

AMENDED DEFENCE TO AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2015/368036

TITLE OF PROCEEDINGS

Plaintiff	Sharon Patricia Weber
Defendant	Greater Hume Shire Council

FILING DETAILS

Filed for	Greater Hume Shire Council, Defendant
Legal representative	Michael Edward Down, Mills Oakley
Legal representative reference	MEDS/MEDS/3184809
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HEARING DETAILS

The proceedings are listed for ~~directions and case conference on 20 May 2016~~ hearing commencing 3 April 2017.

PLEADINGS AND PARTICULARS

In response to the Amended Statement of Claim filed 18 April 2016:

- 1 The Defendant does not admit paragraph 1.
- 2 In response to paragraph 2, the Defendant:
 - a. Admits Part 10 of the *Civil Procedure Act*, 2005 (NSW) applies to the alleged circumstances said to give rise to the proceedings;
 - b. Admits the Plaintiff would have a sufficient interest to commence representative proceedings against it in relation to the alleged circumstances

if she had standing to do so on her own behalf: sections 157(1) and 158(1) *Civil Procedure Act*, 2005 (NSW);

c. Otherwise, does not know and therefore cannot admit paragraph 2.

3 In response to paragraph 3, the Defendant:

- a. Admits there was a fire at the Walla Walla Rubbish Tip on 17 December 2009;
- b. Does not know and cannot admit where the fire started within the confines of the Walla Walla Rubbish Tip.

4 The Defendant does not admit paragraph 4.

5 In response to paragraph 5, the Defendant:

- a. Repeats paragraphs 2 and 3 pleaded above;
- b. Does not know and cannot admit the identity of any person in the class identified in paragraph 5(a) who suffered loss or damage of the kind alleged in paragraph 5(a);
- c. Does not know and cannot admit the existence of any loss or damage defined in paragraph 5(a);
- d. Does not know and cannot admit the identity of any person in the class identified in paragraph 5(b) who suffered economic loss of the kind alleged in paragraph 5(b);
- e. Does not know and cannot admit the existence of any economic loss defined in paragraph 5(b);
- f. Does not know and cannot admit the identity of any person in the class identified in paragraph 5(c) who suffered personal injury of the kind alleged in paragraph 5(c);
- g. Does not know and cannot admit the existence of any personal injury defined in paragraph 5(c);
- h. Does not know and cannot admit the existence of any legal personal representatives of the kind defined in paragraph 5(d).

6 The Defendant does not admit paragraph 6.

7 The Defendant admits paragraph 7.

8 In response to paragraph 8, the Defendant:

- a. Admits subparagraph 8(a); and
- b. Does not admit subparagraph 8(b).

9 In response to paragraph 9, the Defendant:

- a. Admits it had responsibilities in relation to activities carried out at the Walla Walla Rubbish Tip on or before 17 December 2009;
- b. Does not admit its responsibilities are accurately summarised as “the ultimate responsibility” as alleged in paragraph 9(a);
- c. Says persons other than the Defendant or its employees carried out regular maintenance activities at the Walla Walla Rubbish Tip before 17 December 2009;
- d. Says the Walla Walla Rubbish Tip was secured by a fence to which access was provided by way of a key;
- e. Says a copy of the key to the Walla Walla Rubbish Tip had been issued to persons other than the Defendant or its employees before 17 December 2009;
- f. Denies persons other than the Defendant were excluded from carrying out maintenance at the Walla Walla Rubbish Tip before 17 December 2009;
- g. Otherwise, does not admit paragraph 9.

10 In response to paragraph 10, the Defendant:

- a. Does not know and cannot admit the type of waste present at the Walla Walla Rubbish Tip on 17 December 2009 which was capable of igniting and sustaining a fire as alleged in paragraph 10(a);
- b. Does not admit each of the risks identified in paragraphs 10(b), 10(c) and 10(d) were risks of which the Defendant knew or ought to have known on or before 17 December 2009;
- c. Denies the risk of a fire spreading from the Walla Walla Rubbish Tip to surrounding properties and beyond was a risk which was reasonably foreseeable to it on or before 17 December 2009;
- d. Otherwise, denies paragraph 10.

11 In response to paragraph 11, the Defendant:

- a. Repeats paragraph 5 pleaded above;

- b. Denies persons in the classes identified in paragraphs 5(a), 5(b) and 5(c) were vulnerable to the impacts or effects of a fire spreading from the Walla Walla Rubbish Tip to surrounding properties and beyond because it was open to some or all of those persons to protect themselves by obtaining insurance;
- c. Denies persons in the classes identified in paragraphs 5(a), 5(b) and 5(c) were dependent on the Defendant to ensure a fire did not spread from the Walla Walla Rubbish Tip to surrounding properties and beyond because any such a fire would have to pass over properties over which the Defendant had no control;
- d. Otherwise, does not admit paragraph 11.

12 The Defendant denies paragraph 12.

13 In response to paragraph 13, the Defendant:

- a. Repeats paragraph 10(a) pleaded above;
- b. Does not admit each of the matters pleaded at paragraphs 13(a), 13(b), 13(c) and 13(d) were matters of which the Defendant knew or ought to have known on or before 17 December 2009;
- c. In specific respond to paragraph 13(c)(ii), says the construction and maintenance of a fire break around the perimeter of the Walla Walla Rubbish Tip before 17 December 2009 was work carried out by a person other than the Defendant or its employees;
- d. Otherwise, denies paragraph 13.

14 In response to paragraph 14, the Defendant:

- a. Admits subparagraph 14(a);
- b. Says the Walla Walla Golf Course is located on land owned by the Department of Lands in right of the State of New South Wales;
- c. Says the Walla Walla Golf Course was not maintained by the Defendant, nor was there any agreement between the Department of Lands and the Defendant for the Defendant to carry out any such work, before 17 December 2009;
- d. Otherwise, does not admit subparagraph 14(b).

15 In response to paragraph 15, the Defendant:

- a. Does not admit each of the conditions pleaded therein existed at the Walla Walla Rubbish Tip on 17 December 2009;
 - b. Otherwise, denies paragraph 15.
- 16 The Defendant denies paragraph 16.
- 17 The Defendant denies paragraph 17.
- 18 In response to paragraph 18, the Defendant:
 - a. In specific response to subparagraphs 18(b)(i) and 18(b)(ii), repeats subparagraph 13(c) pleaded above;
 - b. In specific response to subparagraphs 18(c)(i) and 18(c)(iii), says it inspected each of the four designated waste areas at the beginning and at the conclusion of each day the Walla Walla Rubbish Tip was open for operation;
 - c. Otherwise, it denies paragraph 18 and each and every particular pleaded therein.
- 19 The Defendant denies paragraphs 19 and 20.
- 20 In response to paragraph 21, the Defendant:
 - a. Repeats paragraph 5 pleaded above;
 - b. Otherwise, it does not admit paragraph 21.
- 21 The Defendant denies paragraph 22 and 23.
- 22 The Defendant does not admit paragraph 24.
- 23 The Defendant denies paragraph 25.
- 24 In response to paragraph 26, the Defendant:
 - a. Repeats paragraph 5 pleaded above;
 - b. Otherwise, it does not admit paragraph 26.
- 25 In response to the paragraphs pleaded under the heading "Common Questions of Law or Fact", the Defendant:
 - a. Says the questions concerning whether a duty was owed and/or breached by the Defendant are not necessarily common to the claims made by the Plaintiff and all Group Members because the nature and content of each duty, and the circumstances in which any duty is breached, will depend on the circumstances in which they arise;

b. Says the Common Questions of Law or Fact listed in the Annexure A to this Amended Defence are questions common to the claims made by the Plaintiff and all Group Members;

c. Otherwise, the Defendant does not admit those paragraphs.

26 In answer to the whole of the allegations made against the Defendant in the Amended Statement of Claim, in the event the Defendant is found to have owed any duty of care to the Plaintiff (which is denied), the Defendant says it was not negligent pursuant to the principles in sections 5B and 5C of the *Civil Liability Act*, 2002 (NSW) and, in the event the Defendant is found to have been negligent (which is denied), it relies on the principles in section 5D and 5E of the *Civil Liability Act*, 2002 (NSW).

Section 42 of the *Civil Liability Act*, 2002 (NSW)

27 Further, and in the alternative, the Defendant relies on section 42 of the *Civil Liability Act*, 2002 (NSW) and says it is a public authority limited in its functions by financial and other resources available to it for the purposes of exercising its functions.

Section 733 of the *Local Government Act*, 1993 (NSW)

28 Further, and in the alternative, the Defendant says the particulars of negligence and nuisance pleaded against it relate to acts or omissions of the Defendant in relation to land being subject to the risk of bush fire.

29 The acts of the Defendant or omissions by it to take those steps, which the particulars of negligence and nuisance imply should have been taken, were acts or omissions done by the Defendant in good faith.

30 By reason of section 733(2A) of the *Local Government Act*, 1993 (NSW), the Defendant does not incur any liability in respect of those acts or omissions.

Sections 50C and 50D of the *Limitation Act*, 1969 (NSW)

31 Further, and in the alternative, if the Plaintiff and any Group Members of the class identified at paragraph 5(c) of the Amended Statement of Claim suffered injury, loss and damage as alleged (which is not admitted), the Defendant says any proceedings against it in relation to personal injuries suffered by the Plaintiff and any such Group Members is statute-barred and are not maintainable by reason of section 50C and 50D of the *Limitation Act*, 1969 (NSW).

Particulars

- (a) Any cause of action against the Defendant was discoverable by the Plaintiff and any Group Members of the class identified at paragraph 5(c) of the Amended Statement of Claim on 17 December 2009.
- (b) The Plaintiff and any Group Members of the class identified at paragraph 5(c) of the Amended Statement of Claim were required to commence proceedings against the Defendant on or before 17 December 2012.
- (c) The proceedings were commenced by the Plaintiff against the Defendant on 15 December 2015.

Section 43A of the Civil Liability Act, 2002 (NSW)

- 32 Further, and in the alternative, the Defendant says the particulars of negligence pleaded against it in paragraph 18 of the Amended Statement of Claim relate to the omission by the Defendant to exercise a special statutory power within the meaning of section 43A of the Civil Liability Act, 2002 (NSW).
- 33 The things which it is alleged the Defendant failed to do, and should have done, in relation to the Walla Walla Rubbish Tip involve acts or omissions in relation to a reserve under the Crown Lands Act, 1989 (NSW).

Particulars

- a. The registered proprietor of the land on which the Walla Walla Rubbish Tip is located is the State of New South Wales.
 - b. The land on which the Walla Walla Rubbish Tip is located is a reserve within the meaning of section 5 of the Crown Lands Act, 1989 (NSW) known as Reserve No. 49269.
 - c. The Defendant (formerly known as Culcairn Shire Council) was appointed by the Minister as the trustee manager of the Reserve Trust No. 49269 pursuant to sections 92 and 95 of the Crown Lands Act, 1989 (NSW).
 - d. The Reserve Trust No. 49269 has the functions of the Defendant pursuant to section 98(1) of the Crown Lands Act, 1989 (NSW).
- 34 The Defendant's powers to take the steps which the particulars imply should have been taken are powers conferred by or under statute.
- 35 Persons generally are not permitted to undertake the steps necessary to remedy the failures complained of by the Plaintiff and the Group Members.

Particulars

- a. The Defendant cannot delegate any of its functions as the trustee manager of Reserve Trust No. 49269 to any other person or body without the approval of the Minister pursuant to section 97A of the *Crown Lands Act, 1989* (NSW).
- b. The Reserve Trust No. 49269 cannot sell, lease or mortgage or grant an easement or licence over the land on which the Walla Walla Rubbish Tip is located without the approval of the Minister pursuant to section 102 of the *Crown Lands Act, 1989* (NSW).

36 The omission of the Defendant to take the steps, which the particulars of negligence and nuisance allege or imply should have been taken, was not so unreasonable that no authority having the power could properly consider the omission to take those steps a reasonable exercise of or failure to exercise the power: section 43A(3) of the *Civil Liability Act, 2002* (NSW).

37 By reason of section 43A(3) of the *Civil Liability Act, 2002* (NSW), the omission to take those steps does not give rise to a civil liability.

Section 121 of the Crown Lands Act, 1989 (NSW)

38 Further, and in the alternative, the Defendant says the particulars of negligence and nuisance pleaded against it relate to acts or omissions of the Defendant in relation to its management of the Reserve Trust No. 49269.

39 The acts of the Defendant or omissions by it to take those steps, which the particulars of negligence and nuisance allege or imply should have been taken, were acts or omissions done by the Defendant in good faith.

40 By reason by section 121(1) of the *Crown Lands Act, 1989* (NSW), the Defendant does not incur any liability in respect of those acts or omissions.

Proportionate Liability

41 Further, and in alternative, the Defendant says that if the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim suffered loss and damage as alleged, which is not admitted, the liability of the Defendant for that loss and damage must be limited to the extent of its responsibility for that loss and damage:

- a. The claims made by the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim against the Defendant are apportionable claims for the purposes of Part 4 of Division 6 of the *Civil Liability Act, 2002* (NSW);

- b. The following are concurrent wrongdoers within the meaning of section 34(2) of the *Civil Liability Act, 2002 (NSW)*:

Particulars

- i. Department of Primary Industries – Lands (formerly the Department of Lands) for and on behalf of the Crown in right of the State of New South Wales (“the Department of Lands”).
 - ii. MD & VC Jacob Pty Limited ABN 48 873 822 986 trading as MD & VC Jacob Earthmoving and Trenching (“Jacob Earthmoving”).
- c. The circumstances which render each of concurrent wrongdoers liable to the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim are set out below.

Department of Primary Industries - Lands

- 42 The Defendant says the land adjoining the Walla Walla Rubbish Tip, and on which the Walla Walla Golf Course is located, is land owned by the Department.
- 43 The Department was the occupier of and, in this capacity, had the care, control and management of the land on which the Walla Walla Golf Course is located.
- 44 The Department owed a duty of care to the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim.
- 45 The duty of care owed by the Department required it to take reasonable care to prevent a fire, which had escaped from the confines of the Walla Walla Rubbish Tip, from spreading over the land on which the Walla Walla Golf Course is located and beyond.
- 46 The risk of a fire, which had escaped from the confines of the Walla Walla Rubbish Tip, spreading over the land on which the Walla Walla Golf Course is located and beyond was a risk which was foreseeable to the Department before 17 December 2009.

Particulars

- a. Letters from Maxwell David Jacob to the Department dated 2 April 2009, 20 May 2009 and 21 July 2009.
- b. Complaints made by Jeffrey John Pumpa to the Department before 17 December 2009.

- 47 The risk pleaded in paragraph 46 above was not insignificant.
- 48 For the purpose of this proportionate liability defence only, the Defendant says a reasonable occupier in the Department's position would have taken precautions against the risk pleaded in paragraph 46 above and, further, the Department breached its duty of care owed to the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim by not doing so.

Particulars

- a. The Defendant repeats the allegation made at paragraph 18(a) of the Amended Statement of Claim against the Department save for the particulars pleaded therein.
 - b. Failing to maintain the land on which the Walla Walla Golf Course is located, either adequately or at all.
 - c. Failing to remove or minimise the amount of high dry grass and timber on the land on which the Walla Walla Gold Course is located.
- 49 The failure of the Department to take any or all of those steps pleaded in paragraph 48 above caused the loss and/or damage alleged by the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim in paragraphs 21 of the Amended Statement of Claim.

MD & VC Jacob Pty Limited ABN 48 873 822 986 trading as MD & VC Jacob Earthmoving and Trenching

- 50 Jacob Earthmoving owed a duty of care to the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim.

Particulars

- a. At all material times, the Defendant had engaged Jacob Earthmoving to carry out a "push" of rubbish at the Walla Walla Rubbish Tip.
- b. A "push" involves the use of machinery to push rubbish and waste into one of the four designated areas within the confines of the Walla Walla Rubbish Tip.
- c. From July 2009, the "push" carried out by Jacob Earthmoving at the Walla Walla Rubbish Tip was done on a fortnightly basis.

51 The duty of care owed by Jacob Earthmoving required it to take reasonable care to prevent a fire from igniting within and escaping from the confines of the Walla Walla Rubbish Tip.

52 The risk of a fire igniting within and escaping from the confines of the Walla Walla Rubbish Tip was a risk which was foreseeable to Jacob Earthmoving before 17 December 2009.

Particulars

- a. Letters from Maxwell David Jacob to the Department dated 2 April 2009, 20 May 2009 and 21 July 2009.

53 The risk pleaded in paragraph 52 above was not insignificant.

54 For the purpose of this proportionate liability defence only, the Defendant says a reasonable company in the position of Jacob Earthmoving would have taken precautions against the risk pleaded in paragraph 52 above and, further, Jacob Earthmoving breached its duty of care owed to the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim by not doing so.

Particulars

- a. The Defendant repeats the allegations made at paragraphs 18(b)(iii), 18(c)(i), 18(c)(iii) and 18(c)(iv) of the Amended Statement of Claim against the Department save for the particulars pleaded therein.
- b. Failing to “push” waste into the one area of each of the four areas within the confines of the Tip for which it was intended.
- c. Failing to prevent waste from spilling out of or into unwanted areas within the Walla Walla Rubbish Tip.

55 The failure of Jacob Earthmoving to take any or all of those steps pleaded in paragraph 54 above caused the loss and/or damage alleged by the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim in paragraphs 21 of the Amended Statement of Claim.

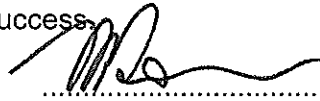
56 The Defendant’s liability, if any, to the Plaintiff and any Group Members of the classes identified at paragraphs 5(a), 5(b) and 5(d) of the Amended Statement of Claim must be reduced to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of the

Defendant's responsibility for the damage or loss pursuant to section 35 of the *Civil Liability Act, 2002 (NSW)*.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature of legal representative



Capacity

Solicitor for the Defendant

Date of signature

10.6.16


AFFIDAVIT VERIFYING

Name Steven Pinnuck
Address 39 Young Street, Holbrook NSW 2644
Occupation General Manager
Date 10 June 2016

I say on oath:


- 1 I am the General Manager of the Defendant and, in this capacity, I am authorised under delegation to make the affidavit.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN at Holbrook

Signature of deponent 
Name of witness Lynda Philpa
Address of witness 20 Croft Street Holbrook NSW 2644.
Capacity of witness Justice of the Peace

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- ~~1 I saw the face of the deponent.~~
- 2 I have known the deponent for at least 12 months.

Signature of witness 
174501 NSW Registration.