HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S121/2024
File Title:	La Perouse Local Aboriginal Land Council ABN 89136607167
Registry:	Sydney
Document filed:	Form 27D - First Respondent's Submissions
Filing party:	Respondents
Date filed:	21 Nov 2024

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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 SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The issues stated in [2] of the appellants' submissions (**AS**) are the appellants' framing of the narrower issue for decision, which is whether reserved Crown land is "lawfully used" and therefore not claimable under s 36(1)(b) of the ***A**boriginal **L**and **R**ights **Act** 1983* (NSW) when it is leased to a tenant for value, pursuant to Crown lands legislation that authorises the Minister to lease such land for any purpose compatible with the public interest and to apply rental proceeds for public purposes.[1]

3. The case concerns leasing in the true sense of granting the right to exclusive possession. Contrary to AS [58], no issue arises about forms of interest which, although labelled as "leases", do not confer exclusive possession. The proper focus of the question, "What would constitute use of the land?", might differ depending on whether the Crown has parted with possession and thus forgone the legal right to conduct any activities on the land.

[1] *Crown Lands Act 1989* (NSW), s 34A. All references are to the Act as in force at the time the Minister granted the Lease to Paddington Bowling Club Ltd commencing 1 December 2010.

PART III: SECTION 78B CERTIFICATION

4. The first respondent considers that notice under section 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: FACTS

5. The facts recited at AS [6]-[23] are not in dispute. AS [15]-[17] are, however, materially incomplete: when the Crown required **CSKS** Holdings Pty Ltd to remedy breaches of the **Lease**, CSKS did so by undertaking substantial repairs and the Lease was not forfeited as threatened: **ABFM** 14, 494-498, 614-615, 616-633. Furthermore, CSKS and the Crown were actively negotiating about alternative uses for the land; the Crown encouraged CSKS to "provide information requested" about that and invited CSKS to "discuss … alternative uses of the land": ABFM 635-636.

6. As to AS [24]-[26], it is wrong to suggest that the ground now in issue was not raised at first instance. The primary judge recorded the argument that the Crown was using the land for the purpose of leasing: PJ [51]; **CAB** 31. Any difference in the Court of Appeal was squarely to frame that proposition as one of law.

PART V: SUMMARY OF ARGUMENT

Introduction and summary

7. The Court of Appeal correctly held that land the subject of a registered Lease to the first respondent was being used at the date of the Land Councils' land claim: **J** [41]-[123]; CAB 62-83. The Land Councils advance a construction of "use" that is exclusively "concerned with how the land as a concrete physical mass is being deployed": AS [32]. The test they propound "requires a focus upon the activities that are or are not happening on the land" and "an analysis … of the physical activities occurring on the actual land": AS [32], [73]. Under that test, the sole determinant of use is the occurrence of "activities" on "the physical land itself": AS [84]. The appellants argue that the Crown's letting of land is not such a "use" of land, despite Crown lands legislation expressly contemplating leasing for public purposes as one of the uses to which reserved land may be put.

8. The Land Councils deny *any* relevance to the Crown's purposes and activities as an owner, even when the Crown is not in possession of "the physical land itself" because it has granted exclusive possession to its tenant. On the Land Councils' construction, the vulnerability of Crown land to claim depends entirely on a tenant's diligence. That is an incoherent construction of Crown lands legislation and the ALR Act.

9. The Land Councils' construction should be rejected as contrary to the ordinary meaning of "used" having regard to the statutory context and purpose, as well as the decisions in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2008) 237 CLR 285 (***Wagga Wagga***) and *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 (***Berrima Gaol***).

10. ***Ordinary meaning of "used"***: Nothing in the text or context of s 36(1)(b) precludes concurrent uses of land by a lessor and lessee as each constituting a use of the land for purposes of the provision: J [45]-[50]; CAB 63-64. The appellants invite the Court to adopt a categorical rule that would foreclose any possibility of non-physical uses of land, irrespective of the material and other benefits the Crown derives from its dealing with the land. That approach is inconsistent with the well-accepted understanding that "use" is a "protean word"[2] of "wide import",[3] capable of taking "manifold" forms and dependent to a "great extent"[4] on context, and therefore not amenable to rigid definition that supposes to "chart the metes and bounds of those ideas" in the ALR Act.[5] The appellants' denial of non-physical uses of land is belied as well by authority addressing what it means to "use" land in other statutory contexts. In *Newcastle City Council v* ***Royal Newcastle Hospital*** (1957) 96 CLR 493, this Court recognised (and the Privy Council affirmed) that "it is not necessary, to constitute a present use of land, that there should be a physical use of all of it, *or indeed of any of it*".[6] And in *Ryde Municipal Council v* ***Macquarie University*** (1978) 139 CLR 633, the Court acknowledged that land is "used" within the "ordinarily accepted meaning" if an owner derives rent from its lease or pursues a particular purpose by leasing the land.[7]

11. ***Judicial consideration of "use" of land***: Finding no foothold for their construction in the text or context of s 36(1)(b), the Land Councils seek to support their "activities on the land" test by reference to past cases applying the ALR Act. Their reading of those cases is acontextual and disregards this Court's admonition that past decisions should not be "understood as

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2 *Wagga Wagga* at 306 [69] (Hayne, Heydon, Crennan and Kiefel JJ). See also ***Daruk*** *Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 164C (Priestley JA).

3 See, eg, *Macquarie University* at 637 (Gibbs ACJ), 651 (Stephens J); *Macquarie University v Ryde Municipal Council* [1977] 1 NSWLR 304 at 313-314 (Mahoney JA) (***Macquarie University*** **(CA)**); *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (1993) 31 NSWLR 106 at 120B-F (Sheller JA) (***Nowra Brickworks (No 1)***); *Royal Newcastle Hospital* at 515 (Taylor J).

4 *Royal Newcastle Hospital* at 515 (Taylor J), quoted in *Macquarie University* at 651 (Stephens J).

5 *Wagga Wagga* at 306 [69] (Hayne, Heydon, Crennan and Kiefel JJ); *Berrima Gaol* at 253 [22] (French CJ, Kiefel, Bell and Keane JJ).

6 ***Parramatta City Council*** *v Brickworks Ltd* (1972) 128 CLR 1 at 21 (Gibbs J) (emphasis added), explaining *Royal Newcastle Hospital*.

7 *Macquarie University* at 638 (Gibbs ACJ) (emphasis added).

attempting some exhaustive definition of when land is not lawfully used or occupied".[8] Judicial statements that "activities occurring on the land" are *sufficient* to establish use do not mean that activities of that kind are always *necessary* for land to be used. Activities on the land were properly the focus of past decisions because the Crown had sole possession and physical control of the land subject to claim. In that context, it made sense to assess the Crown's use by reference to the activities it was undertaking upon the land. But where, as here, the Crown has parted with possession by leasing the land, the inquiry cannot be so limited. One must look elsewhere, to the Crown's dealing with the land as lessor, to understand the Crown's use. Exploitation of the land by leasing is qualitatively different from exploitation *by sale*. In the case of a lease, the Crown continues to use the land by putting in a tenant, who can be expected to pursue public purposes for which the land is reserved or leased, by retaining a reversionary interest foreshadowing continued use of the land rather than disposal, and by deriving rental income.

12. ***Practical difficulties with the appellants' construction***: The Land Councils' construction would also lead to improbable consequences and create serious difficulties for the administration of the scheme for Aboriginal land claims. *First*, the Crown's fee simple would be liable to claim whenever its tenant ceases to conduct "activities on the land". *Secondly*, the ALR Act specifically contemplates that only *part* of the land is claimable, but has no mechanism for dealing with a registered lease in this circumstance.

The land was "used" by the Crown as at the date of claim

13. As of the date of claim (19 December 2016), the land the subject of the Lease was being "used" by the Crown. As contemplated by the *Crown Lands Act*, it was leased to a tenant in the public interest and the tenant could be expected to fulfil public purposes. The Crown actively managed the Lease and took steps shortly before the date of claim to secure the tenant's compliance with the Lease. All the while, the Crown was receiving rent to be applied for public purposes.

14. The test to be applied in determining whether land is "used" was articulated in *Wagga Wagga* and affirmed in *Berrima Gaol*: identify the "acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being 'not lawfully used'" and then "measure those acts, facts, matters and circumstances against an understanding of what would constitute use … of the land".[9]

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[8] *Wagga Wagga* at 305-306 [69] (Hayne, Heydon, Crennan and Kiefel JJ).

[9] *Wagga Wagga* at 305 [69] (Hayne, Heydon, Crennan and Kiefel JJ).

15. The relevant "acts, facts, matters and circumstances" as of 19 December 2016 are recorded in the Court of Appeal's reasons and include the following:

(a) the land was subject to a reservation pursuant to s 87 of the *Crown Lands Act* for "Community and sporting club facilities and tourist facilities and services" (J [2]; CAB 50);

(b) the Minister for Lands, on behalf of the State, granted the Lease to Paddington Bowling Club Ltd for a 50-year term commencing on 1 December 2010 (J [3]; CAB 50);

(c) the terms of the Lease required payment of rent to the State, initially set at $52,000 per year and subject to annual CPI adjustments and three-yearly reviews (J [3]; CAB 50);

(d) the Lease was granted for purposes that "broadly coincided with the purposes for which the land had been reserved", being "Community and Sporting Club Facilities, Tourist Facilities and Services, Access", and on terms that prohibited use of the site for any other purpose (J [5]; CAB 51);

(e) the Lease was transferred from Paddington Bowling Club Ltd to CSKS (J [6]; CAB 51);

(f) as at the date of the claim, CSKS was not using the land for purposes permitted by the Lease, but was continuing to pay substantial rent to the Crown (J [9], [19]; CAB 51, 55); and

(g) the Crown took steps to secure CSKS's compliance with the conditions of the Lease, and encouraged CSKS to engage with it further about proposed alternative uses for the land (see above at [5]).

16. Also among the relevant "acts, facts, matters and circumstances" are the provisions of the *Crown Lands Act* that governed the Lease. The objects of the Act included "regulation of the conditions under which Crown land is permitted to be occupied, used, sold, leased, licensed or otherwise dealt with": s 10(d). The Minister granted the Lease pursuant to s 34A. That provision empowered the Minister to grant a lease over a Crown reserve "for any … purpose the Minister thinks fit": s 34A(1). However, the Minister was not to grant a lease unless the Minister was satisfied that it was in the public interest to do so and had given due regard to principles of Crown land management, which relevantly included "that Crown land be … leased … in the best interests of the State": ss 11(f), 34A(2)(c). The proceeds from any lease were "to be applied as directed by the Minister": s 34A(4). Without limiting such directions, the Act envisaged that they might include payment of proceeds into the Consolidated Fund or the Public Reserves Management Fund or to a relevant government agency: s 34A(5).

17. Turning to the second stage of the *Wagga Wagga* inquiry, what "would constitute use" must logically differ as between an owner who is in possession and one who is not. This follows from "use" being an inherently context-dependent concept and is consistent with s 36(1)(b) not

referring to any particular form of use or user: J [47]-[48]; CAB 64.[10] The relevant context here includes the circumstance that the Crown has parted with possession of the land. When due regard is had to that context, the use able to be made of leased land cannot sensibly be confined to "activities upon the land" or "what is or is not occurring on the land" (as might ordinarily be the primary focus in the case of an owner in possession). The Crown, having parted with possession for the lease term, has forgone the right to conduct *any* activities on the "concrete physical mass" for the duration of the lease. It is no answer to say that in the case of leased land the focus simply shifts to activities on the land carried out by the *tenant*, because that would expose the Crown to loss of the fee simple whenever its tenant ceases to conduct such activities. Although the Crown is out of possession for the lease term, it *can* be seen to be using the land by having put in a tenant for purposes like community sport (for the provision of which the Crown might commonly rely on the private sector) and to generate rental income for public purposes.

18. Beyond generating an economic return to the State, the leasing of land by the Crown constitutes a use by reason of its *purpose*, which is "intrinsic to" the concept of use.[11] The legislative assumption of the *Crown Lands Act* (and its successor) is that where land has been reserved for a public purpose, the Crown may seek to pursue that purpose by putting into possession a private tenant who can be expected to carry out activities for its fulfillment. Such leasing of reserved land for public purposes is itself a form of "use" by the Crown quite independent of "activities on the land" or receipt of rent (and distinguishable by such purpose from the sale of the land).

19. Again, that use was present here. The declared purpose of the reserve—"Community and sporting club facilities and tourist facilities and services"—was apt to be pursued by the Crown leasing the land to a private sector tenant, as the Crown would not itself pursue purposes of that kind in the ordinary course. Contrary to AS [11], [46], [50] and [56], it is not fatal to a finding of use on this basis that the tenant at the date of the claim, CSKS, was not in fact using the land for the reserved purpose or the permitted purposes under the Lease. Nor does it matter that the land was in "a state of disrepair": cf AS [46], [50], [56], [78]. Those are all matters affecting *the tenant's* use or occupation. The relevant use in this case is independent of the tenant's activities and derives from *the Crown's purpose* in granting the Lease, which is to put into possession a tenant who can be expected *at the time of the grant* to pursue public purposes

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[10] *Wagga Wagga* at 306 [69] (Hayne, Heydon, Crennan and Kiefel JJ); *Daruk* at 164C (Priestley JA); *Macquarie University* at 651 (Stephens J); *Macquarie University* (CA) at 313-314 (Mahoney JA); *Royal Newcastle Hospital* at 515 (Taylor J).

[11] *Berrima Gaol* at 270 [88] (Gageler J); *Nowra Brickworks (No 1)* at 120D-F (Sheller JA).

compatible with the reservation. The tenant's diligence in pursuing the reserved purpose after the lease is granted says nothing about the purposes for which the Crown granted the lease. And at least where the Crown, as here, was taking steps to secure the tenant's compliance with the lease, and encouraging dialogue about alternative uses of the land by the tenant (see above at [5]), the Crown's own use was continuing.

20. The ordinary meaning of "used" extends both to leasing for rent and to leasing in pursuit of a purpose, in which case the use is for that purpose. In *Macquarie University*, the Court held that campus land owned by the University and leased to retail shops that catered to students and staff qualified for a rating exemption for "[l]and … used … by the University … solely for the purposes thereof". Gibbs ACJ and Stephen J (with whom Murphy J agreed) held that the rating exemption applied. Though the appellants deny it, Gibbs ACJ *did* find that "mere leasing" was sufficient to demonstrate use, and Stephen J did not exclude that it could: AS [72]. The suggestion that *Macquarie University* is "of limited utility" because of the specific statute under consideration ignores that its reasoning is expressed at the level of general principle: AS [71].

21. The contention at AS [74] that Gibbs ACJ's finding of use was based upon "a use by the University through those actually undertaking the physical activities on the land" is at variance with Gibbs ACJ's actual reasoning. Gibbs ACJ saw no difficulty with the propositions that leasing for rent and for pursuit of a particular purpose are each "uses" of land. His Honour said that a person uses land "for his own purposes notwithstanding that he permits someone else to occupy it, even under a lease", where the purpose is to acquire income or where the lease is granted to pursue some further or alternative purpose such as enabling employees to perform their duties efficiently (at 638). Gibbs ACJ rejected "the view that the questions by whom, and for what purposes, premises are used must be answered by considering only what is done on the premises" (at 638-639).

22. The appellants rely (AS [72]) on Stephen J's finding that "the only use made of the market site by the University is in the provision of facilities to staff and students" (at 651). Stephen J was not denying as a general proposition that leasing for rent may have the character of a "use". In the passage relied on, Stephen J was addressing a further question in that case about whether the use was "for particular purposes which would earn exemption from rates or land taxes" (at 651). That question does not arise under the ALR Act, which does not specify any particular "uses" which disqualify land from claim under s 36(1)(b). On the general question of whether land is "used", Stephen J said that that expression refers to "land being made available by its owner for use for a particular purpose, rather than any active personal use by the owner itself" (at 647). That view is consistent with the Crown's leasing of land for a

public purpose being a use.

The proposed "activities on the land" test should be rejected

23. ***Issacs J's definition of land***: The appellants attach much importance to Isaacs J's definition of land as "the concrete physical mass, commencing at the surface of the earth and extending downwards to the centre of the earth": AS [34].[12] His Honour articulated that definition in the context of explaining why gold and silver in the soil, for which the State had made an express reservation when alienating the land, "neither more nor less than copper or tin or platinum or clay or oil, are part of the … land" for the purposes of compulsory acquisition legislation (at 33). Isaacs J was not concerned with the *uses* to which land could be put. A physical definition of land, ventured to explain why metals physically present in it are part of it, has no bearing on this case (especially when "land" is defined differently in the ALR Act). It says nothing about the myriad ways land can be *used*. The same land can be used in more than one way, and by more than one user, when multiple interests in the land exist: cf J [48]; CAB 64. Some uses may well involve activities on the "concrete physical mass". Others may not. But even accepting for the sake of argument the soundness of the Land Councils' starting premise that s 36(1)(b) is concerned with "deployment" of the "concrete physical mass", it is fully compatible with land being used when leased for profit and in pursuance of public purposes contemplated by Crown lands legislation. As a matter of ordinary English usage, a landlord can be said to be "deploying" the "concrete physical mass" by putting a rent-paying tenant into possession. Likewise, it is an orthodox use of language to say that the Crown "deploys" or "put[s] to advantage or benefit" (AS [34], [44]) a Crown reserve by leasing the land for a public purpose authorised by Crown lands legislation.

24. ***The significance of prior authorities on "use" in s 36(1)(b)***: Contrary to AS [33], the Court of Appeal's approach was not "a fundamental departure from the basis upon which the ALR Act has been understood and administered since its inception". Understood in context, none of the authorities on which the Land Councils rely is inconsistent with the Crown "using" land by leasing it for value and in pursuance of public purposes. White JA properly recognised that existing authorities on the "use" limb of s 36(1)(b) offered only limited guidance, including because "[n]one has addressed a claim to land leased by the Crown": J [73]; CAB 69. Past cases have examined mining tenures (described as "leases"), but these did not confer exclusive possession. The *Crown Lands Act* expressly contemplated "leases" of that kind: s 42.[13]

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[12] *Commonwealth v New South Wales* (1923) 33 CLR 1 at 33 (Isaacs J).

[13] The *Nowra Brickworks* cases (see J [89]-[90]; CAB 74) considered land subject to a "mining lease", a type of statutory tenure that confers rights to carry out works on the land but not exclusive possession: *Nowra*

25. The applicants argue at AS [35] that White JA erred by departing from the supposedly categorical conclusion of Priestley JA in *Daruk* that "'used' in par (b) means 'actually used' in the sense of being used in fact and to more than a notional degree" (at 164D). Priestley JA should not be understood as referring only to "activities occurring on the land". The Land Councils' gloss on *Daruk* assumes the answer to the question for decision, namely that any use not consisting of physical activities on the land is "notional" and not a "use in fact". That is not true, and not what Priestley JA meant. That Priestley JA was not preoccupied with activities on the land can be confirmed by reference to the argument put in *Daruk*, based on *Royal Newcastle Hospital*, that "members of the public made use of the land by looking at it" (at 164G-165B). Priestley JA rejected that argument because "there [was] no evidence to support such a conclusion", not because use always requires activities on the land (at 164G-165B).

26. Similarly, in the Court of Appeal's decision in *Wagga Wagga*, Giles JA observed in dissent that "[t]here can be use without physical use, and the 'use in fact' in the meaning given in *Daruk* does not require physical use".[14] The High Court upheld the majority's conclusion that preparations for sale could not qualify as use, but referred to Giles JA's statement of principle without casting doubt on it.[15]

27. There is nothing "notional" about the use made of land by the Crown as a landlord that has parted with possession for a public purpose and in exchange for rent. Priestley JA's deprecation in *Daruk* of use or occupation that is merely "notional" is better understood not as a rejection of all non-physical uses of land, but as a response to the occasionally deployed fiction that the Crown uses or occupies all lands at all times, irrespective of its physical presence on, or other meaningful exploitation of, the land: see J [43]; CAB 62-63.[16] Indeed, that this is what Priestley JA had in mind by use of the word "notional" is supported by his Honour's observation, with reference to that fiction, that "reserved Crown land is ipso facto lawfully occupied in at least some senses of the word" (at 160E-G).

28. In any event, Priestley JA's elucidation of use in *Daruk* is not exhaustive or controlling

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Brickworks (No 1) at 109D-F (Sheller JA); *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2)* (1997) 42 NSWLR 641 at 644C-G (Sheller JA) (***Nowra Brickworks (No 2)***). In *Nowra Brickworks (No 1)*, such an interest was held not to be a "lease" within the meaning of the transitional provision in cl 8 of Pt 2 of Sch 4 to the ALR Act. These "leases" permitted the Crown, by covenant, to use the land "for any public purpose": *Mining Regulations 1907* (NSW), Sch 43A ("Form of Mining Lease, Crown Lands"). See also the discussion of mining leases in *Western Australia v Ward* (2003) 213 CLR 1 at 158 [285]-[287], 165-166 [308] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[14] *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 at 32 [70] (Giles JA) (***Wagga Wagga* (CA)**).

[15] *Wagga Wagga* at 304 [63] (Hayne, Heydon, Crennan and Kiefel JJ), quoting *Wagga Wagga* (CA) at 32 [70] (Giles JA). See also *Nowra Brickworks (No 2)* at 649D (Sheller JA).

[16] *Minister Administering the Crown Lands Act v* ***La Perouse*** *Local Aboriginal Land Council* (2012) 193 LGERA 276 at 286-287 [44]-[46] (Basten JA), citing *Attorney General v Brown* (1847) 1 Legge 312 at 317.

of the meaning of that concept. In the course of his Honour's analysis of "occupation"—transposed to his findings on "use" on the basis that the two concepts were "governed by the same considerations"—Priestley JA recognised that while "[p]hysical acts of occupation, the exercise of control, [and] maintaining of lands are all relevant", "the diversity of the circumstances in which the question whether Crown lands are occupied can arise cautions … against attempting to articulate a comprehensive test for resolving that question" (at 163C-D, 164D). As Basten JA observed in *La Perouse*, "[r]ead in context, it is not possible to describe the approach adopted by Priestley JA in *Daruk*, expressly stated not to be a definition of use or occupation for application in particular circumstances in particular cases, as involving anything other than a permissible and helpful exercise in statutory construction" (at 287 [47]). The point was put beyond any doubt by the qualifications in the joint reasons in *Wagga Wagga* (referring to *Daruk* among other decisions) that "what was said in those earlier decisions responded to the arguments advanced about the particular facts and circumstances of each case" and that "nothing that was said in the earlier decisions of the Court of Appeal … should be understood as attempting some exhaustive definition of when land is not lawfully used or occupied or of what is relevant use or occupation that will take lands outside the definition of claimable Crown lands".[17]

29. The appellants rely on the observation in *Wagga Wagga* that Priestley JA's references in *Daruk* to use "in fact" and to use being "more than notional" "might be understood as directing attention to some physical use of the land" (at 303 [62]). It does not follow from this statement that *only* physical uses of the land are capable of constituting a use of land within the meaning of s 36(1)(b), particularly in light of the joint reasons' acknowledgement that *Daruk*, like other decisions, was not advancing an all-encompassing definition of use.

30. The appellants present certain statements in *Wagga Wagga* as supporting that only physical use of land is relevant to whether it is "used": AS [37]. *Wagga Wagga* should not be understood that way. The joint reasons attached significance to the circumstances that "nothing was being done on the land when the claim was made", that "[t]here was no physical use of the land", that "there was no evidence of *anything* else being done on the land", and that the steps preparatory to sale "were all steps that occurred away from the land" (at 307-308 [76]-[77]). But the context is important. The Court naturally focused on activities on the land because the Crown was an owner *in possession*, albeit one in the process of selling the land. The sale itself could not be described as a use of the land because it would result in the irrevocable and

[17] *Wagga Wagga* at 305-306 [68]-[69] (Hayne, Heydon, Crennan and Kiefel JJ). See also *Berrima Gaol* at 300 [183] (Nettle and Gordon JJ).

unconditional transfer of the fee simple. And the steps preparatory to sale, to the extent they "occurred at places other than the land", did not have a character separate from the sale itself (at 307 [76]). The land not being leased or licensed, there was no occasion to consider any concurrent use of the land by a lessor.

31. *Wagga Wagga* not only does not say that use requires physical activity on the land. It rejects the primacy of any single criterion for identifying whether land is being used or occupied. The statement in the joint reasons at [69]-[70] bears emphasising. After warning against reading past decisions as propounding any "exhaustive definition" of use or occupation, affirming that use is a "protean word", and acknowledging that it is only "the most common cases where it can be said that there is use or occupation of the land" which involve "recurring physical acts, by which the land is made to serve some purpose" and "a combination of *legal* possession, conduct amounting to *actual* possession, and some degree of permanence or continuity", the Court stated the test in the way it did. The focus is the acts, facts, matters and circumstances measured against a normative conception of what "would" constitute use. Rigid rules are to be avoided.

32. Contrary to AS [41] and [54], the rejection in *Wagga Wagga* of the proposition that "exploitation, *by sale*, amounts to lawful use of the land" (at 307 [74]) does not support a conclusion that exploitation of land *by leasing* is also not a use. White JA correctly accepted that the sale and leasing of land are fundamentally different: J [99]; CAB 77. Sale involves "disposing of the asset and receiving the proceeds of sale", and is therefore aptly characterised as "exploitation of the land as an asset of the owner" rather than as a "use of the land itself".[18] From the moment the Crown resolves to sell the land and begins making preparations for its sale, it can be inferred that the Crown no longer has any use for it. The conveyance itself results in the Crown losing the fee simple and revokes any public purpose for the land: *Crown Lands Act*, s 104(2). It would be destructive of the ALR Act's central purpose of making surplus lands claimable if sale or preparation for sale could defeat a claim, because the very fact of the Crown seeking to alienate the land shows that it is surplus to requirements. The position with leases is different. The land maintains its public purpose and has continuing utility to the State. The Crown retains a reversionary interest not retained in the case of a sale, generates rental income that is applied for the State's purposes, and pursues a public purpose by putting into possession a tenant who can be expected to pursue that purpose.

33. These differences of kind, and not merely of degree, between exploitation by sale and

[18] *Wagga Wagga* at 307-308 [74], [76] (Hayne, Heydon, Crennan and Kiefel JJ); *Berrima Gaol* at 253 [21] (French CJ, Kiefel, Bell and Keane JJ).

exploitation by leasing answer the argument that *Wagga Wagga* "can be seen as logically extending to the exploitation of the land as an asset in order to obtain a rent from it": AS [56]. The appellants claim that "this Court said in *Wagga Wagga* at [74] that such exploitation did *not* constitute 'use' for the purposes of s 36(1)(b)": AS [54]. But the Court did not "doubt" that "there are uses of land which can be described as exploitation of the land" and that "[i]t may be accepted" that "lawfully used or occupied" "encompasses utilisation, *exploitation* and employment of the land" (at 306-307 [73], [74]).

34. Nor do the appellants derive assistance from Fullagar J's dissent in *Royal Newcastle Hospital*: AS [55].[19] The joint reasons in *Wagga Wagga* endorsed Fullagar J's comment that it is a "fallacy" to think that "deriving an advantage from the ownership of land is the same thing as using the land" in the context of responding to the argument there put that preparing land for sale is a "use" of the land (at 307 [75]). The Court was not saying that deriving an advantage from land can *never* be a use, as it simultaneously accepted that the ordinary meaning of use "encompasses … exploitation" and that "there are uses of land which can be described as exploitation of the land" (at 306-307 [73]-[74]). Deriving an advantage from the land by leasing it is one of them.

35. Turning next to *Berrima Gaol*, the Land Councils give too much work to do to the plurality's statement (at [34]) that use and occupation "require an examination of activities undertaken upon the land in question": AS [42]. To say that those concepts "require an examination" of physical activities is not the same as saying they "require" those activities. The plurality is not to be understood as saying that *only* "activities undertaken upon the land" are capable of constituting a use of land. It was making the point that "used" and "occupied" have a "commonly understood meaning in ordinary parlance" and that "activities undertaken upon the land", being within that ordinary meaning, will be relevant to whether land answers to those descriptions. Their Honours were not saying that identification of use requires "examination" of those activities *and no other*: J [108]-[109]; CAB 80. There was no need for the Court to go so far because *Berrima Gaol*—a case addressed to the "occupied" limb of s 36(1)(b)—did not raise for consideration activities not occurring on the land.

36. In sum, the true import of the decided cases is that any activities occurring on the land will always be *relevant* to whether land is "used". They do not support the more radical propositions that *only* those activities are relevant, or that activities occurring otherwise than on the land are *never* relevant. Statements in past cases that use refers to "physical use" or requires "an examination of activities undertaken upon the land" were made in contexts where the courts

[19] *Royal Newcastle Hospital* at 506 (Fullagar J).

were not grappling with concurrent uses by the Crown as a landlord, pursuing public purposes and collecting rent (a use not involving any "activities on the land"), and a tenant in possession.

37. The appellants' reliance on *Chief Commissioner of State Revenue v* ***Metricon*** *Qld Pty Ltd* (2017) 224 LGERA 236 is misplaced: AS [47]-[48], [57]. That case concerned the applicability of a tax exemption. Barrett AJA held that the phrase "land used for primary production" in s 10AA of the *Land Tax Management Act 1956* (NSW) referred only to "physical deployment of Isaacs J's 'concrete physical mass' in pursuance of a particular purpose", and thus that "activities undertaken upon the land in question" were "central to identification of 'use'" (at 251 [46], 255 [61]). But that reasoning cannot be applied to the ALR Act. As recorded in *Metricon*, whether land was "land used for primary production" depended, in turn, on whether the "dominant use" of the land was "for" one of the specific activities enumerated in paragraphs (a) to (f) of s 10AA(3) (at 252 [48]). It was "significant", Barrett AJA noted, "that each of the six activities listed in paras (a) to (f) involves *deliberate physical acts in relation to the land*" (at 253 [49]). Thus, the specific uses enumerated *in the statute itself* "point[ed] strongly" to physical use being the relevant use, in a way that s 36(1)(b) of the ALR Act, which does not specify any particular kinds of use, does not (at 254 [55]; see also J [48]; CAB 64). Barrett AJA recognised that "the authorities support the abstract notion that land may be 'used' without immediate physical activity" (at 253 [49]). His Honour ultimately concluded that a non-physical use of land such as leasing could not be a "use" of land "for primary production" because of the "difficulty" involved in comparing physical and non-physical uses of the same land to determine which is the "dominant use" (at 254 [54]). No such dilemma arises in the case of s 36(1)(b), which does not invite any comparison of competing uses.

38. ***Prior authority on non-physical use***: The notion that use requires "activities on the land" is incompatible with *Royal Newcastle Hospital*, which has come to stand for the proposition that "it is not necessary, to constitute a present use of land, that there should be a physical use of all of it, *or indeed of any of it*".[20] Vacant bushland adjoining Royal Newcastle Hospital was land that was "used" or "occupied" for the hospital's purposes, and thus exempt from rating legislation, because it served purposes including providing clean air and quiet surroundings for patients recovering from tuberculosis.[21] The Privy Council upheld the decision on the basis that the land was "used": *Newcastle City Council v Royal Newcastle Hospital*

[20] *Parramatta City Council* at 21 (Gibbs J) (emphasis added), explaining *Royal Newcastle Hospital*.

[21] *Royal Newcastle Hospital* at 505 (Williams J), 514-515 (Taylor J).

(1959) 100 CLR 1 (***Royal Newcastle Hospital* (PC)**). Denning LJ observed that in certain circumstances an owner uses land "even though he does nothing on it".[22]

39. The correctness of *Royal Newcastle Hospital* has not been doubted. In *Wagga Wagga*, the Court cited with approval the *ratio* in *Royal Newcastle Hospital* that use does not require activity on the land, and quoted without criticism Giles JA's observation in the decision below that "[t]here can be use without physical use".[23] And in *Nowra Brickworks (No 2)*, the Court of Appeal relied on *Royal Newcastle Hospital* to find that lands "being held for active mining in the future" were "used" within the meaning of s 36(1)(b) despite not being "immediately physically used".[24]

40. The Land Councils seek to side-step *Royal Newcastle Hospital* by heavily qualifying their proposed "activities upon the land" test. They accept that "[t]he need to focus on the land itself does not mean there must necessarily be human perambulation *or other activity occurring on the land*" and that it is permissible to consider how the "'concrete physical mass' … is being put to advantage or benefit": AS [43]-[44] (emphasis added). These concessions are fatal to the Land Councils' argument. That "use" does not "necessarily" mean there must be "activity occurring on the land" introduces a large exception that swallows the rule for which they contend. The concession is irreconcilable with the insistence in the balance of the Land Councils' submissions that "the focus remains upon what is or is not occurring on the land as a 'concrete physical mass'": AS [44]. To the extent use requires only that the "concrete physical mass" be "put to advantage or benefit", the Crown is doing just that by leasing the land for public purposes. After all, it is the exclusive right to possess the "concrete physical mass" that the Crown forgoes as consideration for the rent it receives. Parting with possession of the physical land mass in exchange for rent is in no sense an "intangible" use of land: cf AS [45]. It is a use of the land as land.

41. Contrary to AS [44], the significance of *Royal Newcastle Hospital* lies not in Williams J's attention to the land being held in its virgin state for natural therapeutic qualities. His Honour held that the vacant land adjoining the hospital was "occupied" rather than "used", a conclusion about which the Privy Council expressed "some doubt".[25] His Honour cited with approval ***Liverpool Corporation*** *v Chorley Union Assessment Committee and Withnell Overseers* [1912] 1 KB 270, which was based (in part) on a finding of occupation by a lessor

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[22] *Royal Newcastle Hospital* (PC) at 4 (Denning LJ).

[23] *Wagga Wagga* at 304 [63] (Hayne, Heydon, Crennan and Kiefel JJ), quoting *Wagga Wagga* (CA) at 32 [70] (Giles JA). See also *Berrima Gaol* at 268-269 [84]-[87] (Gageler J).

[24] At 643B-C (Handley JA), 649D-F (Sheller JA). See also *Nowra Brickworks (No 1)* at 121C (Sheller JA).

[25] *Royal Newcastle Hospital* (PC) at 4 (Denning LJ).

by leasing. The Court of Appeal had held that a municipal corporation was in rateable occupation of a "gathering ground" that it razed and left vacant to prevent polluted water flowing from the land into its adjacent waterworks. The corporation's only acts of occupation consisted of planting some trees, converting a portion of the land into nurseries, and the letting of "sporting rights" over the land to a lessee for a term of years. In a passage quoted by Williams J, Buckley LJ held that "*by the demise of the sporting rights* [the corporation] are *deriving profit* from the land being left free of population", and that this was one of "several ways" the land was "of value" to the corporation.[26] The House of Lords affirmed.[27]

42. The significance of *Royal Newcastle Hospital* lies instead in the reasons of Taylor J, who held that the vacant land was being "used", and it is those reasons that have gained general acceptance.[28] Nothing in Taylor J's reasoning privileges "what is or is not occurring on the land as a 'concrete physical mass'" or otherwise excludes use of land by leasing. To the contrary, Taylor J explained that "[t]he word 'used' is, of course, a word of *wide import* and its meaning in any particular case will depend to a great extent upon *the context in which it is employed*" (at 515). "The uses to which property of any description may be put", his Honour continued, "are *manifold* and what will constitute 'use' *will depend to a great extent upon the purpose* for which it has been acquired or created" (at 515). His Honour noted that while some of the forms of user in the rating legislation "no doubt[] contemplate a use which is synonymous with actual physical occupation and enjoyment", "[o]thers contemplate a use in a *less direct form*" (at 515).

43. Denning LJ reasoned similarly. To make good that "[a]n owner can use land by keeping it in its virgin state for his own special purposes", Denning LJ observed that "[a]n owner of a powder magazine or a rifle range uses the land he had acquired nearby for the purpose of ensuring safety even though he never sets foot on it" and "[t]he owner of an island uses it for the purposes of a bird sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds".[29] It is not at all obvious that Denning LJ would have drawn the line at a Crown landlord who benefits from the land by the receipt of rent and the expected pursuit by a tenant of public purposes.

44. ***Practical difficulties with the Land Councils' construction***: On the appellants' construction, the use and occupation of leased land depend entirely on *the tenant's* actual use and occupation. The Crown's title is at risk of claim whenever a delinquent (or merely absent)

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[26] *Liverpool Corporation* at 288-289 (Buckley LJ) (emphasis added), quoted in *Royal Newcastle Hospital* at 502 (Williams J).

[27] *Liverpool Corporation v Chorley Union Assessment Committee and Withnell Overseers* [1913] AC 197.

[28] *Parramatta City Council* at 22 (Gibbs J).

[29] *Royal Newcastle Hospital* (PC) at 4 (Denning LJ).

lessee ceases to occupy or conduct activities on the land. Unsatisfactory results of that kind should be avoided by adopting a reasonably open alternative construction.[30] It is unthinkable that the *Crown Lands Act* would have enabled the Minister to grant leases over reserved lands where the tenant could unilaterally act in a way that causes the Crown to lose the fee simple and defeats the public purposes being pursued. It is difficult to envisage how the grant of a lease in those circumstances could ever be "in the best interests of the State".[31]

45. It would not be a simple matter for the Crown to protect its interest by ejecting a tenant who has ceased to occupy or use the land. In the first place, the Crown may not even be aware that a tenant has imperilled its title by ceasing to occupy or conduct activities on the land. If it were aware, it might perceive the public interest to favour cajoling the tenant into action rather than ejecting them, but in the meantime the land could be claimed. Further, the lease terms may not entitle the Crown to eject the tenant for absenteeism or non-use. And even if they did, substantial time would be required for the Crown to do so and put the land back into use or occupation. The need to afford procedural fairness to the lessee and to have any forfeiture registered may occasion further delay. At any time before that process is complete, the lodgement of a claim would operate to defeat the Crown's title despite its manifest intention to retain ownership and maintain use of the land.

46. That is not the only difficulty thrown up by the appellants' construction. It now appears to be common ground that, if leased land were claimable under the ALR Act, a Land Council would receive the fee simple subject to any existing leasehold interest (cf the arguments below addressed at J [61]-[68]; CAB 66-68). The Act does not address which terms of the lease could benefit or burden the successor Land Council, even though terms appropriate to the Crown may be ill-suited in their application to a Land Council. More problematically, the ALR Act has to operate where only *part* of the land leased by the Crown's tenant is claimable by a Land Council (s 36(5)), but neither the ALR Act nor any other law specifies what is to occur in relation to the lease in that event: J [71]; CAB 69.[32] There is no provision for how the tenant's proprietary and contractual rights are to be transformed to accommodate the existence of different landlords in respect of different parts of the land, or how rent and outgoings are to be apportioned to reflect the division of the leasehold interest.

47. If the intention had been for leased land to be claimable, it is improbable that the legislature would have neglected to deal with matters apt to generate such uncertainty and to

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[30] *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at 217 [45] (French CJ, Kiefel, Bell and Keane JJ).

[31] Compare *Crown Lands Act*, ss 11(f), 34A(2)(c)(ii).

[32] See also *Conveyancing Act 1919* (NSW), ss 23F, 23G(k).

cause difficulties for the scheme's administration. It is equally improbable that the legislature would work such alteration of private property rights indirectly. A fundamental tenet of the ALR Act is that "third parties are not to be deprived of their interests and rights (including of user)".[33] It is still more improbable where the ALR Act addresses the effect of transfers under s 36 on easements, forestry rights and native title interests: s 36(9), (11), (12); J [63]; CAB 67. Had it been contemplated that leased land would be claimable, one might expect to find a similar provision clarifying that a lease survives a transfer, and not only in the transitional provisions: cf Sch 4, Pt 2, cl 8. The Act's silence on the effect of transfers on leasehold interests, much less what is to occur when a transfer will result in the bifurcation of a lease, betrays a legislative assumption that land the subject of a lease is not claimable because it is "lawfully used or occupied".

48. These difficulties were "not fully explored" below (AS [68] fn 43) because the Land Councils offered (and still offer) no answer to them. They have abandoned their argument below that the transfer of land to a Land Council extinguishes any lease: J [62]; CAB 67. The Land Councils now say that if "difficulties of this nature" had been "considered by the legislature to be of a scale that the Minister could never be satisfied that any land subject to a lease [could] be claimable Crown land, one would have expected to see such a conclusion spelt out expressly in the ALR Act": AS [68]. But it is much more likely that the legislature perceived no need to "spell out" a difficulty that was never expected to arise.

The definition of "land" in s 4(1)

49. The Court of Appeal's construction of "used" in s 36(1)(b) cohered with the definition of "land" in s 4 of the Act. That is not to say that the construction depended on that definition, as though it otherwise involved some departure from the ordinary meaning of "used": cf AS [82]. White JA drew on text, context, purpose, and prior judicial consideration of "use". For example, White JA noted that the lack of specification in s 36(1)(b) of particular uses or users contemplates that the same land might be put to different uses by different users: J [47]-[48]; CAB 64; see also J [71], [74]ff; CAB 69ff.

50. Nonetheless, the definition tells strongly against the Land Councils' narrow definition of "used". As "land" includes any estate or interest in land, the available conceptions of "use" are broader than those admitted by the appellants. The Land Councils, to succeed in the appeal, must show that s 36(1)(b) displaces the enacted definition by sufficiently manifesting a contrary intention. Their submissions to that end should not be accepted.

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[33] *Mogo Local Aboriginal Land Council v Eurobodalla Shire Council* (2002) 54 NSWLR 15 at 29 [57] (Giles JA; Hodgson JA and Rolfe AJA agreeing).

51. Contrary to AS [84], it is not "necessary to consider" Isaacs J's generic definition of land as the "concrete physical mass" "[b]efore consideration is given to the significance" of the definitional provision in its application to s 36(1). That is an impermissible approach to statutory construction, which must start with the text,[34] and which may not import *a priori* assumptions about meaning or purpose.[35]

52. AS [85]-[86] advances an argument that s 4(1) cannot possibly apply to s 36(1) so that the reference to "lands" in the latter provision extends to concurrent interests in the land, because s 36(9) provides that "[t]he claimed 'land' under s 36 will be … a claim for the estate in fee simple … in a piece of physical land" and "[t]he only question arising under s 36(1)(b), therefore, was whether the 'land', considered in *that sense*, was being 'used'". Subsection (9) relevantly provides that any transfer of land under s 36 "shall be for an estate in fee simple". The subsection is concerned with the amplitude of the title to be transferred under s 36. That matter has no necessary relationship to the question of whether the land was being "used or occupied" prior to transfer. In any event, the leasing of land, no less than the undertaking of activities on the land, *is* a "use of the fee simple".

53. AS [87] then asserts that s 36(1)(b) evinces an intention to displace the definition of land otherwise applied by s 4(1). That assertion simply assumes the conclusion that "use" has a meaning confined to activities on the land.

54. At AS [88]-[89], the Land Councils suggest that s 4(1), in its application to s 36(1), merely resolves "any doubt" that the "lands vested in Her Majesty" to which s 36 refers are "eligible to be claimed" regardless of how the Crown's interest in the land is characterised. But the definition can play that role while also applying so that use of any estate or interest informs whether lands are "used" under s 36(1)(b).

55. AS [90]-[92] argues that, because it is nonsensical to speak of an "estate or interest" being "occupied", the definition of land "does not apply in s 36(1) at all". That does not follow, and ignores that "use" and "occupation" "refer to different concepts".[36] Section 4(1) provides that definitions in the ALR Act are disapplied "so far as the context or subject-matter … indicates or requires". The definition of land is thus given an ambulatory operation and its precise application to the concept of "occupied" has no necessary bearing on its application to the "different concept" of "used".

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[34] See *Wagga Wagga* at 305 [68] (Hayne, Heydon, Crennan and Kiefel JJ).

[35] *Deal v Kodakkathanath* (2016) 258 CLR 281 at 294-295 [37] (French CJ, Kiefel, Bell and Nettle JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26] (French CJ and Hayne J).

[36] *Berrima Gaol* at 250-251 [14] (French CJ, Kiefel, Bell and Keane JJ).

56. AS [93] challenges White JA's reliance on the legislative note to the definition of "deal with land" in s 40. White JA referred to the note, albeit unnecessarily, only to confirm that the definition of "land" in s 4(1) presumptively applies "in this Act": J [117]; CAB 82.

Response to the Land Councils' remaining arguments

57. AS [58] asserts that White JA implicitly found "that the mere existence of a lease, without any qualitative assessment of th[e] nature and operation of that lease in its particular context, will satisfy the definition of 'use'". But White JA did examine the terms of the Lease, by identifying that the Lease required Paddington Bowling Club Ltd (and later CSKS) to pay substantial rent to the Crown and entitled the lessee to occupy the premises for "purposes [that] broadly coincided with the purposes for which the land had been reserved": J [3], [5], [19]; CAB 50, 55. It was not necessary for the Court of Appeal to analyse the Lease terms in more granular detail. Even now, the Land Councils cannot identify any feature of the Lease that might have deprived it of the quality of a use. The Court need not decide whether the "29 different types of leases or licen[c]es" referred to at AS [58] are forms of use. There is no dispute that *this Lease* required payment of rent in exchange for the Crown parting with exclusive possession.[37]

58. There is no incongruity in treating a lease as a "disqualifying condition" for land claims: AS [60]-[62]. There is nothing unusual in the Act providing on the one hand that lands "able to be" leased are claimable (s 36(1)(a)), and on the other that lands *actually* leased are not (s 36(1)(b)). The same is true of lands "able to be" sold that are not claimable once they are *actually* sold. As long as the other conditions in s 36(1) are met, Crown land remains claimable unless and until it is leased. It is then that it begins to be "used".

59. The Land Councils' argument at AS [63]-[67], based on the transitional provision in cl 8 of Pt 2 of Sch 4 to the ALR Act, was correctly rejected. The substantive effect of the provision supports White JA's construction of "used" in s 36(1)(b) because it prevents leased land from becoming "claimable Crown land" until the lease ends: J [57]; CAB 66. Clause 8 was evidently "included for abundant caution" in relation to vested rights under a "lease, licence or permissive occupancy": J [54]-[57]; CAB 65-66. Surplusage of this kind in a transitional provision is not uncommon.[38] In any event, the transitional provision is not entirely superfluous. The provision employs a "composite expression" that "bespeaks the range of tenure under the *Crown Lands Consolidation Act 1913*".[39] In this way, it insulates from claim not only land that

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[37] The suggestion at AS [67] that White JA's reasoning "may be equally applicable to mining leases and exploration permits" is incorrect because such tenures generally lack that feature (see above at [24]).

[38] *WA Planning Commission v Southregal Pty Ltd* (2017) 259 CLR 106 at 123 [55] (Kiefel and Bell JJ).

[39] *Nowra Brickworks (No 1)* at 118B-C (Sheller JA).

is leased, but also land subject to lesser interests such as gratuitous licences and permissive occupancies: J [56]; CAB 65-66. Contrary to AS [67], White JA's reasons do not entail that these lesser interests are necessarily a "use". These interests lack as a necessary element the Crown parting with exclusive possession (which forgoes the right to undertake activities on the land) as well as the exploitation of land for profit: J [56]; CAB 65-66.[40] More generally, for the reasons already given, there is "good reason" for tolerating a construction productive of only limited surplusage not extending beyond a transitional provision.[41] It would be a curious result if the consideration that a particular construction would render a transitional provision only *partially* superfluous could dictate the meaning of "used" in the Act's operative part.

10 **60.** The appellants contend that White JA erred by "assuming" that the Crown's purpose in granting the Lease was to derive income and complain that there was "no evidence" of the Minister's purpose: AS [75]-[81]. No inquiry into the Minister's state of mind was required. There was no error in White JA inferring the deriving of rent to be *a* purpose of the Minister's grant of a lease under s 34A of the *Crown Lands Act*, in circumstances where there is no dispute that the Crown *was* receiving substantial rent under the Lease: J [3], [19]; CAB 50, 55. Nor did White JA err by inferring that the Crown was pursuing public purposes by granting the Lease, in circumstances where s 34A(2)(c)(i) conditions the Minister's power to grant a lease on the Minister's satisfaction that it is in the public interest to do so and the Lease itself restricted the lessee's use to purposes aligned with those for which the land was reserved: J [5]; CAB 51. It
20 cannot be presumed that the Minister would have acted contrary to law or that the Minister was ignorant of the Lease terms.

PART VI: ORAL ARGUMENT

61. The first respondent estimates 2 hours for its oral argument.

Dated: 21 November 2024

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[40] See, eg, *Crown Lands Act*, ss 45, 47 (Minister may grant licences "authoris[ing] the use or occupation of Crown land for such purposes as the Minister thinks fit"); *Crown Lands Consolidation Act 1913* (NSW), s 136K, as inserted by the *Crown Lands (Permissive Occupancies) Amendment Act 1958* (NSW) (Minister may grant permissive occupancies "for such purposes and upon such terms and conditions as to him may seem fit").

[41] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 12-13 (Mason CJ).

ANNEXURE TO SUBMISSIONS OF FIRST RESPONDENT

Pursuant to *Practice Direction No 1 of 2019*, the first respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provisions
1.	*Aboriginal Land Rights Act 1983* (NSW)	As at 19 December 2016 (Reprinted as at 25 October 2016)	ss 36(1), (5), (9), (11), (12), 40, cl 8 of Pt 2 of Sch 4
2.	*Conveyancing Act 1919* (NSW)	As at 19 December 2016 (Reprinted as at 30 November 2016)	ss 23F, 23G(k)
3.	*Crown Lands Act 1989* (NSW)	As at 1 December 2010 (Reprinted as at 9 July 2010)	ss 4, 10(d), 11(f), 34A, 42, 87, 104(2)
4.	*Crown Lands (Permissive Occupancies) Amendment Act 1958* (NSW)	As made	s 2 (inserting s 136K into the *Crown Lands Consolidation Act 1913*)
5.	*Land Tax Management Act 1956* (NSW)	Current	s 10AA(2), (3)
6.	*Mining Regulations 1907* (NSW)	As made	Sch 43A