HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S121 of 2024

BETWEEN:

LA PEROUSE LOCAL ABORIGINAL LAND COUNCIL ABN 89136607167
First Appellant

NEW SOUTH WALES ABORIGINAL LAND COUNCIL ABN 82726507500
Second Appellant

and

QUARRY STREET PTY LTD ACN 616184117
First Respondent

MINISTER ADMINISTERING THE CROWN LAND MANAGEMENT ACT 2016
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Internet publication

This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

1. ***Shifting ground***: In obtaining special leave, the Land Councils contended that the error, in holding that the Minister was bound to find that the Lease constituted a use of the land, was an error of high principle because "use" refers to activities on the land and leasing was therefore not a use: SLA Pt II [1]-[3]. The Land Councils now accept that non-physical uses of land including leasing are capable of constituting "use": AOOA [5]. Their argument is now factual: that it was "reasonably open" to the Minister to find that *this Lease* was not a use: AOOA [6]. But the essential facts are: a Lease conferring exclusive possession, granted under s 34A of the *Crown Lands Act 1989*, and enforcement of the Lease terms including rent: RS [15]-[16]. Any factual detail capable of depriving those facts of the quality of a use has never been articulated: **CAB 83 [122]**. Reliance on a supposed absence of evidence about the satisfaction of preconditions to granting the Lease goes nowhere: AOOA [14]-[15]. On the material before the Minister, bolstered by the presumption of regularity, it would not have been open to conclude that the preconditions were not satisfied.

2. ***Applying the established test***: The leasing of land by the Crown for a public purpose satisfies the established test in *Wagga Wagga* (2008) 237 CLR 285 at 305 [69] (**JBA Vol 3**

Tab 10). The court "measures" the acts, facts, matters and circumstances "against an understanding of what would constitute use … of the land": RS [14].

(a) The normative conception of "what would constitute use" extends to leasing, because: the Crown has forgone its right to occupy the land or to conduct activities upon it; continues to enforce the lease terms (whatever they might be) including rent; and retains a reversionary interest in the land, unlike in the case of sale: RS [17]-[18], [31]-[33]. The Land Councils' construction would render irrelevant the activities of an owner not in possession and make land liable to claim depending entirely on the actions of a tenant, however delinquent.

(b) The statement in *Berrima Gaol* (2016) 260 CLR 232 at 256 [34] (**JBA Vol 3 Tab 13**) that use and occupation "require an examination of activities undertaken upon the land" must be read in context: RS [35]-[36]. The Court was not in that case, or in *Wagga Wagga*, dealing with an owner not in possession and thus unable to undertake such activities. While for any given parcel of land, activities on the land might disclose a use, it is not "common ground" that for every putative use of land, activities on the land will be relevant: AOOA [9].

3. ***Leasing is within ordinary meaning of "used"***: The ordinary meaning of "use" when applied to land includes non-physical uses: *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493; (1959) 100 CLR 1 (PC) (**JBA Vol 3 Tabs 11 and 12**); *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 at 21 (Gibbs J) (**JBA Vol 3 Tab 14**); RS [38]-[43]. The "ordinarily accepted meaning" extends to the leasing of land: *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 638 (Gibbs ACJ) (**JBA Vol 3 Tab 16**); RS [20]-[22]; see also **CAB 63 [43]**, citing *Tourapark Pty Ltd v Federal Commissioner of Taxation* (1982) 149 CLR 176.

4. ***No different meaning of "used" in the Act***: In the *Aboriginal Land Rights Act 1983* (**ALR Act**), "use" also does not require physical activity on the land: *Minister Administering the Crown Lands Act v NSWALC* (1993) 31 NSWLR 106 (***Nowra Brickworks (No 1)***) at 120B-F (Sheller JA) (**JBA Vol 4 Tab 27**), explaining ***Daruk*** *LALC v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 (**JBA Vol 4 Tab 21**). The cases about non-physical use cannot be explained simply as purposeful inactivity without also accepting that leasing is also a purposeful vacation of the physical land in favour of a tenant.

5. The interaction of land claims with private property rights has increased since the making of indiscriminate "bulk claims": **CAB 52 [13]; ABFM Vol 1 p 31**. Of the three cases said to be "wrongly decided" on the Court of Appeal's construction (AS [62] fn 38) two are consistent with it: *Nowra Brickworks (No 1)* (dealing with "mining leases" not giving exclusive possession); *Darkinjung LALC v Minister* [2023] NSWLEC 134 at [115] (**JBA Vol 4 Tab 20**) (no lease at date of claim); RS [24] fn 13. The other, *Little Bay* [2022] NSWLEC 142 (**JBA Vol 4 Tab 29**), starkly illustrates the difficulties.

6. There is lacking any textual basis to narrow the ordinary meaning of "used": cf *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 224 LGERA 236 (**JBA Vol 4 Tab 17**); RS [37]. Nothing suggests that the definition of "land" in s 4(1), extending to any estate or interest in land, does not apply in s 36(1): RS [50]. On the contrary:

(a) The collocation of "use" and "occupation" and the non-specification of any form of user suggest that an occupier's use does not exhaust the concept of use: RS [17], [49].

(b) Sub-ss (9) and (9A), referring to transfers being "for an estate in fee simple" or "lease in perpetuity", and subject to "native title", confirms the defined meaning: RS [52]. It would be odd if land, transferred because it is "not lawfully used or occupied", could not be put by the transferee to any different use or occupation than that which obtained pre-claim.

(c) Sub-s (12), preserving certain interests, indicates a legislative assumption that leased lands would not be claimable: RS [47].

(d) Sub-s (5), permitting claims to be granted in part, cannot work where land is leased. The Land Councils' construction creates practical difficulties where only part of leased land is claimable Crown land, and would make the Crown's use and occupation of leased land depend solely on the tenant's actual use and occupation: RS [44]-[46]: MS [19]-[30].

(e) The Court of Appeal's construction is not productive of surplusage in the transitional provision in cl 8 of Pt 2 of Sch 4 which has work to do in each of its operations, given that not all "leases" confer exclusive possession like the Lease in this case: RS [59].

Dated: 13 March 2025 Brendan Lim