persons aggrieved by the decision by the Respondent at issue in these proceedings. The decision will impact on the ability of the area to be conserved and protected in the future.

11 The Respondent is the Minister for Lands ("the Minister") who is the relevant authority under the *Crown Lands Act 1989*.

The Land

12 Lot 587 in DP 822970 ("Taylor Oval") is approximately 2.429 hectares and is in the Moree Council Local Government area. The State of New South Wales is the registered proprietor and the land is registered under the *Real Property Act 1900*.

13 The registered title for Taylor Oval shows that it is currently dedicated for public recreation pursuant to s 25 of the *Crown Lands Consolidation Act 1913*. It has been gazetted for public recreation since 1886.

Particulars

Title Search Folio 587/822970 showing dedicated for public recreation (dated 21/1/09).

Gazette of 23 November 1886 dedicated as reserve for public recreation.

Gazette of 7 December 1892 revoked dedicated as reserve for public recreation, under s 105 of *Crown Lands Act 1884* and part was rededicated as Cricket Ground, and part as public recreation.

Gazette of 24 April 1931 revoked dedication for cricket ground under s 25 of *Crown Lands Consolidation Act 1913* and rededicated for purpose of public recreation.

14 Moree Council are currently the manager of the Taylor Oval Reserve Trust under the *Public Trusts Act 1897*. The Council were appointed trustee in 1931.

15 Taylor Oval is land under the control of the Council in accordance with s 92 of the *Crown Lands Act 1989*.

16 Lot 701 in DP 1029428 ("Lot 701") adjoins the Taylor Oval site and consists of around 1.6722 hectares and is also in the Moree Council Area. The State of New South Wales is the registered proprietor and the land is registered under the *Real Property Act 1900*.

17 The registered title for Lot 701 shows that it is also currently dedicated for public recreation pursuant to s 25 of the *Crown Lands Consolidation Act 1913*.

Particulars

Title Search Folio 587/822970 showing dedicated for public recreation (dated 21/1/09).

18 Taylor Oval and Lot 701 (together "the Subject Land") comprise a facility for public recreation.

19 The Subject Land as to the whole or part was dedicated as D560016 and D560017 being reserves for public recreation of which the Moree Council is trustee.

20 The present use of the Subject Land is consistent with the dedicated purpose of public recreation.

21 The Subject Land is located in the main centre of Moree and is set back behind existing shops from the main street in Moree, the Newell Highway. The entrance to Taylor Oval is on Albert Street and to the South of the Oval are tennis Courts used by the Moree Tennis Club and beyond is Lloyd Oval and the Mehi River.

- 22 An existing Woolworths supermarket and car park is also adjacent to Taylor Oval to the South. Moree Primary School is to the west of Taylor Oval on Albert Street. The local Fire Brigade is also east of the Oval on Albert Street.
- 23 Taylor Oval is walking distance to Moree Secondary College which is located on the opposite side of the Newell Highway.
- 24 Other major sporting facilities in Moree are located away from the town centre.

Statutory framework under the Crown Lands Act 1989

- 25 The Minister for Lands has power to deal with Crown lands under the *Crown Lands Act 1989* ("CL Act").
- 26 Under s 6 of the CL Act, Crown land may not be sold, reserved or otherwise dealt with unless the dedication or dealing is authorised by the CL Act.
- 27 The CL Act contains detailed objects at section 10 to ensure that Crown land is managed for the benefit of the people of NSW. Those include:
- a) a proper assessment of Crown land,
 - (b) the management of Crown land having regard to the principles of Crown land management contained in this Act,
 - (c) the proper development and conservation of Crown land having regard to those principles,
 - (d) the regulation of the conditions under which Crown land is permitted to be occupied, used, sold, leased, licensed or otherwise dealt with,
 - (e) the reservation or dedication of Crown land for public purposes and the management and use of the reserved or dedicated land, and
 - (f) the collection, recording and dissemination of information in relation to Crown land.
- 28 The assessment of Crown land is one of the key objectives of the CL Act.
- 29 Under section 11 of the CL Act, the principles of management of Crown land are set out as follows:
- (a) that environmental protection principles be observed in relation to the management and administration of Crown land,
 - (b) that the natural resources of Crown land (including water, soil, flora, fauna and scenic quality) be conserved wherever possible,
 - (c) that public use and enjoyment of appropriate Crown land be encouraged,
 - (d) that, where appropriate, multiple use of Crown land be encouraged,
 - (e) that, where appropriate, Crown land should be used and managed in such a way that both the land and its resources are sustained in perpetuity, and
 - (f) that Crown land be occupied, used, sold, leased, licensed or otherwise dealt with in the best interests of the State consistent with the above principles.
- 30 The responsibility of the Minister under s 12 is to achieve the objects of the CL Act.

- 31 Under s 30 of the CL Act, the Minister is required to carry out a programme of land assessment, which shall consist of an inventory, an assessment of the capabilities of the land, the identification of suitable uses for the land, and where practicable of the preferred use or uses.
- 32 Under s 32 of the CL Act the identification of uses requires that regard shall be had to the particulars of the land contained in the inventory, the assessment of the land's capabilities, the principles of Crown land management and any current policies relating to the land approved by the Minister, and views of any government department which has expressed an interest in the land.
- 33 The Minister may from time to time cause a preferred use to be reviewed and either confirmed or varied having regard to the changed particulars of the inventory, or any changes in the capabilities or preferred uses of the land (s 33(2)). The CL Act contemplates at s 33(2) that the Crown land assessment forms a central role in the management of Crown land.
- 34 The Minister is in the premises obliged to act in accordance with the recommendations of the Crown land assessment or at the least to take into account and give significant weight to the Crown land assessment, when making decisions affecting the use and management of Crown land.
- 35 Section 84 of the CL Act deals with revocation of dedications. Section 12 makes it clear that the Minister in making all decisions under the CL Act must act in accordance with the objects of the CL Act which include principles of Crown land management set out at paragraph 29.
- 36 The Crown land assessment and preferred uses under that assessment are therefore mandatory relevant considerations to the exercise of the Minister's powers under s 84 of the CL Act.
- 36A In the premises it is an implied statutory precondition to the exercise of powers under s.84 of the CL Act that the Minister form an intention to revoke the dedication of land before undertaking the procedure for revocation set out therein.

The Course of Events

- 37 On 4 June 2004, the Moree Council advertised Expressions of Interest to attract a major Discount Department Store to Moree.
- 38 Fabcot Pty Ltd, a subsidiary of Woolworths Ltd ("Woolworths"), was the only applicant and proposed a Big W store for Moree.

- 39 On or around 7 February 2005, the Subject Land was identified by Moree Council and Woolworths as the most appropriate site for the Big W store.
- 40 On 25 November 2005 the Minister for Lands advertised the exhibition of a draft assessment of crown land at Moree under the *Crown Lands Act 1989*.
- 41 The Subject Land was investigated by the Department of Lands to prepare a Crown Land Assessment Report ("the Assessment Report" and a Report on Preferred Uses – Assessment of Crown Land at Moree (Taylor Oval) ("the Preferred Uses Report").
- 42 The Assessment Report and the Preferred Uses Report were published by the Department of Lands in April 2006. The Executive summary of the assessment makes clear that the report is related to "potential sale of Crown Land that currently provides recreation and sporting facilities". It was therefore linked to the Minister's powers under s 34 of the CL Act and designed to inform the Minister about the matters that he was to have regard under the CL Act.
- 43 The Assessment Report examined Crown land at Taylor Oval and the surrounding blocks including Lloyd Oval and the Moree Tennis Club of which the Subject Land comprises part with the objective of identifying a range of suitable uses of the sites prior to any decision being made on future use of the land. It identified that Taylor Oval had high capability for community or public purpose (non-urban and urban land use). It stated that the long term retention and maintenance of the Subject Land as a major sporting facility and open park land setting should be seen as a priority. The report stated that it is unlikely that Taylor Oval will be suitable for other purposes other than its current land use in the short to medium term. The report noted that the Subject Land is best suited to non urban recreation and community or public purposes in particular park land and public open space.
- 44 The Preferred Uses Report contained recommendations for the preferred uses of the Subject Land as Community or public purposes and recreation. That assessment considered not just suitable uses but preferred uses for the relevant sites. The Preferred Uses Report recommended that the Subject Land be retained as Crown land reserved and dedicated for public purposes.

Development application

- 45 On 11th January 2007, Woolworths sought land owners consent from the Minister for Lands to lodging a development application on the Subject Land for the Big W store.

- 46 On or about 28 February 2007 the Minister gave consent to Woolworths Ltd to lodge a development application with Moree Plains Shire Council in respect of the Subject Land.
- 47 The consent given on 28 February 2007 did not purport to approve the development of the land, or operate as an agreement to grant any interest in it.
- 48 On 21 March 2007, the Director General of the Department of Lands confirmed that the Minister for Lands consented to Woolworths lodging a development application for Big W on the Subject Land on the condition that owner's approval was not intended to operate as the approval of the development.
- 49 On 21 June 2007, Woolworths lodged a development application with the Moree Council for a Big W store and shopping centre development on the Subject Land (part of lot 587 DP822970 and part lot 701 DP 10298 and lot 1 DP1013137) ("Big W Proposal").
- 50 At the time that the Big W Proposal was lodged, the Subject Land was subject to the dedication for public recreation.

Particulars

Title search 587/822970, attached to development application (dated 20/6/07).

Dedication of Subject Land under Crown Lands Act 1989

- 51 On 24th October 2007, staff of the Department of Lands prepared a submission on the proposed revocation of the dedication of the Subject Land ("the Submission"). The Submission concluded "The dedications do not reflect the current uses and occupations, nor do they enable future management in accordance with the recommendations of the land assessment with regard to either continuing use, or potential development". It recommended that the dedication be revoked on this basis.
- 52 The Submission was false in material particulars in that:
- a. The Assessment Report did not conclude that the dedications did not reflect the current uses,
 - b. The Assessment Report did not conclude that the dedications prevented future management of the land in accordance with the suitable uses identified;
 - c. The Preferred Uses report did not recommend that the dedications be removed;

d. The Preferred Uses report did not conclude that there was incompatibility between the dedications and the future uses it identified.

- 53 On 25th October 2007, the Regional Manager of the Department of Lands approved the submission at paragraph 51.
- 54 On 2 November 2007, the Minister for Lands gazetted a notification of proposed revocation of the dedication of Crown land for public purpose for the Subject Land or part thereof being D560016 and D560017 in the NSW Government Gazette purportedly under s 84 of the *Crown Lands Act 1984* ("the Revocation Gazettal").
- 54A The Revocation Gazettal stated that *inter alia* that the Minister intended, following the laying of a copy of the notification before both Houses of Parliament, to revoke the dedication of the Subject Land.
- 54B The representation contained in the Revocation Gazette was false in that the Minister for Lands had not, at the time of publication of the Revocation Gazettal, formed the intention to revoke the dedication of the Subject Land for the public purpose of revocation.
- 55 On 5 November 2007, the Minister for Land was briefed by the Department of Lands on the revocation. The briefing to the Minister indicated that the Subject Land had been the subject of an Assessment Report and the Preferred Uses Report adopted on 13 April 2006. It also noted that the investigations determined that the dedications do not reflect the current uses and occupations nor do they enable future management in accordance with the recommendations. The briefing therefore recommended revocation of the dedication.
- 56 The briefing note contained the same representation as appeared in the Submission with respect to the uses of the Subject Land and the Assessment and Preferred Uses Report, and was also false in material particulars as is pleaded at paragraph 52 hereof.
- 57 The Minister acted in reliance on the briefing note and the recommendation contained in the Submission to cause the notification of intended revocation to be tabled in the Legislative Assembly and the Legislative Council.
- 57A In the premises the Minister had not formed the intention, or alternatively had no proper basis on which to form the intention, to revoke the dedication of the Subject Land or to publish the Revocation Gazettal or to lay the Revocation Gazettal before both Houses of Parliament.

- 58 On 27th November 2007, the notification of revocation was tabled in the Legislative Assembly and Legislative Council.
- 59 The Revocation Gazetteal purported to set out the Minister's intention that current and future proposals for the use and management of the Subject Lands will be considered in accordance with the preferred use and recommendations as outlined in the Assessment Report and the Preferred Uses Report.

Particulars

Schedule 3 Gazette Notice Government Gazette No 160 p8226 2 November 2007.

Other consequent decisions:

- 60 On 5th November 2008, Moree Council resolved to support the draft LEP as exhibited and forward the draft LEP to the Department of Planning. The draft LEP purported to change the zoning of the subject land from zone 6(a) Public Open Space under the *Moree Plains Local Environmental Plan* to zone 3 business. The rezoning is known as *Moree Plains Local Environmental Plan 1995 (Amendment No.17)*.
- 61 On 2nd January 2009, the Minister decided to make the draft LEP.
- 62 Both of these decisions appear to rely on the purported revocation of the dedication, despite the fact that at the time these decisions were made, the subject land was still gazetted for a public purpose on the land titles register.
- 63 Both of these decisions were inconsistent with the Preferred Uses report.

Ground 1 – Jurisdictional error/Failure to consider relevant consideration

- 64 As outlined at paragraph 34-36, the Minister can only lawfully exercise his power to revoke a dedication if certain circumstances are satisfied.
- 65 Before forming the intention to ~~revokeing~~ a dedication, the Minister must be satisfied the proposed revocation is consistent with the principles of Crown land management.
- 66 The Minister also needs to consider the Assessment Report before forming the intention to publish notification of intention to revoke a dedication making any decision pursuant to s 84 or to table the notice of proposed revocation in both Houses of Parliament.
- 67 While the briefing to the Minister set out at paragraph 55 purported to consider the Assessment Report and the Preferred Uses Report, it clearly contained statements that were inconsistent with the findings of those reports as set out at paragraph 42-

44. The briefing therefore misled the Minister such that the Minister could not form any proper intention to revoke the dedication of the Subject Land for public recreation.

67A The Minister did not, at the time of publication of the Revocation Gazettal, or at the time the Revocation Gazettal was tabled in Parliament, have any intention, or any factual basis on which properly to form the intention, to revoke the dedication of the Subject Land for public recreation.

67B It was an essential precondition to a valid notification of intention to revoke the dedication that the Minister had formed the intention to revoke the dedication of the Subject Land for public recreation, or alternatively had a proper basis on which to form that intention.

67C In the premises, the notification of the intention of the revocation of the Gazettal was void and of no force and effect.

67D The conclusions of the Assessment Report and the Preferred Uses Report were considerations relevant to the Minister's formation of the intention to revoke the dedication.

67E By reason of the misrepresentations to the Minister concerning the use of the Subject Land, or alternatively the conclusions of the Preferred Uses Report, or both of them, the Minister failed to take those conclusions into account in forming any intention to revoke the dedication of the Subject Land.

68 The decision of the Minister to table the Revocation Gazettal before both houses of Parliament purportedly under s 84 of the CL Act was not consistent with either the principles of Crown land management or the Assessment Report. The Minister therefore failed to take into account relevant considerations required under s 84 of CL Act.

69 The decision is therefore void and of no effect such that the Subject Land remains dedicated for the purposes of public recreation.

69A In the premises, the notice of the proposed revocation did not comply with s.84(2) Crown Lands Act 1989 such that the Minister may not validly revoke the dedication of the Subject Land for public recreation.

Ground 2- Fundamental error of Fact

70 The decision of the Minister to revoke the dedication was based on the proposition that the dedications do not reflect the current uses and occupations of the Subject

Land, which proposition was false. This assumption was made without regard to the findings of the Assessment Report and the Preferred Uses Report as set out in paragraph 42-44.

71 The decision of the Minister to revoke the dedication was based on the proposition that the dedications did not enable future management in accordance with the recommendation of the Assessment report with regard to continuing use or future development, which proposition was false.

72 The error of fact related to a fundamental fact necessary to the decision under s 84 of the CL Act, as the Assessment Report is a key process in guiding the actions of the Minister in dealing with Crown land.

73 In the premises, ~~the any decision to revocation of proceed to revoke~~ the dedication based on the notice purportedly given under s.84(2) Crown Lands Act 1989 is or will be was void and of no effect such that the Subject Land remains dedicated for the purposes of public recreation.

Ground 3 – Irrelevant consideration/No evidence

74 As outlined above the decision to revoke the dedication was based on the proposition that the dedications do not reflect the current uses and occupations of the Subject Land, which proposition was false.

75 The proposition that the dedication do not reflect the current uses and occupations of the Subject Land is not contained in the Assessment Report or Preferred Uses Report. It is therefore an irrelevant consideration.

76 In the alternative, there was no evidence in the Assessment Report or Preferred Uses Report to support the proposition enable the Minister to conclude that the dedication does not reflect the current uses and occupations of the Subject Land to justify the notice of proposed revocation purportedly given under s.84(2) Crown Lands Act 1989 or to justify the tabling of the Revocation Gazettal before Parliament.

77 In the premises, ~~the any decision to revocation of proceed to revoke~~ the dedication based on the notice purportedly given under s.84(2) Crown Lands Act 1989 is or will be was void and of no effect such that the Subject Land remains dedicated for the purposes of public recreation.

SIGNATURE

Signature of legal representative

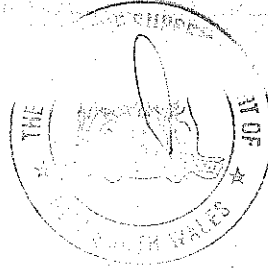
Capacity

Date of signature



Solicitor

14/8/09



14 AUG 2009

NOTICE OF AMENDMENT: UCPR 19.5

- 1 This document is amended pursuant to leave granted by the court on 6th August 2009.
- 2 The amendments are indicated as follows:
 - (a) Omitted information is struck through.
 - (b) New information is in underlined text.