HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S121/2024

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

SUBMISSIONS OF THE APPELLANTS

I. CERTIFICATION

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

II: CONCISE STATEMENT OF ISSUES

2. The appeal raises the following issues:

   a. Is the concept of land being "used" in s 36(1)(b) of the *Aboriginal Land Rights Act 1983* (NSW) (the **ALR Act**) concerned with activity (or inactivity) on the physical land, or with how the owner of the land has exploited its ownership interest in the land?

   b. Is the leasing of land by the Crown a "use" of the land for the purposes of s 36(1)(b) of the ALR Act?

   c. Does the definition of "land" in s 4(1) of the ALR apply to s 36(1)(b) of the ALR Act and, if so, how does it apply?

III: SECTION 78B NOTICES

3. No issue arises under the *Constitution* requiring notice to be given under s 78B of the *Judiciary Act 1903* (Cth).

IV: DECISIONS OF THE COURT BELOW

4. The decision of the Land and Environment Court of New South Wales is *Quarry Street*

Ptd Ltd v Minister Administering the Crown Land Management Act 2016 [2023] NSWLEC 62 (Preston CJ in LEC) (**PJ**).[1]

5. The decision of the Court of Appeal of New South Wales is *Quarry Street Ptd Ltd v Minister Administering the Crown Land Management Act 2016* [2024] NSWCA 107 (White JA, Adamson JA and Stern JA) (**J**).[2]

V: FACTS

6. The present appeal concerns a land claim in respect of Lot 5 of DP 1156846 in the State of New South Wales, described as the "Paddington Bowling Club".[3] The land formerly comprised a clubhouse, bowling greens, and tennis courts: J[2]. The registered proprietor of the site is the State of New South Wales: J[2].[4]

7. On 11 December 2009, the site was subject to a Reservation of Crown Land pursuant to s 87 of the *Crown Lands Act 1989* (NSW) (**Crown Lands Act**), for the purpose of "Community and sporting club facilities and tourist facilities and services": J[2].[5]

8. Between 19 May 1962 and 1 December 2010, the site was the subject of a lease granted to Paddington Bowling Club Ltd: J[3]. A new lease was entered into between the State of New South Wales (acting through the Minister for Lands) and the Paddington Bowling Club Ltd (then subject to a Deed of Company Arrangement) from 1 December 2010 for a term of 50 years (the **Lease**): J[3].[6] In entering into the lease, the Minister was exercising his power under s 34A of the Crown Lands Act.

9. The Lease contained the following relevant terms:

   a. Pursuant to Item 6 of Schedule 1, the initial rent was $52,000.00 per annum and was subject to annual CPI adjustments and three yearly reviews to market pursuant to clause 24.[7]

   b. By Item 36 of Schedule 1 and clause 31 of the Lease, the lessee was given the right to occupy and use the premises for the purpose of "Community and Sporting Club

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1 CAB 15.
2 CAB 43.
3 ABFM 9.
4 ABFM 53.
5 ABFM 69.
6 ABFM 500-528.
7 ABFM 523.

Facilities, Tourist Facilities and Services, Access". The lessee was not required to use the site for those purposes, but the lessee was prohibited from using the site for any other purpose.[8]

c. Clause 39 of the Lease provided that no assignment, sublease, mortgage or other dealing with the Lease was permitted except with consent of the Lessor.[9]

10. On 30 December 2011, the Lease was transferred from Paddington Bowling Club Ltd to CSKS Holdings Pty Ltd (**CSKS**).[10]

11. By 15 October 2015, the Paddington Bowling Club was described as a "forgotten wasteland" that was "overgrown and neglected", with "[d]ecaying furniture and broken umbrellas" and "abandoned bowling greens, which are overrun with weeds".[11] Mr Sanchez, the sole director and company secretary of CSKS, stated that "the greens aren't being maintained because they're not in use".[12]

12. As White JA found at J[9]:

> "Except for tennis courts at the northern end of the site, CSKS did not use the site for the permitted purposes. The bowling greens were unattended. The clubhouse fell into disrepair".

13. The use of the tennis courts at the northern end of the land was found at first instance to be unlawful, a finding that was not challenged in the Court of Appeal (J[30], [33]). That use can therefore be put to one side for the purpose of this appeal.

14. An inspection report commissioned by Crown Lands dated 16 October 2015 continued to "show the club house and grounds to be in poor condition with little to no maintenance": quoted at J[18].[13]

15. On 10 April 2016, an officer of the Department of Land and Natural Resources required CSKS to remedy asserted breaches of the Lease in relation to the state of repair of the clubhouse and grounds at the site, and foreshadowed the potential forfeiture of the

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8 ABFM 523.

9 ABFM 511.

10 Letter from Matthews Solicitors dated 7 March 2019, ABFM 215; Statutory Declaration of Christian Michael Sanchez dated 19 April 2018, ABFM 352.

11 ABFM 639.

12 ABFM 640.

13 Attachment B, ABFM 14. The concerns raised by the building report are summarised in the letter from Alison Stone, Deputy Director General, Land and Natural Resources, dated 10 April 2016, ABFM 494-498. The report is at ABFM 541.

Lease: J[10].[14]

16. On 22 April 2016, the solicitor for CSKS denied the alleged breach of the lease and stated that "the property is not currently occupied" and "is unlikely to be occupied again as a licensed premises, at least in the foreseeable future": J[11].

17. In a letter from the solicitor for CSKS dated 6 May 2016 it was stated that "the property is unoccupied and it is not intended that the property will be used for public purposes without substantial renovation": quoted at J[18].[15]

18. On 19 December 2016, the second appellant, the New South Wales Aboriginal Land Council, lodged a land claim (ALC 42494) pursuant to s 36 of the ALR Act for all reserves within the meaning of s 78 of the *Crown Lands Act* within (subject to exceptions that are not relevant) the boundaries of the first appellant, the La Perouse Local Aboriginal Land Council. That area included the Paddington Bowling Club: J[12].[16]

19. On 15 September 2017, a further inspection report was produced for Crown Lands. This report again identified, *inter alia*, major structural defects in the buildings, areas of wet rot decay, and major subsidence to the footings.[17]

20. On 1 February 2018, the Minister consented to an assignment of the Lease from CSKS to the first respondent, Quarry Street Pty Ltd (**Quarry St**), subject to various conditions.[18] One of the conditions was that Quarry St acknowledged that the land was subject to an undetermined Aboriginal land claim and that if the land or any part of it was transferred to an Aboriginal Land Council pursuant to the ALR Act, the Lease of the premises (or the relevant part of the Lease) would terminate on the date of transfer: J[14].

21. On 10 December 2021, the Minister for Planning and Public Spaces (being the Minister Administering the *Crown Lands Management Act 2016*) determined various claims made in respect of land located in Paddington. One of those was the claim in respect of

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14 Attachment B, ABFM 14. The letter is at ABFM 494.

15 Attachment B, ABFM 14. The letter is at ABFM 616.

16 Land claim dated 19 December 2016, ABFM 31. ALC42494 was held to be valid in *Minister Administering the Crown Lands Act 1989 v New South Wales Aboriginal Land Council* [2018] NSWLEC 26; (2018) 231 LGERA 145.

17 ABFM 710.

18 ABFM 694-746.

the Paddington Bowling Club, which was granted: J[15].

22. On 8 March 2022, Quarry St commenced Class 4 proceedings in the Land and Environment Court seeking an order preventing the Minister from transferring the site to the La Perouse Local Aboriginal Land Council, an order in the nature of certiorari to quash the Minister's decision and a declaration that the site was, as at the date of claim on 19 December 2016, lawfully used or occupied.

23. As judicial review proceedings, it was necessary for Quarry St to demonstrate jurisdictional error in the Minister's decision. Quarry St did not seek reasons for the Minister's decision which, pursuant to s 36(5) of the ALRA, only required the Minister to reach a state of satisfaction on the basis of the material before him that the statutory criteria in s 36(1) had been met. Nor was the whole of the Minister's brief before the Court in the judicial review proceedings.[19].

24. At first instance before Preston CJ in LEC, one of Quarry St's grounds, amongst others, was that the Minister had failed to consider whether the land was "used" by the Crown for the purposes of "letting and/or obtaining rental income".[20] Preston CJ in LEC rejected that argument (PJ, [37]-[51]) together with the remainder of Quarry St's grounds of review. Quarry St did not contend, at that stage, that the only conclusion legally available to the Minister was that the land was "used" by the Crown for the purpose of leasing.

25. Quarry St appealed those orders to the New South Wales Court of Appeal. However, by that appeal, Quarry St abandoned all of the arguments advanced to the trial judge, and instead sought to advance two new grounds of appeal, neither of which had been raised at first instance. One of those grounds was that "it was not open to the Minister to be satisfied that the land met the criterion in s 36(1)(b) of the Act, because it was lawfully used by the Crown for the purpose of leasing the land to CSKS for valuable consideration".[21]

26. The Court of Appeal accepted that argument, and therefore not only made an order in the nature of certiorari to quash the Minister's decision to grant the land claim, but

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19 Tag 11 of the Minister's brief, titled "Legal advice Lot 5 Paddigton [sic] Bowling Club and ALC – 22 March 2021" was not in evidence.

20 Further Amended Summons, CAB 10.

21 Notice of Appeal, ground 2(b), CAB 38.

further (in light of the basis for the decision being that no other conclusion was legally open to the Minister) made an order in the nature of mandamus to compel the Minister to refuse the land claim.[22]

VI: ARGUMENT

Aboriginal Land Rights Act 1983 (NSW)

27. Section 36(5)(a) of the ALR Act provides that, where a claim for land is made and referred to the Minister, the Minister shall, if satisfied that the land is "claimable Crown lands", grant the claim by transferring the "the whole or that part of the lands claimed" to the claimant Aboriginal Land Council.

28. Section 36(1) defines "claimable Crown lands" (relevantly) as follows:

> "(1) In this section, except in so far as the context of subject-matter otherwise indicates or requires-
>
> ***claimable Crown lands*** means lands vested in Her Majesty that, when a claim is made for the lands under this Division-
>
> (a) are not able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901*,
>
> (b) are not lawfully used or occupied, …"

29. Section 36(9) provides as follows:

> "(9) Except as provided by subsection (9A), any transfer of lands to an Aboriginal Land Council under this section shall be for an estate in fee simple but shall be subject to any native title rights and interests existing in relation to the lands immediately before the transfer".

30. Certain definitions are set out in s 4(1) of the ALR Act. In relation to the word "land", s 4(1) provides:

> "***land*** includes any estate or interest in land, whether legal or equitable".

31. Section 4(1) states that the definitions there set out apply "except in so far as the context or subject-matter otherwise indicates or requires".

The meaning of "use" in s 36(1)(b): activities occurring with respect to the physical land

32. The meaning of the word "use" in any particular case will depend to a great extent on

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[22] Orders issued 13 May 2024, CAB 86.

the context in which it is employed.[23] In the context of s 36(1)(b) of the ALR Act, the correct approach is that the concept of "use" is concerned with how the land as a concrete physical mass is being deployed. This requires a focus upon the activities that are or are not happening on the land.

33. The Court of Appeal's contrary approach, which focused and relied upon the exploitation by the Crown of its ownership interest in the land by way of the grant of the Lease, was not only incorrect but constituted a fundamental departure from the basis upon which the ALR Act has been understood and administered since its inception.

34. The core concept of "land" was identified by Isaacs J in *New South Wales v The Commonwealth* (1923) 33 CLR 1 (***New South Wales v The Commonwealth***) at [33] as being "the concrete physical mass, commencing at the surface of the earth and extending downwards to the centre of the earth, which is called 'land'". In relation to the concept of "use" in s 36(1)(b) of the ALR Act, it therefore makes sense to consider whether and how that "concrete physical mass" is being deployed. This has been the approach taken in the prior authorities.

35. In *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 (***Daruk***) Priestley JA (with whom Cripps JA agreed) said at 164D that "'used' in par (b) means 'actually used' in the sense of being used in fact and to more than a notional degree". As White JA acknowledged at J[86], Priestley JA was referring in *Daruk* to "the physical use of the land". This characterisation is correct in relation both to the word "occupied" and to the word "used". As Gageler J (as his Honour then was) said in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 (***Berrima Gaol***) at [87], Priestley JA was here treating "occupied and used as distinct in concept, albeit as overlapping in application". White JA did not say that the approach in *Daruk* was "plainly wrong" and, as a result, ought to have followed it.[24]

36. This Court considered the meaning of "used" in s 36(1)(b) of the ALR Act in *Minister*

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[23] *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 637 per Gibbs ACJ, 651 per Stephen J, 658 per Aickin J; *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515 per Taylor J.

[24] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Gett v Tabet* (2009) 109 NSWLR 1 at [296] per Allsop P, Beazley and Basten JJA; *Totaan v R* (2022) 108 NSWLR 17 at [6] per Bell CJ (with whom Gleeson JA, Harrison, Adamson and Dhanji JJ agreed).

Administering the Crown Lands Act v New South Wales Aboriginal Land Council (2008) 237 CLR 285 (***Wagga Wagga***). Hayne, Heydon, Crennan and Kiefel JJ noted at [62] that, when that matter was in the New South Wales Court of Appeal, Mason P had relied on previous authority in that Court (ie *Daruk*) to the effect that "[t]he word 'used' in s 36(1)(b) means 'actually used' in the sense of being used in fact and to more than a merely notional degree". As the plurality observed at [62], the reference to use "in fact" and to use being "more than notional", "might be understood as directing attention to some physical use of the land".

37. The plurality noted at [69] that what had been said in the earlier decisions (such as *Daruk*) should not be understood as attempting an exhaustive definition of when lands will be lawfully used or occupied for the purposes of s 36(1)(b). However, their Honours' approach was nevertheless consistent with *Daruk*,[25] and they went on to say at [76]:

> "In the present case … nothing was being done on the land when the claim was made, and nothing had been done on the land for a considerable time before the claim was made. There was no physical use of the land during that time … And apart from the survey, and the agent inspecting the land, there was no evidence of *anything* being done on the land…Everything that was being done towards selling the land, apart from the survey and the agent's inspection, occurred at places other than the land…".

38. The plurality emphasised at [69] that "attention must be given to identifying the acts, facts, matters and circumstances" demonstrating "use" or "occupation".

39. The approach in *Daruk* was, subsequent to *Wagga Wagga*, upheld in *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* (2013) 193 LGERA 276 (***La Perouse***), at [47] per Basten JA (Beazley, McColl and Macfarlan JJA and Sackville AJA agreeing).[26]

40. As White JA accepted at J[100], "[t]he reasoning of the plurality in [*Wagga Wagga*] at [75] and [76]… suggests that the plurality considered that only physical use of claimed land was a relevant use for the purposes of s 36(1)(b)" (see also J[102]-[103]).

41. The question of the meaning of s 36(1)(b) was again considered by this Court in *Berrima Gaol*. At [17]-[18], French CJ, Kiefel, Bell and Keane JJ referred with approval to the approach of Priestley JA in *Daruk* and confirmed at [20] that the observations made in

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[25] See *Berrima Gaol* at [80] per Gageler J.

[26] See *Berrima Gaol* at [83] per Gageler J.

Daruk were consistent with the Court's approach in *Wagga Wagga*. At [21] of *Berrima Gaol*, the plurality summarised the approach of the Court in *Wagga Wagga* as being that there was no use at the time of the claim because "[n]othing had been done on the land for a considerable period of time" and that "[w]hilst the word "use" might encompass exploitation, the sale of the land was an exploitation of it as an asset, rather than use of the land itself".

42. The plurality in *Berrima Gaol* also referred at [23] to the Court's approach in *Wagga Wagga* as being premised on the fact that none of the steps taken towards sale "had been taken on the land itself", with the result that those steps could not be said to constitute a use of the land for the purposes of s 36(1)(b). The plurality further said at [34]:

> "True it is that the words "used" and "occupied" might be said to take much of their meaning from context. But that is not to say that they are devoid of commonly understood meaning in ordinary parlance. They **require** an examination of activities undertaken **upon** the land in question…" (emphasis added).

43. The need to focus on the land itself does not mean there must necessarily be human perambulation or other activity occurring on the land. Whether the land is "used" will depend on the purpose of what the owner was doing on the land.[27] As the Judicial Committee of the Privy Council observed in *Newcastle City Council v Royal Newcastle Hospital* (1959) 100 CLR 1; [1959] UKPC 5 (***Newcastle City Council***) at 4, "[a]n owner can use land by keeping it in its virgin state for its own special purposes".[28]

44. However, the focus remains upon what is or is not occurring on the land as a "concrete physical mass", and how the land in this sense is being put to advantage or benefit. As Williams J observed in *Newcastle City Council*, the land in that case was considered to have "natural therapeutic qualities".[29] Critical to the finding that the land was being used was the fact that the land was deliberately held "in its virgin state comprising ridges and gullies heavily timbered with a good deal of underwood"[30] because it was an established benefit, in the treatment of tuberculosis, that the hospital:

> "…be situated in a spacious area carrying a considerable body of natural vegetation so that there will be a plentiful supply of fresh air and an absence of smoke, dust,

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27 *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 366; (2011) 85 ATR 775 at [24] per Allsop P (with whom Campbell JA and Whealy JA agreed).

28 See *Rainn Pty Ltd v Commissioner of State Revenue* [2016] VSCA 338 at [34].

29 *Newcastle City Council* (1957) 96 CLR 493 at 504 per Williams J.

30 *Newcastle City Council* (1957) 96 CLR 493 at 498-499 per Williams J.

noise and other irritants or of any feeling of overcrowding".[31]

45. The decision in *Newcastle City Council* is evidently not authority for any wider proposition that *any* so-called "intangible" use of land (to the extent that any meaning could be given to such phrase at all[32]), or an interest in that land, constitutes a "use" of land for all purposes,[33] let alone the purposes of s 36(1)(b) of the ALR Act.

46. Moreover, there can be no sensible comparison between the facts of the *Newcastle Hospital* case and those of the present case. In the present case, the land is in a state of disrepair and is not actually being used for *any* purpose, including the reserve purpose or the purpose identified in the Lease.

47. The concept of the "use" of land was also considered by the New South Wales Court of Appeal in *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 224 LGERA 236; [2017] NSWCA 11 (***Metricon***). That case concerned was a taxation exemption s 10AA(2) of the *Land Tax Management Act 1956* (NSW) (**Land Tax Management Act**) applicable where land was "land used for primary production", as defined by s 10AA(3). This in turn required an assessment of whether or not the "dominant use" of the land was for various, more specific, activities set out in the subsection. It was common ground that one use of the land in that case was "for the maintenance of cattle", which satisfied the requirements of s 10AA(3): [6]. However, the Commissioner contended that the land was also used for "land banking" or "land development" in the form of Metricon pursuing a plan of development, subdivision and sale, and that this was in fact the "dominant" use: [7]. "Land banking" or "land development" did not fall within s 10AA(3).

48. Barrett AJA (with whom Macfarlan J and Ward JA agreed) observed at [46] that an "[e]xamination of activities undertaken upon the land in question" was central to the identification of "use" and at [55] that, in relation to s 10AA(3) specifically, it was the "physical concept of land" which was relevant to the analysis.

49. Barrett AJA considered that "use" in this sense may encompass "inactivity" where such "inactivity" is deliberate and intended to achieve a specific benefit or advantage, such as land deployed "for the passive enjoyment of its features": [58]. However, this is not

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31 *Newcastle City Council* (1957) 96 CLR 493 at 498 per Williams J.

32 *Metricon*, [64].

33 See *The Council of the Town of Gladstone v The Gladstone Harbour Board* [1964] Qd R 505 at [64] per Gibbs J and Jeffriess J.

apt to capture the use of the land by mere deployment or exploitation of the ownership interest in the land: [53]-[56]. Rather, the question is the "physical deployment of Isaacs J's "concrete physical mass" in pursuance of a particular purpose of obtaining present benefit or advantage from it": [61].

50. In the present case, White JA accepted that the former Paddington Bowling Club was not being "physically used": J[119]. Not only that, but the undisputed evidence established that the land was in a state of significant disrepair and that it was not being used for the Reserve purpose or the purpose set out in the Lease. There was no suggestion (by Quarry St, CSKS, the Minister or anyone else) that the land was deliberately not being used, or had been deliberately placed into this state of disrepair, for any specified purpose so as to gain some advantage from the land.

51. As a result, the Court of Appeal should have dismissed the appeal on the basis that there was no legal error in the Minister concluding that the land was not being "used" for the purposes of s 36(1)(b) of the ALR Act.

Leasing of land as constituting "use"

52. White JA held that the use of land by the Crown leasing it was a "use" contemplated by s 36(1)(b): J[45], [119], [122]. White JA's reasoning was that, via the Lease, the land was being used "by the landlord deriving rent from it": J[43], [72]. This conclusion was not premised on any feature of the particular Lease or the particular land in this case. It applies, logically, to *any* lawful lease of *any* land: see, eg, J[49].

53. This approach is wrong.

54. **First**, a lease may constitute exploiting the land as an asset to derive an advantage from it, namely income in the form of rent. However, the Court said in *Wagga Wagga* at [74] that such exploitation did *not* constitute "use" for the purposes of s 36(1)(b):

> "There can be no doubt that sale of the land would amount to exploitation of the land as an asset of the owner. Nor can there be any doubt that there are uses of land which can be described as exploitation of the land. It by no means follows, however, that exploitation by sale, amounts to lawful use of the land ... And it likewise does not follow that the preliminary steps that are inevitably required in order to effect a sale, whether considered separately or together, will amount to lawful use, even if they could be described as steps directed to exploiting the land by selling it".

55. At [75] the plurality endorsed the observations of Fullagar J in *Newcastle City Council*

at 506 that it is a "fallacy" to think that "deriving an advantage from ownership of land is the same thing as using the land".

56. This reasoning can be seen as logically extending to the exploitation of the land as an asset in order to obtain a rent from it, the purported "use" identified by White JA in the present case. In relation to land which is not occupied, not physically used, and in a state of disrepair, both the selling of the land and the leasing of the land are forms of exploitation of the land as an asset, not of using the land in the sense required by s 36(1)(b). Such actions do not satisfy the requirements of s 36(1)(b).

57. This was the approach of Barrett AJA in *Metricon*, who (in reliance on this Court's approach in *Wagga Wagga*) held that a "use" of the "right of ownership" of the land (such as by leasing the land) was not a use of the land falling within the scope of s 10AA(3) of the Land Tax Management Act: [53]-[56]. The Court of Appeal in the present case was wrong to reach the contrary conclusion.

58. **Second**, at the time the ALR Act was enacted, there were 29 different types of leases or licenses under various Crown lands legislation.[34] These leases are creatures of statute that are varied in their terms and conditions.[35] White JA's decision suggests that the mere existence of a lease, without any qualitative assessment of that nature and operation of that lease in its particular context, will satisfy the definition of "use". This approach is incorrect.

59. **Third**, as Priestley JA said in *Daruk* at 163B-C:

> "The definition of claimable Crown lands stipulates initially those Crown lands which are claimable and then excludes lands which enjoy particular characteristics from those potentially claimable lands".

60. White JA's approach has the incongruous tendency to treat a *qualifying* condition for a land claim as also being a *disqualifying* condition. The fact that land is "able to be lawfully … leased" is, pursuant to s 36(1)(a), a qualifying condition for land to be claimable.[36] On White JA's approach, however, the fact that the land is leased is also a *disqualifying* condition, because that lease constitutes a "use" for the purposes of

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34 Hansard, *Assembly*, 15 November 1988, p. 332. See also *Minister Administering the Crown Lans Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106 (***Nowra Brickworks No 1***) at 118B-C per Sheller JA.

35 *Wik Peoples v Queensland* (1996) 187 1 at 78.

36 *Berrima Gaol*, [42] per French CJ, Kiefel, Bell and Keane JJ.

s 36(1)(b). Had the approach preferred by White JA in the present case been the legislative intention, one would have expected to have seen s 36 of the ALR Act drafted in a very different way.

61. It is well-established that, in considering the proper construction of the various sub-paragraphs of s 36(1), it is important to avoid such an effect. Priestley JA observed in *Daruk* at 161D in relation to the meaning of "occupation":

> "The juxtaposition of par (a) and (b) of s 36(1) of the *Aboriginal Land Rights Act* makes it clear that occupation in the foregoing broad sense is not what par (b) refers to or means. The word "occupied" in par (b) must have a more limited meaning…"

62. As Basten JA said in *La Perouse* at [44], referring to *Daruk*, "[t]o treat the conditions of eligibility for claim as carrying with them the conditions of exemption would have been destructive of the underlying statutory purpose".[37] Similarly, in the present case, the capacity of land to be leased being a qualifying condition for land being claimable should lead to the result that a lease, of itself, is insufficient to constitute "lawful use".[38]

63. **Fourth,** in the specific context of Crown leases, the transitional provisions of the ALR Act (cl 8 of Sch 4) provide as follows:

> "**8 Claimable Crown lands**
>
> Where, but for this clause, any lands would be claimable Crown lands as defined in section 36, those lands shall not, if they were, on the appointed day, the subject of a lease, licence or permissive occupancy, be claimable Crown lands as so defined until the lease, licence or permissive occupancy ceases to be in force".

64. This indicates that, absent the savings provision, land the subject of a lease *could be* claimable Crown land. Such an outcome would be impossible if the mere fact of the existence of a Crown lease meant that land was being "used".

65. White JA held at J[54]-[56] that cl 8 of Sch 4 was simply "included for abundant caution". However, the provision cannot be side-stepped in this way. As McHugh, Gummow, Kirby and Hayne JJ said in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71]:

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[37] See also *Minister Administering Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379 at [225] per Basten JA; *Berrima Gaol*, [45] per French CJ, Kiefel, Bell and Keane JJ.

[38] If White JA's approach is correct, it may mean that many cases have been approached in a fundamentally wrong way and have been wrongly decided: see, for example, *Nowra Brickworks No 1* (see J[89]); *New South Wales Aboriginal Land Council - Little Bay v Minister Administering the Crown Land Management Act* [2022] NSWLEC 142; *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2013] NSWLEC 134.

> "…a court construing a statutory provision must strive to give meaning to every word of the provision[39]. In The *Commonwealth v Baume*[40] Griffith CJ cited *R v Berchet*[41] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent"."

66. Clause 8 of Sch 4 is irreconcilable with the idea that the legislature intended that the fact that the Crown had leased land had the result that it *was not* claimable Crown land by reason of s 36(1)(b) of the ALR Act.[42]

67. White JA said at J[56] that the fact that (on his Honour's approach) the Crown uses land if it leases the land to derive income or fulfill a public purpose does not mean that the Crown will use land by granting a gratuitous license or a permissive occupancy (being other matters addressed in cl 8 of Sch 4). But such a distinction is doubtful. The grant of any right of this nature would involve the deployment of the interest held by the Crown in the land, and thus a "use" of the land, on the reasoning of White JA: see, eg, J[46]-[48]. On that approach, actual use of (in the sense of relevant conduct in relation to) the land becomes irrelevant. Moreover, White JA's reasoning may be equally applicable to mining leases and exploration permits.

68. **Fifth**, White JA held at J[71]-[72] that the conclusion that land that was leased by the Crown was "used" for the purposes of s 36(1)(b) was "buttressed" by the practical difficulties said to be created by a situation in which only part of the land leased by a tenant from the Crown was claimable Crown lands. This was not a practical difficulty raised by the facts of the present case. In any event, whatever those practical difficulties may or may not be,[43] they do not justify a conclusion that leasing land is a "use" for the purposes of s 36(1)(b). Had difficulties of this nature been considered by the legislature to be of a scale that the Minister could never be satisfied that any land subject to a lease cover be claimable Crown land, one would have expected to see such a conclusion spelt

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39 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414, per Griffith CJ; at 419, per O'Connor J; *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12-13, per Mason CJ.

40 (1905) 2 CLR 405 at 414.

41 (1688) 1 Show KB 106 [89 ER 480].

42 Discarding cl 8 of Sch 4 in this way is also inconsistent with the approach of Sheller JA to cl 8 of Sch 4 in *Nowra Brickworks No 1* at 118B-119C.

43 This issue was not fully explored before the Court of Appeal but would involve considerations of the nature of the particular lease in question (eg, in relation to leases granted by a reserve trustee, at 3.43 of the *Crown Lands Management Act 2016* (NSW)) and its terms.

out expressly in the ALR Act. It is not. To the contrary, as explained above, the text and context of the ALR Act suggests that the mere existence of a lease is not sufficient to disqualify land from being claimable Crown land.

69. **Sixth**, the above analysis does not mean that the grant of a lease over land will necessarily be irrelevant to the analysis, or that the grant of a lease over the land will necessarily prevent any reliance on the uses contemplated by the lease.

70. In *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 (***Ryde***) the Court considered whether land leased by Macquarie University to private parties operating commercial and shopping facilities on the site of the University, and which primarily served the students and staff of the University, was "used" by the University "solely for [its] purposes" in accordance with s 132(1)(d)(fii) of the *Valuation of Land Act 1916* (NSW).

71. That was evidently a very different statutory context from the present, and therefore it may be that the reasoning in *Ryde* is of limited utility. However, the reasoning of the Court supports the appellants' approach in any event.

72. The majority in *Ryde* did not find that the *mere* leasing of the land was sufficient to demonstrate "use". Stephen J (Murphy J agreed) found that it was the making available of the land by the University so that it provided necessary services to staff and students that constituted the "use" of the land within the meaning of the section. Stephen J said at 651:

> "…the only use made of the market site by the University is the provision of facilities to staff and students…the advantage which the University intends to derive from the market is the furtherance of its purposes by the provision to staff and students of those facilities which the market now affords them".

73. Such reasoning is consistent with the correct approach in the context of s 36(1)(b) of the ALR Act, namely that an analysis must be undertaken of the physical activities occurring on the actual land.

74. Gibbs ACJ also noted at 635 that "the shops operate with a view to profit but primarily serve the students and staff of the University" and at 636 that the "commercial centre of the market building was intended to provide a convenience to staff and students, and save their time…". Gibbs ACJ characterised what had occurred at 639 as an "indirect use", namely a use by the University through those actually undertaking the physical activities on the land. At 640, Gibbs ACJ noted that it did not matter which expedient

was adopted to achieve the end of the services being provided on the land.

75. **Seventh**, when assessing whether land is "used" for the purpose of s 36(1)(b), as Gageler J explained in *Berrima Gaol* at [82], [85], [88], it is critical to identify the intended purpose of what is being done on or with the land.

76. The approach of White JA assumed (without establishing) that the only legally open conclusion was that the purpose of the Crown in granting the Lease was "for leasing" (as contended in the Notice of Appeal) or to derive income in the form of rent from the land by that Lease: J[43], [72]. The derivation of rent was, of course, a *consequence* of granting the Lease. But it does not follow that this is the *purpose* of granting the Lease, or that this purpose continued to be held at the date of claim.[44] As Stephen J observed in *Ryde* at 649, the use of land by a public authority "for the purpose simply of deriving rental income" is "not lightly to be imputed" to such a body.

77. Beyond the fact of reservation of the land and the Lease itself, there was no evidence before the Minister or the trial judge as to the Minister's purpose in entering into the Lease or continuing to hold the Lease as at the date of claim. The Minister had a broad power to enter into the lease pursuant to s 34A of the Crown Lands Act. There was simply no evidence as to the considerations taken into account in exercising that power, let alone whether any of those considerations remained applicable at the date of claim, six years later.

78. Quite apart from the derivation of rent, it is also possible that the Crown considered that a tenant for the land would assist in maintaining the land in a good state of repair (although the question of the Minister's purpose in granting or holding the lease at the date of claim was at large). If that was the purpose of the Lease, then it could not be said that the land was being "used" for that purpose at the date of the claim, because the land was in a state of disrepair. White JA was wrong to find that only one conclusion was legally open as to what the Minister's purpose in granting the Lease, or holding it at the date of claim, was.

79. It is also noted that the Minister has never himself contended that, at the date of the claim or at any other time, the land was "used" by him (or any other emanation of the Crown) for any purpose, including the purpose of "leasing". In that context, the

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[44] Noting that the deriving of rent was not one of the objects of the *Crown Lands Act* 1989 (NSW) (see s 10) or one of the principles of Crown lands management (see s 11) at the time the lease was entered into.

conclusion reached by White JA that, in fact, the only conclusion lawfully available to the Minister was that he *was in fact* using the land for this purpose is a counter-intuitive one. It is not a conclusion that is justified by the law or the evidence.

80. The proposition that the leasing of Crown land is a "use" for the purposes of s 36(1)(b) is incorrect. It is premised upon, and will have the consequence of, a radical expansion of what actions in relation to land constitute "use", and thus is likely to lead to a significant narrowing of the concept of "claimable Crown lands" in the ALR Act.

81. In the present case, the sole "use" relied upon by Quarry St was a use by the Crown "for the purpose of leasing the land to CSKS for valuable consideration".[45] The mere existence of such a lease is insufficient to demonstrate that the only lawful conclusion available to the Minister was that the land was being "used" for the purposes of s 36(1)(b). All of the other facts before the Minister suggested that the land was not being "used" at all. The Court of Appeal was wrong to conclude otherwise.

The relevance of the definition of "land" in section 4 of the ALR Act

82. Central to the approach of White JA in the decision under appeal was the definition of "land" in s 4(1). As noted above, this provides that "***land*** includes any estate or interest in land, whether legal or equitable". On White JA's approach, this definition was key to a concept of "use" that justified a departure from the prior approach in the authorities set out above, and required a focus, instead, on a particular use being made of the Crown's reversionary interest in the land: see, eg, J[46]-[47], [50]-[52], [73], [113]-[119].

83. This approach was flawed for various reasons.

84. **First**, the definition of "land" in s 4(1) is not an exhaustive one, but rather identifies that the concept *includes* any estate or interest in the land. Before consideration is given to the significance of those inclusions, therefore (and whether they have any sensible relevance to the task in s 36(1)), it is necessary to consider the core meaning of "land" as the "concrete physical mass" identified by Issacs J in *New South Wales v The Commonwealth*. That concept of "land" accords with the proposition that the "use" of land for the purposes of s 36(1)(b) contemplates attention upon the nature of the

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45 Notice of Appeal, ground 2(b), CAB 38.

activities occurring on the physical land itself, as articulated in the authorities above.

85. **Second**, White JA stated at J[46]-[47] that, as a result of the definition of "land" in s 4(1), "[t]here can be concurrent interests [in the land], any of which individually or cumulatively, may be considered [in assessing "use"]".

86. This is wrong. The question of "use" is to be assessed by reference to the nature of the "land" that is the subject of the land claim considered under s 36. The claimed "land" under s 36 will be, as in the present case (see J[2]), a claim for the estate in fee simple held by the Crown or the State of New South Wales in a piece of physical land,[46] noting that pursuant to s 36(9) it must be the estate in fee simple that is transferred to the land council when a successful claim is made. The only question arising under s 36(1)(b), therefore, was whether the "land", considered in *that sense*, was being "used". There is no cause or justification for considering "concurrent interests" either "individually or cumulatively" or for a conclusion that a "use" of one of any such interests satisfies the requirements of use in s 36(1)(b).

87. **Third**, the definition of "land" in s 4(1) is not an unusual one. Schedule 4 of the *Interpretation Act 1987* (NSW) (**Interpretation Act**) defines "land" as follows: "***land*** includes messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein." In both the ALR Act and the Interpretation Act, these definitions are subject to displacement by contrary intention. That contrary intention is clearly shown by the purpose and effect of s 36(1)(b) in context, as explained above. To similar effect, Barrett AJA held in *Metricon* that, despite the definition in the *Interpretation Act*, the concept of land being "used" in s 10AA of the *Land Tax Management Act 1956* (NSW) was concerned with "the physical deployment of Issac J's 'concrete physical mass'".

88. **Fourth**, the definition of "land" in s 4(1), if it applies to s 36(1) at all, might better be seen as ensuring that there can be no doubt that the particular legal characterisation of the Crown's holding in claimed land does not give rise to any doubt that the land is eligible to be claimed. In *Berrima Gaol* the plurality referred at [45] with approval to the observations of Basten JA in *Minister Administering Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379 at [225] that the precondition

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[46] *Berrima Gaol*, [4], [58] per French CJ, Kiefel, Bell and Keane JJ.

for a land claim identified in the *chapeau* of s 36(1) – "lands vested in Her Majesty" – refers simply to "the legal status of the Crown as the holder of the land (whether by way of radical title, fee simple or other interest), being a precondition to land being claimable". The definition of "land" in s 4(1) captures these different permutations.

89. Such clarity has utility in circumstances where, at the time of passage of the ALR Act, the understanding of the basis on which the Crown held lands was that set out in *Attorney-General v Brown* (1947) 1 Legge 312, namely that the Crown became the absolute beneficial owner of all of the land in New South Wales from the time of settlement in 1788. The Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 confirmed, of course, that the common law is that what the Crown acquired at the time of "settlement" was rather "radical title", and that absolute beneficial ownership was only acquired by the subsequent exercise of the Crown's authority over the land.[47] The definition of "land" in s 4(1) might be said to have the useful effect of obviating the need to grapple with such niceties in determining whether the claimed land is "vested in Her Majesty" for the purposes of s 36(1) of the ALR Act.

90. **Fifth**, White JA accepted at J[113], [118] that if the phrase "lawfully used or occupied" was read as a composite expression, then the "lands" so used or occupied must be understood as the "physical lands" so used or occupied. However, White JA held that because this Court had said in *Berrima Gaol* that "use" and "occupation" are separate concepts, the concept of "land" could (in relation to "use") be read to encompass "any estate or interest" in the land.

91. However, it does not follow from the fact that "use" and "occupation" are separate concepts that the definition of "land" should be treated differently in relation to each of those concepts. The legislature is unlikely to have intended that there be two meanings of "Crown lands" in s 36(1), one applicable to considering "use" and one applicable to considering "occupation". The legislature "cannot speak with a forked tongue".[48]

92. White JA's reasoning appears to have accepted that it does not make sense to refer to "any estate or interest" in land (such as a lease) being "occupied". The fact that it does not make sense to refer to "any estate or interest" in land being "occupied" supports the conclusion that such a concept also does not apply to "used", and thus does not apply in

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47 *Berrima Gaol* at [110]-[111] per Gageler J.

48 *Waugh v Kippen* (1986) 160 CLR 156 at 165.

s 36(1) at all.

93. **Sixth**, White JA concluded that s 4(1) applied in the context of s 36(1) because of a "Note" to the definition of "deal with land" in s 40 of the ALR Act: J[114]-[117]. However, the definition in s 40 applies only to Divisions 4 and 4A, with s 36 being in Division 2. The statement in the "Note" that a reference to "land" "[in] this Act" is as set out in s 4(1) cannot be taken to mean that the legislature intended that the definition in s 4(1) was now to be applied throughout the ALR Act regardless of contrary intention.

94. In those circumstances, the definition of "land" in s 4(1) of the ALR Act does not provide support for the approach adopted by the Court of Appeal.

10 95. The appeal to this Court should be allowed, the orders of the Court of Appeal set aside, and the orders of the primary judge reinstated.

VII: ORDERS SOUGHT

96. The appellants seek the orders set out in the notice of appeal.

VIII: ESTIMATION OF TIME

97. The appellants estimate that the time required for presentation of their oral argument, including reply, is 2 hours.

Dated: 24 October 2024

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S121/2024

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

ANNEXURE

Pursuant to Practice Direction No 1 of 2019, the Appellants set out below a list of the constitutional provisions and statutes referred to in these submissions.

No.	Description	Version	Provisions
	Statutory provisions		
1.	*Aboriginal Land Rights Act 1983* (NSW)	As at 19 December 2016	ss 4(1), 36, 40, cl. 8 of schedule 4.
2.	*Crown Lands Act 1989* (NSW)	As at 1 December 2010	s 34A.
		As at 19 December 2016	s 78.
		As at 11 December 2009	s 87.
3.	*Land Tax Management Act 1956* (NSW)	Current	s 10AA(2)-(3).
4.	*Valuation of Land Act 1916* (NSW)	15 February 1974	s 132(1)(d)(fii).
5	*Interpretation Act 1987* (NSW)	Current	Schedule 4.