

Submission  
No 261

## INQUIRY INTO CROWN LAND IN NEW SOUTH WALES

**Organisation:** Mr John Owens

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## **The General Purpose Standing Committee No. 6**

### **Attention**

The Hon Mr Paul Green (CDP, LC Member): Chair  
The Hon. Lou Amato (Lib, LC Member): Deputy Chair

Members:

The Hon. Catherine Cusack (Lib, LC Member)  
The Hon. Scott Farlow (Lib, LC Member)  
The Hon. Daniel Mookhey (ALP, LC Member)  
The Hon. David Shoebridge (The Greens, LC Member)  
The Hon. Ernest Wong (ALP, LC Member)

Dear Honourable Members of the Upper House

### **Crown Lands Inquiry**

The writer is a retired lawyer and has been assisting various community groups for some years now in documenting and exposing serious anomalies in the administration of Crown land across the eastern seaboard of New South Wales. After realizing these matters were not anomalies at all but rather examples of an entrenched pattern of mismanagement, he was the founding convenor of the organisation Crown Land Our Land Inc. This organisation was established to disseminate information on the importance of properly valuing and protecting our Crown estate for future generations.

This submission is a personal submission on the writer's own behalf and is in addition to the submission to be made by Ms Emma Brooks Maher on behalf of Crown Land Our Land. Given the expansive material held by Ms Brooks Maher (as Secretary for Crown Land Our Land) the writer urges the Committee to allow Ms Brooks Maher to address the committee.

### **The need to appreciate the cause of the current malaise regarding Crown land**

There is one important observation to make at the outset: the current malaise in the administration and management of our Crown estate giving rise to this inquiry into Crown land is in no way attributable to defects in or outdated aspects of current legislation.

In recent years, there have been suggestions to the contrary with the Government intimating a new legislative model was needed to overcome current difficulties and provide more benefit to the community.

With respect, this is intellectually dishonest. Save for the unwise recent additions to the Crown Lands Act ("Act") of section 34A and s34AA (and their associated provisions), the current Act is entirely appropriate to cater for the community's needs (although some improvements are mentioned toward the end of this letter).

The objects stated in section 10 and the Principles of Crown Land Management stated in section 11 of the Act are as relevant and appropriate today as they were back in 1989 when this Act was introduced with full support of the Coalition and Labor (after extensive review).

At the root of this current malaise is the simple refusal of successive Governments (Coalition and Labor) and the responsible government agency ("**Crown Lands**") to enforce the rule of law.

The case studies in the possession of Ms Brooks Maher show a long succession of relevant Ministers ("**Responsible Minister**") have failed in their duty under section 12 of the Act "for achieving the objects of this [Crown Lands] Act". Central to those objects is to manage the Crown estate "for the benefit of the people of New South Wales".

These failures and the associated failure to demand compliance with the Principles of Crown Land

Management, have allowed vested interests to take control of countless parcels of precious Crown land in defiance of the Act. That these vested interests have been allowed to do this without having to pay any rent in many cases or next to nothing in others, only adds to the miasma that now surrounds the administration of Crown land in this State.

The expression “people of New South Wales” when it appears in section 10 means what it says; it means the general public. It does not mean those lucky few members of the general public who have special relationships with the controlling minds of the Government of the day, Crown Lands or the relevant local council. And, it surely does not mean unnatural persons like incorporated entities.

As our society faces a crisis in mental and physical health brought on by our obsession with gadgets and by our obsession with viewing activities on a screen instead of actually participating in activities in real life, it is regrettable and irresponsible for any government (Coalition or Labor) to have allowed alienation of our open spaces to vested interests. But to have allowed this privatisation to occur in defiance of the rule of law - so clearly stated by Crown Lands itself in its faultless Trustee Handbook versions of 2007, 2009 and 2014 - takes the matter into a far more serious realm. It goes beyond Crown land. It goes to the heart of the administration of justice in New South Wales. For years the writer and/or Crown Land Our Land have referred the relevant details to the incumbent Attorney General asking action to be taken to apply the rule of law. No action has ever been taken.

The rule of law should not be optional for the well connected in our society. And one cannot overstate the corrosive effect on society when those entrusted to protect the public interest and apply the law, choose to look the other way, especially when concerned with property held on trust for the general good. This is what Lord Nicholls said in *Royal Brunei Airlines v Tan*:

*Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.*

### **The need for this inquiry to proceed and report before passage of any new legislation**

The above points show how timely and important is this Upper House Inquiry into Crown land.

However, the writer urges the Committee to not allow its deliberations and reporting to be hijacked by the Government’s imminent release of a draft bill to replace the current Act. The writer urges the Committee members to do all they can to delay passage of any bill unless and until they have completed and reported on their work. Surely information will be gleaned from this Inquiry that will be vital in making an informed decision on any proposed legislation.

Only if members of Parliament know how we arrived at the current situation will they be able to make an informed decision on how to avoid a repeat of the current problems. Indeed, one glaring deficiency of the current situation that will become apparent to the Committee is that the Government does not yet have a reliable asset register of the Crown estate. How can Parliament make a responsible decision on the future of Crown land if it does not have this information at hand ?

The Coalition considers (and prides) itself on being business smart. What business would make decisions on managing or selling its assets without first compiling an inventory of those assets?

### **Crown Lands’ damning admission it needs training in “fraud and corruption prevention”**

On 22 June 2015, just days before a much publicised Community Summit at Parliament House on systemic mismanagement of Crown land across New South Wales, Mark Paterson (then Secretary of the Coalition Government’s Trade & Investment Department) released a redacted copy of the report (“**Redlich Report**”) by lawyers Holding Redlich into the mismanagement of Crown land used by and operated as the Paddington Bowling Club (including parts of Trumper Park). Mr Paterson made the following statements in his media release:

*The Department is undertaking a number of actions in response to the systemic issues highlighted in the report including staff training provided by ICAC in fraud and corruption prevention and the progressive delivery of training in robust decision making.*

*A new agency governance structure is also being rolled out which includes revised policies, processes and procedures for dealing in land and exercising delegated legislative powers.*

On any reading, the first statement can be accepted as an admission that so systemic and serious was the mismanagement of the Paddington Crown land that the Government was forced to conscript ICAC to administer anti-fraud training to the staff of Crown Lands.

It is beyond the scope of this submission to delve into the events leading up to Mr Paterson's admission. Suffice it to say neither the admission, nor the actual commissioning of the Redlich Report, came about as a result of some responsible and timely proactive action taken by the Responsible Minister, Mr Paterson or Crown Lands.

In fact, the NSW Government was forced to commission the Redlich Report after sustained and intense pressure from various community groups.

It is also regrettable that Mr Paterson did not elaborate on the precise aspects of the saga that compelled the anti-fraud training. It is respectfully submitted that the Inquiry should require access to a non-redacted version of the Redlich Report to assist its deliberations.

As to Mr Paterson's second statement as to the introduction of a "new agency government structure", Talus, King Edward Park and Stuart Park (details of the latter two will be provided to the Committee by others) alone prove that neither the Minister nor Crown Lands have in truth changed their ways. They are still committed to disregarding the rule of law (as for instance set out in *Rutledge*) and as such it is disingenuous to talk of a new "agency government structure" as solving past issues. It is elementary that the impartial and unconditional application of the rule of law is the cornerstone of every governance structure.

Even if there had been a commitment to applying the rule of law by Crown Lands, it would be disingenuous to accept such a commitment from an agency so compromised by years of past neglect and mismanagement.

### **The systemic mismanagement identified by Holding Redlich is not restricted to Paddington**

A close reading of the Redlich Report of itself shows the mismanagement issues identified therein could not possibly be isolated to the Paddington site. They involved repeat offences and displayed a culture of disregard for the Principles of Crown Land Management and general principles of probity and good governance. History tells us that it is entirely improbable to suggest such serious misconduct could only arise in respect of one particular site or transaction. Indeed, if that were the case, it could hardly be described by Mr Paterson as "systemic".

In any event, only two days after Mr Paterson's belated release of the Redlich Report in June 2015, numerous members of the community including the writer and various organised groups from across New South Wales - all committed to upholding the rule of law and the Principles of Crown Land management - attended a summit to listen to numerous other examples of mismanagement that did indeed prove the Paddington issues were systemic and widespread.

Those additional examples included Talus, King Edward Park, Yasmar and Stuart Park in Wollongong. Since that summit, groups like Crown Land Our Land have received details of similar accounts of mismanagement from Tweed Heads to the South Coast.

A further community summit was held this year on 22 June with new details of alarming mismanagement at Gosford and Tweed Heads.

### **Talus: a case study of privatisation for a peppercorn**

It is bad enough for the Government and local councils to privatise our Crown reserves contrary to the rule of law. But when we discover this privatisation is happening at peppercorn prices, we enter a far more serious realm and one that the Committee will need to consider very carefully.

Talus is a complicated matter involving the alienation (by lease) of prime recreational space just 400 metres north of St Leonards train station on Sydney's North Shore. Aspects of the matter are now in the Supreme Court, however in a judgment delivered on 3 February 2016 His Honour Mr Justice Brereton made it clear he would not be commenting on the commercial or political aspects of the case.

That being the case it is appropriate to record the essential commercial features of the arrangements at Talus. Talus is just one example of a typical pattern of improvident transactions exposed by the likes of Friends of King Edward Park, Protect Our Parks and Crown Land Our Land:

- An asset rich community tennis association is for some reason given control of a vast Crown

reserve at a peppercorn rent, about an average of \$7000 per annum or 40 cents per m2 (about \$280,000 in total since 1978).

- It faces the prospect of a fall in income with a downturn in tennis participation rates and so - but without authorisation from the Minister or the relevant local council - purports to grant “management rights” to a well-known private tennis operation (Love & Deuce).
- Love & Deuce pays the tennis club (NSTA) a “management fee” of around \$100,000 per year but it pays nothing to the local council or any other public authority for use of Talus. This arrangement sees an immediate substantial annual profit to NSTA.
- It is now accepted - after submissions from the writer - that this “management” agreement was in truth a sublease or licence handing over Talus to Love & Deuce for its own business and was given in breach of the lease.
- Love & Deuce makes profits from Talus by controlling entry and using it for its lucrative multi-sport activities for children. It makes substantial profits because it has many “fee payers” on each court at the one time (not just 4 tennis players).
- For some reason, successive Ministers for Crown Lands (starting with former Deputy Premier Stoner) have refused to bring these arrangements to an end and return Talus to the general public.
- When pressed, these Ministers have supported the introduction of new backdated arrangements to protect the private businesses. The public was denied access to these arrangements. To this day they have not been shown to the public and Willoughby City Council and the Government have spent hundreds of thousands of dollars trying to protect these private businesses. At the hearing on 23 November 2015, not one argument was put by either the Minister or Willoughby City Council that Talus should be returned to the public.

The facts of Talus become all the more alarming once it is realised that:

- NSTA’s net assets - including a multimillion dollar tennis centre only 800 metres from Talus - exceed \$6M. This includes retained profits exceeding \$1M against a steadily falling membership.
- The owners of Love & Deuce also owned their own multimillion dollar tennis centre in Naremburn which - once they were able to take over Talus - was converted to a multimillion dollar residential subdivision for nine houses.
- The tennis club was given a 30% discount on its rent in return for allowing a charity (Humpty Dumpty) - closely connected to the NSW Government - to run its business out of Talus free of charge. And yet, the individuals who negotiated this discount deal allowed the charity’s management committee of which they were members - to pay “rent” of some \$30,000 per year to the private company of the charity’s chairman. That private company is Love & Deuce; it has received over \$400,000 in rent from Humpty Dumpty since around 1998 for only 15 m2 of Talus.
- So, Humpty Dumpty has been paying its chairman’s private company a rent of over \$1,000 per m2 for space that it is entitled to occupy for free (by reason of the deal struck with Council).
- Since 1978, Willoughby City Council has received the total sum of about \$280,000 for Talus (which is 15,300 m2 - as noted above, on average about 40 cents per m2).
- It is common knowledge that certain of the current and past councillors and the current and previous mayors of Willoughby City Council were/are closely connected to the controlling minds of the businesses at Talus.
- An aboriginal land claim over Talus was lodged on 28 October 2013. The Responsible Minister has declined to process this claim. The Minister’s failure to alert the community to the existence of this claim has seen hundreds of thousands of dollars in legal costs wasted by concerned citizens and other parties. This is because this land claim will trump all other claims. The Responsible Minister did not, presumably, think he was obliged to pass on such information pursuant to his obligations as a “model litigant”.

As noted above, Talus is not unique.

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**The future: how to make the Crown estate sustainable**

Since at least 1959, the High Court has recognised that profits may be generated from a particular parcel of Crown land provided those profits are reinvested in the trust. The Courts have always been alive to the need of the Government to be able to generate profits to maintain and improve the Crown estate.

In recent times - and especially in response to the exposure of controversies such as Talus - it has become fashionable for various elements (including some in the NSW Government) to argue the current law precludes sensible application of economic principles and that privatisation (wholly or partly) is required to allow the Crown estate to be properly maintained and improved.

This is intellectually dishonest for at least two reasons. First, what Talus and the other cases show is the current Government, Crown Lands and local councils have been happy to effectively give away Crown assets for free or at peppercorn prices.

Second, the various local councils that manage these Crown reserves conduct businesses themselves that are far more complex and risky than the simple businesses that have made millions from Crown reserves such as Talus. Willoughby City Council for instance conducts a business at its own Willoughby Leisure Centre that is to all intents and purposes identical to the private business that is exploiting Talus. Why then does not this Council take over Talus to ensure the public receives the income from the public's property?

A proper appreciation of the facts and law would show that the current statutory regime does indeed allow the generation of income to sustain and improve the Crown estate. What we have seen in recent years under successive Labor and Coalition State Governments is a raft of improvident transactions (invariably in secret) that have sapped the estate of its value and full potential and brought (deservedly) Crown Lands and local councils into disrepute. On any measure, that is indefensible and it again reinforces the need for the current regime managers to be relieved of all responsibility for managing our Crown estate moving forward.

**The future: the need for a new administrative body**

In the writer's submission, we need a new dedicated body to take over the administration and management of our Crown estate. It is imperative this body is properly resourced and its staff trained in the importance of public trusts for future generations and the unconditional observance of the rule of law. An individual with any past association with Crown Lands should be disqualified from being a part of the new body.

Alternatively it might be possible to bolster the current National Parks & Wildlife Service (NSW) with additional resources and hand over control of Crown land to this body.

The new body should be required to set achievable targets for the generation of income to maintain and improve the estate. Income should be earned where possible and the income across the portfolio allocated in a sensible way.

**The future: amend the law to allow all reserve trust moneys to be pooled**

The Act should be amended to allow all moneys received in respect of the use of Crown lands to be pooled and held in trust to maintain and improve the Crown estate generally. This would allow cross-subsidisation. As the law stands, this would not be allowed; the income received in respect of a particular parcel is available only to be spent on that parcel.

It is inevitable that cross-subsidisation will be required; not all blocks of Crown land are equally capable of being "exploited" to generate sufficient income.

Apart from their proven inability to manage Crown reserves to date, this is another reason why local councils should be denied any involvement in the future management of Crown land: even with the recent and proposed council amalgamations, their sweep of sites would not be large enough to include sufficient Crown land parcels to allow effective cross subsidisation.

**The future: the need to distinguish between different types/locations of Crown land**

The current classifications of Crown land should be revisited and new rules should be drawn to control the management of Crown land depending on whether that land is located in remote areas, rural areas, urban areas, high density cities and areas close to or adjoining (or comprising) water.

Once this more sophisticated classification is carried out (in conjunction with the stocktake mentioned above), rules may be drawn that will allow the general public's interest to be properly balanced against, for instance:

- the interests of farmers in rural or outback areas.
- the interests of anglers, hunters and the like who surely need - and should be entitled to - continued access to rivers and streams, paper roads and other more remote areas of Crown land.
- the interests of townships and local communities in rural and urban areas.
- the interests of city dwellers in high density locations.

Privatisation in remote and rural areas should be considered more readily than privatisation of more densely populated areas, subject always to maintenance of the rights of shooters and fishers and the like to enter and continue their pursuits. Public recreation in the outback and remote areas must never be threatened by privatisation.

Privatisation of open spaces in high density locations or growing areas must be resisted at all costs given the obvious health issues that attend the absence of appropriate and generous recreational facilities and interaction in community spaces.

Likewise, privatisation of Crown land comprised of beaches, waterways or land adjoining beaches or waterways must be resisted at all costs.

Open spaces - including those on the coast and along our waterways - must never become the preserve of the rich.

### **The future: recognise that elite competitive sport is not “public recreation”**

The writer and Crown Land Our Land have come across many instances of local councils and Crown Lands giving over Crown reserves to elite sporting clubs masquerading as community based organisations. Northbridge Oval on Sydney's north shore - a Crown reserve held on trust for “public recreation” - is now effectively closed to the public as a result of Willoughby City Council handing over control to Northbridge Football Club. The community's picturesque grassy field was lost - with not even a proper Development Application - to an elite synthetic grass sporting facility that is now virtually monopolised fifty two weeks per year by elite football groups.

The law is clear: elite sport is not “public recreation”. And *Rutledge* makes it clear that no one group sporting or otherwise may monopolise use of or control access to a reserve set aside for public recreation.

It is time our public recreation reserves were returned to the general community. No one group, elite or otherwise, should ever be allowed to take over community facilities. Facilities need to be shared.

### **The future: the need for a citizen's right to sue to protect Crown land**

Citizens and public interest groups like Crown Land Our Land face almost insurmountable obstacles in bringing legal proceedings to protect the rule of law and the Crown estate.

The Act should be amended to allow any person to bring proceedings to protect a trust constituted under the Act should the Attorney General refuse to bring proceedings to protect that trust. An accompanying provision should stipulate that the trust estate - not the plaintiff - should bear the costs of any such action unless the Court is satisfied the action was frivolous or vexatious.

### **The future: the need to truly respect Aboriginal land claims**

It is a matter of record that thousands of land claims under the 1983 Aboriginal Land Rights Act remain undetermined by the Responsible Minister. It is telling that the Government of the day has apparently declined to devote the resources required to clear this seemingly insurmountable backlog.

In various anonymous telephone discussions with Crown Lands, the writer was advised that to ameliorate the effects of this delay in processing time, Crown Lands has a policy of not allowing any dealings with a parcel of Crown land pending the determination of the claim. Talus demonstrates this policy is not being applied (at least not in all cases): as noted above, both the Responsible Minister and Willoughby City Council have been working secretly with the private businesses that control Talus on new arrangements in an effort to protect those businesses' rights to continue to control Talus and derive profits. Not only do such actions defy *Rutledge*, they defy the obvious spirit and intent of the Aboriginal Land Rights Act.

It must also be noted that in Talus, the Responsible Minister failed to alert the public to the making of the claim (filed on 28 October 2013) and allowed certain members of the public to proceed with expensive legal action to protect the Talus Trust all the while knowing this legal action was futile given that his determination of the Aboriginal Land - and any possible appeal thereof - will resolve the relevant legal issues.

It should be a matter of profound concern to the Upper House Committee that the Minister and Crown Lands can effectively undermine the value of a land claim by declining to process the claim and - as with Talus - proceed to issue interests to occupy and use the land in the interim. At the very least, all profits earned from Crown land after the lodgment of a land claim should be held in trust pending final determination of the claim.

The Act should be changed immediately to prohibit any dealings in a parcel of Crown land from the moment a claim is lodged under the Aboriginal Land Rights Act.

### **The future: the need to repeal s34A and 34AA of the Act**

Section 34A of the Act appears to allow the Responsible Minister to grant rights over any Crown reserve for "any other purpose the Minister thinks fit". It is clear this purpose can be at odds with the reserve's original public purpose.

The situation at Paddington typifies the problems that flow from granting any individual such extraordinary power. Section 34A should be repealed. If the Government requires a particular reserve for legitimate purposes, there are other ways in which it can proceed.

Section 34AA (and associated provisions) were introduced recently in response to the Court of Appeal's decision in *Goomallee*. These amendments were brought in based on the premise they were required to protect existing rights after the Court of Appeal changed the law. The premise was false and the alleged risks entirely overstated in a phoney crisis; the Court of Appeal's decision did not make any new law but merely restated long standing principles (including those propounded in *Rutledge*). The provisions purport, inter alia, to effectively defeat certain Aboriginal Land Claims lodged on or after 9 November 2012.

Section 34AA and its attendant transitional provisions should be repealed and any Aboriginal land claims prejudiced by these provisions should be reinstated.

### **Conclusion**

The writer trusts this submission is of some assistance to the Standing Committee. Obviously the mass of information in the writer's possession is beyond inclusion in this brief outline. If the Committee requires any additional information, it should not hesitate to contact the writer at its convenience.

Yours faithfully

JBOwens