HIGH COURT OF AUSTRALIA

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File Number:	S121/2024
File Title:	La Perouse Local Aboriginal Land Council ABN 89136607167
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellants
Date filed:	12 Dec 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

QUARRY STREET PTY LTD ACN 616184117

First Respondent

10 **MINISTER ADMINISTERING THE CROWN LAND MANAGEMENT ACT 2016**

Second Respondent

APPELLANTS' REPLY SUBMISSIONS

Part I: Internet publication

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

Part II: Reply submissions

2. ***The nature of the present proceedings***. The respondents' approach is premised upon a misapprehension as to the true nature of the present proceedings. The proceedings were not in the form of an appeal by the Land Council to the Land and Environment Court under s 36(7) from a decision of the Minister to *refuse* the land claim in reliance on s 36(1)(b). Such an appeal would involve *de novo* review of the question of whether s 36(1)(b) was satisfied,[1] with the Minister bearing the onus and the Land Council having a right to lead evidence. No such decision or review has occurred. Rather, the proceedings take the form of a judicial review of the Minister's decision to *grant* the land claim. The Minister's reasons for decision were not in evidence and Quarry St did not request a statement of reasons: PJ[58] (CAB 33). Before the primary judge, Quarry St nevertheless contended that the Minister had failed to consider the leasing of the land as a possible "use", or that if the Minister done so he had found that the leasing of the land *could not* constitute a relevant use. Both arguments were rejected: PJ[47], [51] (CAB 30-31). Neither argument has been pursued since. Quarry St then advanced a *new* argument to the Court of Appeal (cf **FRS, [6]**) that, despite this, the only conclusion reasonably open to the Minister was that the land was being used by reason of the Lease.

3. The question for this Court is therefore not whether the Minister erred in some decision that the land was being "used" under s 36(1)(b) as a result of the Lease. Rather it is whether it is correct (as the Court of Appeal held) that the Minister made a legal error in granting the land claim because the only conclusion reasonably open to him was that, to the contrary, and because of the Lease, the land *must be* being "used". Strikingly, neither respondent refers in their submissions *at all* to the relevant test of whether only one conclusion was reasonably open to the Minister, let alone seeks to justify the necessary outcome.

4. Proper appreciation of this point illuminates various errors in the respondents' approach. For example, as to **FRS, [2],** the true question is not whether Crown land is used "when it is leased to a tenant for value". The question is whether the Court of Appeal was correct to conclude that it was not reasonably open to the Minister to decide that, despite the Lease, the land was not being used. As to **FRS, [8]**, the appellants do not deny any relevance to the Crown's leasing of the land (see **AS, [69]-[74]**). Rather, the appellants contend that the *mere* leasing of the land

[1] *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council* (1998) 43 NSWLR 249 at 251 per Meagher JA; *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379; [2009] NSWCA 138 at [211] per Basten JA.

does not *inevitably* constitute use, such that the Minister's original decision was open to him. As to **FRS, [10]**, the appellants do not need to "foreclose any possibility" of "non-physical" activities being relevant to "use". Rather, it is Quarry St that had to establish that the "non-physical" use on which it relies *necessitated* a conclusion by the Minister that the land is being "used", regardless of the other circumstances. At **FRS, [5], [19]**, Quarry St erroneously seeks to argue the merits of the case as to whether the land was being "used" and asserts that "it is not fatal to a finding of use" that the tenant was not using the land. But the question is not whether the fact that the tenant was not using the land was "fatal" to a finding of "use"; rather, it is whether it was not reasonably open to the Minister to conclude that the land was *not* being used. As to **FRS, [29]**, the question is not whether only physical uses of the land are "capable" of constituting use, but rather the inverse: is the mere leasing of land necessarily *sufficient* (in and of itself) to constitute use. At **FRS, [60]**, Quarry St says that there was no error in White JA making certain inferences as to the "use" of the land. But it was not the function of White JA to make inferences about "use". Rather, the question was whether it was reasonably open to the Minister to conclude, as he had, that the land was not being "used".

5. ***Relevance of activities occurring on the land***. Quarry St acknowledges at **FRS, [36]** that "activities occurring on the land will always be *relevant* to whether land is "used"". This acknowledgement is appropriate. That acknowledgement is inconsistent with the proposition that it was not reasonably open to the Minister to conclude (as he did) that in the particular circumstances of this case, where the land was not subject to any physical use at all, it was not being "used". Further, Quarry St contends at **FRS, [40]** that the appellants' approach to "use" involves creating "a large exception that swallows the rule" because the appellants note that there is no invariable necessity for there to be activity occurring on the land for it to be "used". This is wrong. The point is that it is always necessary to consider what is happening on the land. Sometimes, land is deliberately put to advantage or benefit by keeping it in its "virgin state" (**AS, [43]-[44]; FRS, [43]**). But that is not the present case.

6. ***Leasing as necessarily constituting use***. Quarry St contends that merely by leasing the land, the Crown *must* be treated by the Minister as using that land pursuant to s 36(1)(b) for the entirety of the term of the lease (regardless of the activities occurring or not occurring on the land): eg **FRS, [2], [20]**. (This approach logically extends to other forms of interest such as licences.[2]) Quarry St must frame its case in this way because it must demonstrate that the Minister committed legal error in concluding the land *was not* being used, and that the only

[2] Section 46 of the Crown Lands Act contemplates that a licence may confer exclusive possession: cf **FRS, [3].**

conclusion reasonably open was that it *was* being used because of the Lease. But this approach is inconsistent with the submission that one should "reject the primacy of any single criterion" and that "[r]igid rules are to be avoided" (**FRS, [31]**). If the mere existence of the Lease is not determinative, then Quarry St cannot demonstrate that the Minister's conclusion as to use was not reasonably open to him, particularly where – in light of the findings of the primary judge – the Minister had considered the impact that the Lease might have on his conclusion as to use.

7. ***Supposed use of the land for public purposes***. Quarry St also advances an alternative argument that, at the date of claim, the land was being used for public purposes, effectuated through the Lease: e.g. **FRS, [7], [11], [13], [16], [18], [31]**. The Minister makes similar submissions: see **SRS, [8], [14], [16], [18]**. There was no evidence before the Minister, the primary judge or the Court of Appeal as to the reasons that motivated the Minister to grant the Lease. The Minister had the power to grant a lease pursuant to s 34A of the Crown Lands Act for "any purpose" he thought fit (including private purposes), provided it was in the "public interest" to do so. The exercise of the power does not mean the Minister was necessarily pursuing any "public purpose" in granting the Lease. On the evidence before the Court the Minister's particular purpose is simply unknown and in the context of judicial review proceedings of the present nature is not properly a matter for inference.[3] White JA found only that the *permitted* purposes in the Lease "coincided" with the Reserve purpose, and even then that the lessee was not *required* to use the site for those purposes: J[5] (CAB 51). In any event (as accepted at **FRS, [15(f)]**), as it transpired, the land was not being used for the purposes permitted by the Lease at the date of claims at all: see **AS, [11]-[17]**. Moreover, in granting the land claim, the Minister was advised that "[t]here is no evidence to support a conclusion that the balance of the claimed land [including the Paddington Bowling Club] was needed or likely to be needed for an essential public purpose" pursuant to s 36(1)(c).[4] Quarry St has not challenged this finding. It is inconsistent with the land being "used" for a "public purpose".

8. ***Assessment of "use" at the date of claim***. Quarry St contends at **FRS, [19]** that the Court should focus upon the Crown's purpose in granting the Lease "*at the time of grant*" rather than the position after the Lease is granted. This approach is contrary to the well-established proposition that "use" under s 36(1)(b) must be assessed at the date of claim.[5] As the Court of

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[3] The Minister may not exercise the powers in s 34A of the Crown Lands Act without either carrying out an assessment of the land pursuant to s 35(1) or making a determination that such an assessment is not required pursuant to s 35(2). None of the documents concerning such an assessment were in evidence.

[4] Attachment B to Minister's Brief signed 10 December 2021 (**ABFM 15-16**).

[5] *New South Wales Aboriginal Land Council v The Minister (The Winbar Claim)* (1988) 14 NSWLR 685 at 692 per Hope JA; *Gosford CA* at [7] per Basten JA; at [19] per Preston CJ in LEC (with whom Gleeson JA agreed).

Appeal explained in *Darkinjung Local Aboriginal Land Council v Minister Administering Crown Land Management Act 2016* (2022) 110 NSWLR 535 (***Gosford CA***) in the context of s 36(1)(c), "[t]he reservation or dedication of land for a specified purpose at an earlier point in time does not, of itself, mean that the land is needed for that purpose at a later point in time when a claim is made for the land".[6] Indeed, in the present case the Lease was for a term of 50 years. Other Crown leases may be up to 100 years (see s 41 of the CLA). It is wrong to suggest that the answer to the question whether the land is being "used" cannot change over the life of the lease, regardless of what is actually happening in relation to the land at the date of claim.

9. ***Supposed imperative to identify use of reversionary interest.*** Quarry St contends at **FRS, [11], [17]** that, because the Crown's *only* interest in the land is its reversionary interest as lessor, the Court "must" adopt a concept of "use" that encompasses the exploitation of that particular interest. No such imperative is contained within s 36(1)(b). The "use" of the land should be assessed as a whole by reference to the "acts, facts, matters and circumstances" relevant to the land. The mere fact that a person might hold some type of interest in the land does not require that the question of "use" must be assessed solely through the lens of that type of interest.

10. ***The "loss" of Crown land***. Quarry St contends that the appellants' approach would leave land "vulnerable" to claims (**FRS, [8]**) and mean that the Crown might "lose" its fee simple (**FRS, [17], [44]**). Similarly, the Minister seeks the "protection" of land from claims (**SRS, [21]**). The pejorative tone in these submissions is unfortunate. Land that is the subject of a claim under the ALR Act is not "vulnerable", is not "lost" and is not in need of "protection"; rather, it is transferred pursuant to the legislature's statutory mandate[7] to address the historical dispossession, without compensation, of Aboriginal land. Quarry St's approach fails to show fidelity to the preamble and purposes of the ALR Act.

11. ***A tenant's "diligence" or "delinquency"***. The respondents place emphasis on the possibility that a tenant's lack of diligence, or delinquency, in relation to the land may have the result that the land is not being "used" and thus claimable: **FRS, [8], [12], [17], [44]**; **SRS, [20]-[25].** The Minister extends such possible delinquency to its own Crown land managers (**SRS, [29]**).[8] The suggestion that the Minister is unable to take sufficient steps to ensure that Crown land is being

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6 *Gosford CA*, [72] per Preston CJ in LEC (with whom Gleeson JA agreed).

7 *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* [2012] NSWCA 359 (***Malabar CA***) at [29] per Basten JA (with whom Beazley JA, McColl JA, Macfarlan JA and Sackville AJA agreed); *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA; [2007] NSWCA 281 (***Wagga Wagga CA***), [24] per Mason P (with whom Tobias JA agreed).

8 The Minister also relies on the CLM Act enacted after the date of claim: **SRS, [25]-[30].** This is irrelevant.

appropriately managed to avoid "delinquency" of tenants (or, *a fortiori*, Crown land managers) is untenable. The submission is more remarkable in that it contradicts what the Minister told the Court of Appeal, where he rejected the idea that any practical issue arose in this regard and contended that "it is always open to the Crown to terminate a lease in accordance with its terms".[9] If land is not occupied or used at the date of claim – regardless of why that is so – then it is claimable. Indeed, it is commonplace that land is claimable by reason of the Crown's lack of attention or diligence; to take an example, in *Gosford CA* land was found to be claimable, despite the fact that it was occupied by a charitable organisation, because the Crown was not aware of what was happening on the land, had not ensured that the any use of the land was lawful and did not even know who it had appointed as the reserve trust manager.[10] This is precisely the sort of situation where land is appropriately treated as claimable.

12. ***Impact of land claims on leases***. Quarry St contends at **FRS, [48]** that the appellants have conceded that transfer of land to a Land Council does not extinguish an existing lease. This is not correct. The issue simply does not arise on this appeal, see **AS, [20], [68]**.

13. ***The Minister's approach to this appeal***. In the courts below, the Minister rejected the proposition that the land was being "used" by reason of the Lease. The Minister said (correctly) that "on the proper construction of s 36(1)(b), the word "use" does not encompass the mere fact of the Crown leasing the land in return for rent".[11] The Minister's submissions to this Court are essentially to the opposite effect. Apart from being unmeritorious, this late reversal has had unfortunate consequences. Quarry St sought and obtained from this Court an opportunity to reply to the Minister's submissions on the basis that the Minister would take a position adverse to Quarry St.[12] The Minister did not dispute Quarry St's understanding of the position when these orders were made.

Dated: 13 December 2024

Bret Walker
Fifth Floor St James' Hall
T: 02 8257 2527
caroline.davoren@stjames.net.au

Oliver R Jones
Eleven Wentworth
T: 02 8223 2020
oliverjones@elevenwentworth.com

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9 Submissions of the Minister dated 17 November 2023, [55] at ASBFM 18.

10 Gosford CA, [75]-[101] per Preston CJ in LEC (with whom Gleeson JA agreed). At **SRS, [14],** the Minister erroneously relies on the reasoning of Pain J at first instance, which was overturned on appeal.

11 Submissions of the Minister dated 17 November 2023, [2(b)] at ASBFM 5. See also [42]-[55] of those submissions.

12 Affidavit of Stephen Howard Klotz affirmed 23 October 2024, [4]-[6], [8].