HIGH COURT OF AUSTRALIA

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Important Information

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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

SECOND RESPONDENT'S SUBMISSIONS

Part I Certification

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

Part II Issues

2. This proceeding concerns a narrow point of statutory construction, being whether land is being "used" for the purposes of s 36(1)(b) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**), such that (assuming the use is lawful) the land is not "claimable Crown land", in circumstances where, at the time of the claim:

    a. the land the subject of the claim has been reserved for a public purpose;

    b. the land has been leased to a tenant for value under s 34A of the *Crown Lands Act 1989* (NSW) (**Crown Lands Act)**; and

    c. the tenant is not taking active steps on the land to apply it to any purpose, but continues to pay substantial rent to the Crown.

Part III Section 78B certification

3. The second respondent (the **Minister**) does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV Facts

4. The Minister adopts the facts recited at [6]-[23] of the appellants' submissions (**AS**) and at [5] of the first respondent's submissions (**QS**).

Part V Summary of argument

5. In the Court below, the Minister adopted an approach consistent with *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 14 at 35-36. The Minister did not contend for any particular outcome on the appeal, but did make submissions on the proper construction of the word "use" in s 36(1)(b) to the effect that the Crown does not "use" land by the mere fact of leasing it.

6. On this appeal, again the Minister does not contend for any particular outcome. The Minister also does not challenge the Court of Appeal's conclusion that the Crown was "using" the land for the purposes of s 36(1)(b) in circumstances where it was leasing Land to CSKS Holdings Pty Ltd (**CSKS**) in return for income and to pursue the reserved purpose of the Land: cf CAB 62-83 [41]-[123]. The Minister makes no submission on whether the Land was "used" or not at the date of the claim, but aims to assist the Court by highlighting three matters of statutory context and purpose which may bear upon the question whether the Crown was "using" the land for the purposes of s 36(1)(b).

Leasing and "use" of the land

7. The first respondent submits that the "acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being 'not lawfully used'", and which are to be "measure[d] … against an understanding of what would constitute use" of the land,[1] include the provisions of the Crown Lands Act which governed the Lease: QS [16]. The Minister makes the following three points.

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[1] *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2008) 237 CLR 285 (***Wagga Wagga***) at [69] (Hayne, Heydon, Crennan and Kiefel JJ), affirmed in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 (***Berrima Gaol***) at [20], [22] (French CJ, Kiefel, Bell and Keane JJ), [79] (Gageler J), [183] (Nettle and Gordon JJ).

8. *First*, the Crown Lands Act, and the current cognate provisions under the *Crown Land Management Act 2016* (NSW) (**CLM Act**),[2] each reflect a clear legislative intention to enable the Crown to achieve the public purposes for which land may be dedicated or reserved by leasing that land to third parties: cf QS [18]-[19].

9. The power to reserve from alienation lands which were or were likely to be required for public needs has a long history in NSW.[3] So, too, does the power to lease reserved lands to private tenants for certain purposes.[4]

10. In this case, as in every case involving reserved land, the Minister was prohibited from dealing with the Land, including by leasing it, otherwise than in accordance with the Crown Lands Act: s 6.

11. The Land was subject to a reservation under s 87 of the Crown Lands Act for "Community and sporting club facilities and tourist facilities and services": CAB 50 [2]. The Court of Appeal held that the Lease, which had been transferred from Paddington Bowling Club Ltd to CSKS prior to the claim, was granted for purposes which "broadly coincided" with the reserve purposes, being "Community and Sporting Club Facilities, Tourist Facilities and Services, Access",[5] and was granted on terms which prohibited the use of the Land for any other purpose:[6] CAB 51 [5].

12. The Minister's power to enter into the Lease was conferred, and constrained, by s 34A of the Crown Lands Act. The Minister was empowered to grant a lease over the Land "for the purposes of any facility or infrastructure or for any other purpose the Minister [thought] fit": s 34A(1).[7] However, the Minister could not validly grant the lease unless satisfied that it was in the public interest to do so, and unless the Minister had given due regard to the principles of Crown land management in s 11: s 34A(2)(c). Those principles included, relevantly, that public use and enjoyment of appropriate Crown land be encouraged (s 11(c)); that, where appropriate, Crown land be used and managed in such a way that both the land and its resources are sustained in perpetuity (s 11(e)); and that Crown land relevantly be leased in the best interests of the State: s 11(f).

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2 See, in particular, Div 2.5 of Pt 2; see also ss 3.22, 3.26, 3.27, which confer powers to lease certain Crown lands upon Council land managers.

3 See, eg, *Randwick Corporation v Rutledge* (1959) 102 CLR 54 (***Rutledge***) at 71ff (Windeyer J).

4 See, eg, *Rutledge* (1959) 102 CLR 54 at 73, 80 (Windeyer J). There, his Honour cited the *Trustees of Public Reserves Enabling Act 1924* (NSW), *Trustees of Show Grounds Enabling Act 1909* (NSW) and *Trustees of Schools of Arts Enabling Act 1902* (NSW) as early examples.

5 See Appellants' Book of Further Materials (**ABFM**) at 510 (clause 31(a)), 523 (item 36, column 2).

6 ABFM 510 (clause 31(b)), 523 (item 36, column 2).

7 References are to the Crown Lands Act as at the date the Lease was granted, namely 1 December 2010.

13. Once the Lease had been granted, the proceeds were to be "applied as directed by the Minister": s 34A(4). That could include, without limitation, a direction that the proceeds be paid into the Consolidated Fund or to the Public Reserves Management Fund: s 34A(5)(a).

14. *Secondly*, the framework just outlined reflects the reality that the public purposes for which land may be reserved may legitimately (and, in some circumstances, more appropriately) be fulfilled by private tenants.[8] As Pain J recently observed in the context of the "essential public purpose" provision in s 36(1)(c) of the ALR Act, adopting a submission by the Minister:[9]

> That the NSW and Commonwealth governments chose to pursue the essential public purpose [of supported employment for persons with a disability] partly by encouraging, subsidising and regulating private providers such as charitable institutions … does not mean the purpose is not fundamentally a public one …
>
> Governments are increasingly contracting out the provision of many traditional governmental services. In circumstances where an organisation … is carrying out an essential service of supported employment for disabled persons, the fact that they are a private organisation in the sense of being a non-governmental organisation does not mean the relevant purpose is not public. Services such as drainage and sewerage works demonstrate this point.

15. That practical reality is reflected in the conclusion that the operation of a cemetery is an essential public purpose within the meaning of s 36(1)(c) notwithstanding its delivery by

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[8] See, eg, *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)* (2012) 84 NSWLR 219 at [30] (Basten JA, Beazley and McColl JJA agreeing at [1] and [2] respectively). See also *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 653 (Stephen J): it was "scarcely conceivable" that University servants would themselves deliver the banking, travel agent and retail services which were to be provided on the site.

[9] *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act* [2022] NSWLEC 68 at [126], [129], [194]. That decision was overturned on appeal ((2022) 110 NSWLR 535), but the Court of Appeal did not comment adversely on those remarks. To similar effect in the context of a local council as trustee of reserved land, see *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2006] NSWLEC 180 at [123] (Pain J): "It is a core role of councils to achieve balanced urban development, whereby goods and services and facilities are available to, and appropriately matched with, the current and future needs of the community and the wider public, as well as with the management and improvement and development of the resources. That the provision of such services and facilities requires the participation of private developers, doctors, pharmacists and retailers does not lessen the public nature of the Council's purpose or the Council's proper interest and involvement in bringing that result about".

a private provider,[10] and that a trigonometrical station that runs both public and private survey operations is also an essential public purpose.[11]

16. Of course, the authorities just cited do not concern whether the mere existence of a lease between the Crown and a private entity is sufficient to demonstrate an "essential public purpose". Instead, they support the proposition that the actual delivery of services or activities directed to that purpose will not deprive the purpose of its "public" character notwithstanding that delivery was undertaken by private entities. However, those authorities also demonstrate that the Crown Lands Act, and now the CLM Act, accommodate the possibility that the Crown may validly effectuate public purposes by engaging or leasing to private sector tenants which, at the time of the grant or engagement, may be expected to fulfil those purposes.

17. *Thirdly*, the possibility that private sector tenants may be best placed to deliver public purposes of reserved lands is also reflected in the extrinsic materials for the *Crown Lands Legislation Amendment Act 2005* (NSW), which inserted s 34A into the Crown Lands Act.[12] The Explanatory Note stated that the objects of the Bill which became that Act included to "provide greater flexibility and accountability in relation to the management of Crown reserves" and to "extend the Minister's existing power to grant licences in respect of Crown reserves so that the Minister will be able to grant leases, permits, easements and rights-of-way over Crown reserves".[13] Further, the Second Reading Speech recognised that Crown land, being a "valuable public asset", must be "managed wisely for the benefit of all", which was intended to be achieved through "providing greater flexibility in the day-to-day management of Crown land" in order to respond to "modern commercial skills and imperatives" affecting, at that time, some 30,000 reserves across the State.[14]

18. The features of the Crown Lands Act outlined above demonstrate that the statutory framework under which the Minister granted the Lease contemplates that it may be an integral step in the achievement of public purposes for which land is reserved that the land be leased to private sector tenants. That forms part of the "acts, facts, matters and

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[10] *Deerubbin Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1997) 95 LGERA 353 at 360-361 (Lloyd J).

[11] *Wanaruah Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2001) 113 LGERA 163 at [83] (Lloyd J).

[12] See Sch 1, cl 5.

[13] Explanatory Note, Crown Lands Legislation Amendment Bill 2005 (NSW) at 1, paras (a) and (d).

[14] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 May 2005 at 16117-16118.

circumstances" which inform whether the Land was in "use" for the purposes of s 36(1)(b) of the ALR Act at the date of the claim.

Consequences for the Crown as lessor

19. The second aspect of the Minister's submissions concerns the practical consequences of the appellants' construction for the Crown as lessor.

20. As the first respondent submits, the construction of s 36(1)(b) adopted by the appellants would require that *only* a tenant's actual use and occupation of land is relevant to the inquiry under s 36(1)(b): QS [44]-[45]. Accordingly, on that construction, whether or not land is claimable under the ALR Act may, in some circumstances, turn on the delinquency or absence of the lessee.

21. The practical result is that the protection of the Crown's fee simple would require it, as lessor, to engage in frequent monitoring of the nature and degree of tenants' use and to conduct a qualitative and fact-dependent assessment as to whether their use of the land in carrying out the relevant public purpose is to more than a "notional degree".[15] That monitoring must be sufficiently frequent as to ensure that a tenant's use is more than sporadic or "token"[16] and, if it is not, to enable the timely exercise of powers available to the Crown under the lease (if any) to rectify the tenant's delinquency.

22. Determining whether a lessee is engaging in more than notional "use" is a difficult exercise, even for courts to undertake,[17] and this Court has been careful not to attempt an "exhaustive definition of when land is not lawfully used or occupied".[18]

23. In addition to the complexity of that assessment, there is then the question of how the Crown must go about that task in respect of all the Crown leases across NSW. Crown leases do not necessarily include provisions which effectively prohibit a tenant from inactivity on the land (as opposed to prohibiting the tenant from acting for purposes outside the permitted purpose under the lease, as was the case here).

24. Even assuming the Crown had the right to eject a tenant for inactivity, and sought to do so, a claim could be made under the ALR Act before the completion of often lengthy

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[15] Cf *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 164D (Priestley JA); *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106 at 108 (Priestley JA), 119, 121 (Sheller JA, Clarke JA agreeing); *Wagga Wagga* (2008) 237 CLR 285 at [62] (Hayne, Heydon, Crennan and Kiefel JJ).

[16] See, eg, *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379 (***Bathurst***) at [161] (Tobias JA).

[17] See, eg, *Bathurst* (2009) 166 LGERA 379 at [158] (Tobias JA).

[18] *Wagga Wagga* (2008) 237 CLR 285 at [69] (Hayne, Heydon, Crennan and Kiefel JJ).

processes of affording procedural fairness[19] and finding a replacement tenant, and that new tenant being able to take steps to effectuate the permitted public purposes of the land. These practical considerations raise questions of impracticability, rather than impossibility, but are nevertheless relevant to the task of statutory construction.[20]

25. This Court's construction of "use" in s 36(1)(b) in this case will also likely affect the operation of other mechanisms for the leasing of reserved lands, namely the framework for leasing of reserved lands controlled by Crown land managers under the CLM Act.

26. Under that Act, the Minister may, by written instrument, appoint certain qualified persons as Crown land managers for specified dedicated or reserved Crown land: s 3.3(1). Crown land managers are responsible for the care, control and management of Crown land for the purposes referred to in s 2.12[21] which apply to the land (s 3.13(1)(a)), and exercise any other functions conferred upon them by the CLM Act (s 3.13(1)(b)) in accordance with their instrument of appointment, any applicable allocation of responsibility made by the Minister, and applicable Crown land management rules and plans of management: s 3.13(2). Depending on the person or body appointed as Crown land manager, a manager is empowered to lease the land, although in many circumstances the power to do so is subject to Ministerial consent.[22]

27. The Minister retains additional forms of control over Crown land managers and the reserved land which they manage. In particular, the Minister is empowered to make Crown land management rules which apply to Crown land managers (s 3.15), and retains his own powers with respect to the land notwithstanding the appointment of a Crown land manager: s 5.3(4). Further, the proceeds of managed Crown land must be applied only for the permitted purposes in s 3.16(3), which include making improvements to the land; purchasing, leasing or acquiring an easement over the land; and the purposes in s 2.12 which apply to the land.

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[19] See, for example, the notice period required prior to forfeiture under cl 42 of the Lease: ABFM 511-512.

[20] *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [100] (Nettle J), see also [45] (French CJ, Kiefel, Bell and Keane JJ); and *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [48] (French CJ, Hayne, Crennan and Kiefel JJ).

[21] Being the purposes for which the land is dedicated or reserved, any purpose incidental or ancillary to those purposes, and any other purposes authorised by the CLM Act or another Act (which includes a purpose specified in a plan of management for the land: see s 3.38).

[22] See CLM Act, s 3.26 (with respect to "category 1 non-council managers") and s 3.27 (with respect to "category 2 non-council managers"). Local Councils appointed as Crown land managers are required to manage the land as if it were community land under the *Local Government Act 1993* (NSW): CLM Act, s 3.22(1)(a).

28. The framework for the management of reserved land by Crown land managers, which replaced the scheme for reserve trusts under the Crown Lands Act,[23] was introduced to assist in managing over 580,000 individual Crown land parcels, covering 33 million hectares.[24] It implicitly recognises that Crown land managers, as a matter of practical reality, provide capacity in addition to the Crown itself which is integral to the proper management of reserved lands.

29. If the appellants' construction of "use" in s 36(1)(b) of the ALR Act produces the result that a tenant's delinquency may lead to the land being claimable, then it may have the same effect in respect of any delinquency of a Crown land manager in ensuring that a tenant continues actively to use reserved land to a sufficient degree.

30. While the Minister's powers over Crown land managers and reserved lands placed under their control outlined above provide a mechanism for oversight by the Crown, the practical considerations noted at [21]-[23] above would create an additional burden for the Minister in overseeing the conduct of both tenants and Crown land managers.

Consequences for lessees and investors

31. The *third* matter concerns the practical consequences for lessees and investors, which may affect the delivery of the public purposes for which land is reserved.

32. In order successfully to deliver services and activities which fulfil the relevant public purpose of the reservation, private tenants may wish to engage in significant and lengthy development or structural work. This case provides an example: CAB 52 [11], 53-55 [18]. That work may be preceded by an extensive planning and preparation phase, including work to obtain the necessary development consents.

33. During that phase, it makes little economic sense for the tenant to be required to invest in the previous use of the land or establish an interim use of the land, with the result that there may be no substantial activity on the land for a lengthy period (as was the case here). A construction which focuses solely on the tenant's activity on the land may discourage a tenant from deferring any use of the land while it engages in offsite preparatory work for the risk of the land falling out of "use" within the meaning of s 36(1)(b). That may, in turn, discourage investment in the redevelopment of Crown land even where that development is designed to better pursue the reserved purpose and the public interest.

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[23] See, eg, Explanatory Note, Crown Land Management Bill 2016 (NSW) at 2; see also the transitional provisions relating to reserve trusts in Sch 7 to the CLM Act, including s 7.

[24] New South Wales, *Parliamentary Debates*, Legislative Council, 19 October 2016 at 61.

That risk is a real one, given the authorities establish that the lodging of a development application will not evidence occupation in fact for the purposes of the other limb of s 36(1)(b).[25] Nor, in some circumstances, will even significant expenditure of money on remedial or emergency works constitute lawful use or occupation.[26]

Orders sought

34. Given the limited role taken by the Minister in this Court, regardless of the result the Minister does not seek his costs of this appeal and no costs order should be made against him. However, if the appeal is allowed, with the result that the first respondent's appeal to the Court of Appeal is dismissed, then the first respondent should pay the Minister's costs in that court having regard to the more active role the Minister took below.

Part VI Oral argument

35. The second respondent estimates 20 minutes for its oral argument.

Dated: 2 December 2024

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[25] See, eg, *Tweed Byron, New South Wales Aboriginal Land Council (on behalf of Dubbo GA Local Aboriginal Land Council) v Minister* [1997] NSWLEC 157 (Lloyd J); *Bathurst Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 82 at [82] (Pain J).

[26] See, eg, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Newcastle Post Office Claim)* (2014) 204 LGERA 1 at [177]-[178] (Pepper J).

ANNEXURE TO THE SECOND RESPONDENT'S SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2019*, the Minister 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)	s 36
2.	*Crown Lands Act 1989* (NSW)	As at 1 December 2010 (reprinted as at 9 July 2010)	ss 6, 11, 34A, 87
3.	*Crown Lands Legislation Amendment Act 2005* (NSW)	As made	Sch 1, cl 5
4.	*Crown Lands Management Act 2016* (NSW)	Current	Div 2.5 of Pt 2, ss 2.12, 3.3, 3.15, 3.16, 3.22, 3.26, 3.27, 3.38, 5.3, Sch 7
5.	*Local Government Act 1993* (NSW)	Current	N/A
6.	*Trustees of Public Reserves Enabling Act 1924* (NSW)	As made	N/A
7.	*Trustees of Schools of Arts Enabling Act 1902* (NSW)	As made	N/A
8.	*Trustees of Show Grounds Enabling Act 1909* (NSW)	As made	N/A