

**1. Minister Blair's statutory obligation**

- The Minister for Lands & Water has a statutory duty to achieve the objects of the Crown Lands Act (s12(1)).
- The Act's overarching object is to "ensure Crown land is managed for the benefit of the people of New South Wales" (s10).

**2. History: Governor Darling's commission**

- As far back as Governor Darling's commission in 1825, the UK Tory Government appreciated the importance of community spaces.
- Lord Bathurst instructed Darling to appoint Commissioners for Lands to report on what lands should be reserved for various public purposes including "... *places fit to be set apart for the recreation ... and for promoting the health of the community* " (Historical Records of Australia, Series 1 Governors' Despatches To & From England Volume X11 June, 1825 - December, 1826 at 113, 116-117 Mitchell Library)
- Darling was specifically instructed by Lord Bathurst: "*We do strictly enjoin and require you that you do not, on any account or on any pretence whatsoever, grant, convey or demise to any person or persons any of the Lands, so specified as fit to be reserved as aforesaid, nor permit or suffer any such Lands to be occupied by any private person for any private purposes.*" (ibid, at p117 at about .6-.7)
- It is perverse that almost 200 years after Bathurst's wise instructions to Darling - at a time when our society battles an epidemic in mental illness and obesity produced by our addiction to gadgets and loss of "community" - we must meet tonight to discuss the alarming threat to our open spaces.
- Although Premier Baird has decommissioned the all powerful Trade & Investment Department, we still have its White Paper: a White Paper that unashamedly seeks to commoditise our Crown estate without any attempt to quantify the enormous long term cost to our society of denying future generations the parks we have all enjoyed.

- This threat comes from one thing: the refusal of Crown Lands to respect and apply the rule of law.
- We do not need new laws; we need the current law to be applied without fear or favour.
- The selective application of the rule of law is a form of corruption. It brings the law into disrepute.

3. **The rule of law: *Council of the Municipality of Randwick v Rutledge***

- Tonight's case studies demonstrate how far we have strayed from Lord Bathurst's wise instructions to Governor Darling.
- These case studies are the tip of the iceberg. We should note the admission on Monday by Mark Paterson CEO of Trade & Investment - on releasing the Paddington Trust Report - of systemic mismanagement in his department. It is helpful to have this timely and damning admission, although Mr Paterson and his department needs to immediately answer the obvious question: why - having received the report on 11 August 2014 - have they allowed ongoing defiance of the rule of law in cases such as Talus?
- Lord Bathurst's wisdom was set in stone in *Rutledge*. Justice Windeyer's seminal judgment examines Bathurst's instructions and holds that Crown land held on **trust for public recreation requires the land to remain open to the public generally as of right and not be a source of private profit. Public profits are allowed provided they are reinvested in the trust.** This is the rule of law.
- *Rutledge* has been applied without demur since 1959, and was most recently affirmed in *Goomallee* and *King Edward Park*. It is simple and it is commonsense. Who could object to it? It is the High Court's way of stopping privatisation by stealth.

- Do not be duped by those who argue *Rutledge* has no place in modern society: it is absurd to suggest only the private sector is able to manage our Crown reserves.
- It is not difficult to manage reserves: shown by the millions made by the businesses at Talus. Most local councils conduct businesses far more involved.

#### 4. Crown Lands happy for local councils to ignore the law

- The case studies show how Crown Lands has for years allowed local councils to ride roughshod over community rights and the rule of law, to enter into dodgy deals with no fear of being held to account.
- This precludes the Minister being able to discharge his duty to achieve the objects of the Crown Lands Act.
- 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.

Let me quote Lord Nicholls 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.*

- Once we accept the maladministration of Crown lands in NSW involves a conscious and deliberate decision by certain forces to deny the application of clear principles of law, we enter a far more serious realm.
- It goes beyond Crown Lands. It goes to the heart of the administration of justice in NSW.

#### 5. The common law criminal offence of misconduct in public office

- If relevant public officials persist in their defiance of *Rutledge*, perhaps it is time to consider a prosecution for the offence of misconduct in public office.

- The elements of this common law offence are:
  - 1. A public officer acting as such.
  - 2. Wilfully neglects to perform his duty and/or wilfully misconducts himself.
  - 3. To such a degree as to amount to an abuse of the public's trust in the office holder.
  - 4. Without reasonable excuse or justification. (see UK Court of Appeal (Criminal Division) Attorney General's Reference No.3 of 2003)

**Note also Lord Mansfield in *R v Bembridge* (1783) 3 Doug KB 32:**

*Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomsoever and in whatsoever way the officer is appointed..... secondly, where there is a breach of trust, fraud or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.*

## 6. The need for private suits to protect public trusts

- Given the apparent lack of political will of Attorney Generals to take action to protect public trusts (for instance in Talus), we need a new law to allow a private citizen to take such action if the Attorney General refuses to do so.