HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2

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

QUARRY STREET PTY LTD ACN 616184117

First Respondent

MINISTER ADMINISTERING THE CROWN LAND MANAGEMENT ACT 2016

Second Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication

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

Part II: Propositions to be advanced in oral argument

The nature of the proceedings

2. The proceedings are in the form of a judicial review of a decision by the Minister to grant a land claim pursuant to s 36(5) of the ALR Act on the basis, *inter alia*, that the land was not being "used" for the purposes of s 36(1)(b) (**AS, [21]-[23]**).

3. At first instance, the primary judge rejected an argument by Quarry St that the Minister had failed to consider the fact of leasing as constituting a "use" of the land for the purposes of s 36(1)(b) (**AS, [2]**). Quarry St did not challenge that finding in the Court of Appeal.

4. The question that arises in the present appeal is whether the Court of Appeal was correct to conclude that, despite this, it was not reasonably open to the Minister to decide that the land was not being "used" for the purposes of s 36(1)(b) (**AR [4]**).

5. The question is not whether only physical uses of the land are "capable" of constituting use,

but rather the inverse, i.e. is the mere leasing of land necessarily *sufficient* (in and of itself) always to constitute "use" (**AR, [4]**).

6. Because of the nature of the proceedings, it was not the function of the Court of Appeal to draw inferences as to the "use" of the land. Rather, the correct question is whether it was reasonably open to the Minister to conclude, as he did, that the land was not being "used" despite the fact of the Lease (**AR, [4]**).

The correct approach to the "use" of "land" in s 36(1)(b) of the ALR Act

7. The Court of Appeal was wrong to treat the mere existence of the Lease as a "use" defeating the claimable character of the land pursuant to s 36 of the ALR Act.

10 8. In assessing the meaning of the word "land" in s 36 of the ALR Act, primacy is to be given to the terms and effect of that section, which is to mandate, where the land claim is made out, the transfer of the estate in fee simple in the land (**AS, [86**]). The matters included in the definition of "land" by s 4(1) of the ALR Act do not direct the factual inquiry away from an examination of activities undertaken upon the land (**AS, [84]-[89]**).

9. It is common ground between the parties that activities occurring on the land will always be relevant to whether land is "used" (**FRS, [36]**; **AR, [5]**): *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2008) 237 CLR 285 at [62], [69], [76]; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 (***Berrima Goal***) at [17]-[18], [21], [23], [34] (**JBA Vol 3, Tabs 10**
20 **and 13**).

10. In relation to the concept of "occupation" in s 36(1)(b), the "land" that is the subject of the relevant inquiry is the physical land (**AS, [90]**). Although "occupation" and "use" are different concepts (**AS, [35]**), the definition of "land" relevant to each concept is the same (**AS, [90]**).

11. The question of "use" is assessed at the date of claim, not at the date that the Lease was granted or any other date (**AR, [8]**).

The Minister's decision as to the "use" of the land in the present case

12. It is common ground that, as at the date of the claim, the tenant was not using the land and it was unattended and in a state of disrepair (**AS, [11]-[12]**).

13. The Minister's power to grant a lease in s 34A of the Crown Lands Act does not demonstrate

that the mere grant of the Lease had the result that it was not reasonably open to the Minister to conclude that the land was not being "used" for the purposes of s 36(1)(b) of the ALR Act (**AS, [77]**).

14. The Minister's authority to grant a lease pursuant to s 34A of the Crown Lands Act extended to a lease for "any purpose" he thought fit (including private purposes), provided it was in the "public interest" to grant the lease (**AR, [7]**). There was no evidence before the Minister in making the decision under challenge, or the primary judge, as to the Minister's purposes in granting the Lease (**AS, [77]**).

15. The Minister was not entitled to exercise the powers in s 34A of the Crown Lands Act without carrying out an assessment of the land pursuant to s 35(1) or making a determination that such an assessment was not required pursuant to s 35(2) (**AR, [7]**). No such assessment or determination was before the Minister in granting the claim or in evidence in the proceedings. As a result, there could not be (and was not) any finding in the proceedings as to whether the Minister had formed a view about any of those matters in granting the claim **(AR, [7]**).

16. The Court of Appeal's resort to the purposes *permitted* by the terms of the Lease – as opposed to the activities *required* by the Lease – was wrong (**AR, [7]**). In any event, it was common ground that the land was not being used for the purposes permitted by the Lease (**AR, [7]**).

17. On the approach of the respondents, land will be rendered non-claimable merely because a lease has been granted by the Crown in respect of the land, even where nothing is being done on the land pursuant to the lease, including as a result of the default or delinquency of the Crown. This is inconsistent with the intent and purpose of the ALR Act (**AR, [11]**).

18. The transitional provisions of the ALR Act (cl 8 of Sch 4) are inconsistent with the proposition that the mere leasing of land is sufficient to constitute "use", regardless of any other matter (**AS, [63]**).

Dated: 12 March 2025

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