

NEW SOUTH WALES

APPEAL AGAINST CROWN LAND CLAIM REFUSAL*

NSW Aboriginal Land Council v Minister Administering the Crown Lands Act [2008] NSWLEC 13, NSW Land and Environment Court per Jagot J, 31 January 2008

Aboriginal Land Rights Act – Minister’s certificate challenged – Final and conclusive – Jurisdictional error

Background

The New South Wales Land and Environment Court considered an appeal against a decision to refuse a crown land claim on the basis that the land was not claimable crown land. The court held that certificates issued by the Minister stating the land was needed for residential purposes, amounted to a miscarriage by reason of jurisdictional error. The court also held that the Minister had not established the factual conditions necessary for the opinion upon which the decision was based, to be formed.

Facts

The New South Wales Aboriginal Land Council (the Land Council) made a claim for land at Nambucca under the *Aboriginal Land Rights Act 1983* (NSW) (the ALR Act). Over 15 years later, the Minister administering the *Crown Lands Act* (the Minister) refused the claim on the basis of his opinion that the land was not claimable crown land at the time the claim was made because, at that time, the land comprised land which was needed or was likely to be needed as residential land. The Minister subsequently issued certificates stating that the land was needed for residential use. Under the ALR Act, these certificates “shall be accepted as final and conclusive evidence of the matters set out in the certificate and shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatsoever”. The Land Council appealed the Minister’s refusal.

Issue

The issue before the court was whether the Minister had satisfied the court that, when the claim was made, the land was, in the opinion of the Minister, needed or likely to be needed as residential lands.

Reasoning

In upholding the Land Council’s appeal, her Honour Justice Jagot considered that the evidence, taken as a whole, indicated that the Department of Lands (the Department) was aware of circumstances which entailed that the lands were inappropriate for residential development. This evidence did not support a finding of an opinion of a Minister that the land or any part of the land was needed or likely to be needed as residential lands when the claim was made. Her Honour addressed separately the issue of the legal validity of the certificates tendered by the Minister, before turning to the factual question as to whether the lands were non claimable crown lands at the time the claim was made, in the Minister’s opinion.

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The Validity of the Certificates

The court held that the Minister's function in issuing the certificates, fundamentally miscarried by reason of jurisdictional error. In deciding to issue the certificates, the Minister relied upon a briefing note which omitted and inaccurately depicted information which was in the Department's possession and which bore directly upon the issue of the use of the land. This entailed that the Minister could not have had regard to all mandatory relevant considerations in the making of his decision. Accordingly, the certificates were not at law certificates within the meaning of s 36(8)(a) of the ALR Act, thus rendering their effect under that Act absent. The court ordered that the Minister be restrained from tendering the certificates in the proceedings.

Residential Land Use

The court held that the evidence did not support an opinion about any need or likely need for the whole of the land as residential lands when the claim was made. The making of a development application, grant of consent, and placement of a project on the program did not establish a decision or manifestation of political will about the use of land. These steps were inherently prospective in nature and raised the issue of likely need, rather than need. The court assessed that these steps were equivocal in light of the following factual circumstances which were known to the Department:

- the land presented significant difficulties for residential subdivision;
- the proposed subdivision involved substantial costs;
- the proposed subdivision was marginal and awkward in nature;
- the proposed subdivision involved a very low yield;
- limited resources (both staff and financial) were available to the Department; and
- there were other zoned areas available for far larger residential developments.

On this evidence, the court was not satisfied that in the opinion of the Minister, the land or any part of the land was needed or likely to be needed as residential lands when the claim was made.

Land Use: Public Purpose and Lawful Use

The court rejected the Minister's alternative argument that the lands were not claimable crown lands as part of the land was needed for the essential public purposes of drainage and open space as this was not adequately demonstrated by the evidence. The court did not resolve the issue of whether "residential lands" extends to land used for ancillary activities such as drainage and open space however her Honour agreed the Minister's argument would depend on the character, nature and extent of the uses in question.

The court also rejected the Minister's assertion that the lands were not claimable crown lands as the land was lawfully used when the claim was made. The acts relied upon to indicate "lawful use" including the Council's provision of detailed engineering design drawings, were of limited character and extent, were ephemeral in nature and did not amount to use of the land to more than merely a notional degree when the claim was made.

Conclusion

The appeal was upheld and the land ordered to be transferred to the applicant.